HB

387

Representative Eric Croft

HB 387
The Alaska Religious Freedom Protection Act

Sponsor Statement

The Alaska Religious Freedom Protection Act (ARFPA) is a state response to United States Supreme Court decisions that have undermined the religious freedoms of Americans in recent years.

The United States and Alaska Constitutions contain nearly identical provisions stating that governments shall make no law "respecting an establishment of religion, or prohibiting the free exercise thereof." For most of the nation's history, the "free exercise" clause of the United States Constitution was interpreted to require that governments make reasonable exceptions to general laws if the implementation of those laws impinged on the religious practice of its citizens.

A good example is the case of Wisconsin v. Yoder, 406 U.S. 205 (1972). Members of the Old Order Amish religion allow their children to attend public school until the eighth grade to learn basic reading, writing, and math skills, but then the Amish religion requires the children begin preparation for adult baptism and life under the religious precepts of their faith. Pennsylvania allows Amish children of high school age to attend special vocational schools for three hours and then go home for religious and other instruction. Wisconsin, however, did not allow any exception to the compulsory school attendance law. Frieda Yoder, a 15-year old member of the Old Order Amish religion refused to attend public high school on religious grounds and her father, Jonas, was convicted of violating the law. The United States Supreme Court ruled that the compulsory attendance law violated the free exercise rights of the Yoder family. The Court ruled that the government may place a substantial burden on the free exercise of religion only if the government can show a compelling state interest and that the government's action is the least restrictive means of accomplishing that interest. This is known as the "compelling state interest" test for religious freedom. The Court noted that because the Amish children attended school until the 8th grade the burden on their education was relatively light and that the burden on the religion was proven to be substantial. The Yoder case and others stood for the proposition that a "regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." Yoder, 406 U.S. 221; see also Sherbert v. Verner, 374 U.S. 398 (1963).

The constitutional respect for freedom of religion embodied in the "compelling state interest" test was eliminated in 1990 by the United States Supreme Court in Smith v. Emp. Div., 494 U.S. 872 (1990). Justice Scalia, writing for a court divided 5-4, ruled that government no longer had to provide a religious exemption to general laws. "The Court today . . . interprets the [free exercise clause] to permit the government to prohibit, without justification, conduct mandated by an individual's religious beliefs, so long as that prohibition is generally applicable." Smith, 494 U.S. at 893 (Justice, O'Conner, dissenting).

The Smith decision met a storm of protest. In 1993, a broad bipartisan majority of both houses of Congress passed The Religious Freedom Restoration Act (federal RFRA) and the bill was signed into law by President Clinton. RFRA attempted to use congressional power to restore the "compelling state interest" test for religious freedom. In 1997, the United States Supreme Court ruled that the federal RFRA statute was an unconstitutional extension of federal power. City of Boerne v. Flores, 521 U.S. 507 (1997). The Flores decision effectively left any protection of religious freedom to the individual states. The Alaska Supreme Court has consistently interpreted the free exercise clause of the Alaska Constitution to require a compelling state interest analysis.
See Frank v. State, 604 P.2d 1068 (Alaska 1979) (allowing a religious exemption for the taking of a moose for an Athabaskan funeral potlatch). There is no present indication that the Alaska Supreme Court intends to follow the direction of the Smith decision in interpreting the Alaska Constitution. However, a change in the composition of the court or judicial philosophy could lead to this change in the future.

HB 387, the Alaska Religious Freedom Protection Act (ARFPA), will provide statutory protection for religious freedom in Alaska by enshrining the compelling state interest test for all state, municipal, and school district actions.

HB 387 is not intended to create an establishment of religion or allow a claim of religious freedom to authorize the infringement of the rights of others. It simply recognizes that Alaskans value their religious liberties and are willing to allow an exception from generally applicable laws for religious freedom unless the government shows a compelling state interest.

FISCAL NOTE

STATE OF ALASKA
2000 LEGISLATIVE SESSION

BILL NO. HB 387

Revision Date/Time (Note if correction) _____ Dept. Affected All
Title "An Act prohibiting governmental entities, BRU _____
including ..., from restricting a person's free exercise of religion." Component _____
Sponsor Representative Croft _____
Requester House Community and Regional Affairs Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*******	*******	*******	*******	*******	*******
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	*******	*******	*******	*******	*******	*******

Estimate of any current year (FY2000) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

HB 387 prohibits a school board or school district, a municipality, or a state agency from restricting a person's free exercise of religion unless the restriction is in the form of a rule of general applicability and does not intentionally discriminate against religion or among religions, and application of the restriction to the person is essential to further a compelling government interest and is the least restrictive means of furthering that compelling government interest. The bill further allows a person to bring a civil action against a school board or school district, a municipality, or a state agency for violating this section. The court may grant a declaratory judgment, an injunction, or damages.

Under existing law, individuals can and do sue the State of Alaska claiming their right to free exercise of religion has been infringed. However, they cannot seek damages from the state and

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Division Attorney General's Office Date/Time 3/1/00, 3:13 PM
Approved by Commissioner Bruce M. Botelho, Attorney General Date 3/1/00
Agency Department of Law

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ANALYSIS CONTINUATION

have only limited ability to get damages from state officials under federal law. This bill would create a new civil action for damages.

Providing for an award of damages may encourage more litigation in this area. At a minimum, it will make suits more time consuming and complicated, as the damages will have to be evaluated. The more significant fiscal impact, however, would be the damages themselves, should a plaintiff prevail. What the actual amount might be, or which agencies might be sued, cannot be predicted.

NORTHWEST RELIGIOUS LIBERTY ASSOCIATION

NRLA

March 2, 2000

Alaska State Legislature
House Community and Regional Affairs Committee

Re: HB 387 - The Alaska Religious Freedom Protection Act

Honorable Chairman and Committee Members,

We strongly support House Bill 387 for several reasons. First, we are mindful of the fact that the Supreme Court's decision in *Sherbert v. Verner* (1963) specifically involved a Seventh-day Adventist church member who had been discriminated against at her place of employment on the basis of her firmly held beliefs. We take special interest in the fact that it was in this particular case that the high court ruled that the state's interest in denying unemployment benefits - merely because Mrs. Sherbert would not make herself available for work on Saturday (her Sabbath) as required by the state's unemployment compensation law - was insufficiently compelling to warrant an infringement upon this most fundamental right: the free exercise of religion.

★ LEGAL RATIONALE

Second, Representatives Croft, Dyson, Coghill and Halcro's efforts to restore the "compelling state interest" and "least restrictive means " tests as established in *Sherbert v. Vernor* (1963) and *Wisconsin v. Yoder* (1972), respectively, could not come at a better time. Such a provision will effectively restore an individual's right to free exercise of their religious convictions at the state level, and prevent the unnecessary discrimination that occurs on a daily basis in the public sector, particularly in the workplace. As Justice Sandra Day O'Connor stated in the Supreme Court's Decision in *Employment Division of Oregon v. Smith*, the court made a critical mistake when they failed to offer "convincing" evidence "to depart from the settled First Amendment jurisprudence." This fundamental departure allows states to 1) "make criminal an individual's religiously motivated conduct" in a way that burdens [an] individual's free exercise of religion"; 2) puts at a clear disadvantage minority religions and religious practices when leaving accommodation to the political process; and 3) enables government to ignore religious claims altogether, if it suits them, without offering any compelling justification to support their actions (494 U.S. 872 at 897, 902). However, as Justice O'Connor reiterated in *Smith*,

> The essence of a free exercise claim is relief from a burden imposed by government on religious practice or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community (4[illegible] U.S. 872 at 897).

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★ **HISTORICAL RATIONAL**

Third, to place on the shoulders of government the burden to prove a compelling interest in order to protect the greater, or common good, is to place an individual's claim to religious freedom in its rightful place. America's founders, namely Thomas Jefferson and James Madison, believed that the free exercise of religion was the most "liberal" of all the rights Americans could claim, the one right that placed the greatest ust in the capacity of private choice, and the one least dependent on positive law. In other words, a right that was considered "unalienable." Again, as Justice O'Connor stated in *Smith*, "The First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority" (493 U.S. 872 at 902). We believe that HB 387 will restore this historical intent at the state level.

If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

Joseph L. Story

Joseph L. Story, Government Relations Representative
Northwest Religious Liberty Association

HOME SCHOOL LEGAL DEFENSE ASSOCIATION

Advocates for Family & Freedom

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ATTORNEY (PA, MD, DC)

To: Members of the Alaska House Community and Regional Affairs Committee

From: Chris Klicka

Date: February 29, 2000

Re: House Bill 387, The Alaska Religious Freedom Protection Act

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By way of introduction, the Home School Legal Defense Association is a national organization which has as its primary purpose the protection of the right of parents to direct the education of their children. We presently have more than 66,000 member families in all 50 states and the District of Columbia, with many member families in Alaska. Because the vast majority of our members choose to home school out of religious convictions, the protection of religious freedom is essential to our cause.

The Alaska Legislature has a tremendous opportunity to restore the protection of religious freedom for all citizens in the state. The U.S. Supreme Court, in 1997, denigrated the right of the free exercise of religious beliefs to a second class right. The Alaska Legislature must ac now to protect religious liberty. Below are some commonly asked questions about state Religious Freedom Restoration Acts.

What will HB 387, the Alaska Religious Freedom Restoration Act, do?

The Alaska Religious Freedom Restoration Act (RFRA) reestablishes a test which courts must use to determine whether a person's religious belief should be accommodated when a government action or regulation restricts his or her religious practice. Known as the "compelling interest test," this test requires the government to prove with evidence that its regulation is (1) *essential* to achieve a compelling governmental interest and (2) the *least restrictive means* of achieving the government's compelling interest.

For example, in *People v. DeJonge*, a case argued by the Home School Legal Defense Association (HSLDA), a Michigan couple had the religious belief that they as the parents, although they were not certified teachers, should be teaching their children in their home rather than sending them to school. But the state law requiring all teachers to be certified did not permit

the couple to exercise this religious belief. Using the "compelling interest test," the court required the state to show that (1) teacher certification is *essential* to fulfill the state's compelling interest that children be educated and (2) that teacher certification was the *least restrictive means* to fulfill its interest. The state was able show without much difficulty that it had a compelling interest in seeing that its citizens were educated. But because this couple's children were scoring above the 90th percentile on standardized tests, the state could not prove teacher certification was *essential* for children to be educated and the least restrictive means to achieving that end. Thus, because the state could not satisfy the "compelling interest test," the parents were allowed to continue teaching their children according to their religious beliefs.

Why does Alaska need a RFRA?

Prior to 1990 the U.S. Supreme Court used the above test—the "compelling interest test"—when deciding religious claims. However, in a 1990 decision (*Employment Div. of Oregon v. Smith*) the Court tipped the scales of justice in favor of government regulation. The Court threw out the compelling interest test, which had shielded our religious freedom from onerous government regulation for more than 30 years.

The *Smith* decision reduced the standard of review in religious freedom cases to a "reasonableness standard." In other words, if a state regulation is "reasonable" (which they nearly always are), a religious objector loses. While all other fundamental rights (freedom of speech, press, assembly, etc.) remain protected by the stringent "compelling interest test," the Court singled out religious freedom, reducing its protection to the weak "reasonableness test."

In 1993, Congress attempted to remedy the *Smith* decision by enacting the federal Religious Freedom Restoration Act. This Act simply restored the "compelling interest test" in religious freedom cases. Four years later, the federal RFRA was struck down by the U.S. Supreme Court in the 1997 *City of Boerne* case.

As a practical matter, here are a few real-life examples of government restricting the free exercise of religion that have taken place under the "reasonableness test."

a) the long-standing practice of pastor-laity confidentiality has been repeatedly violated;

b) a Catholic hospital was denied accreditation for refusing to teach abortion techniques;

c) among other zoning ordinance conflicts, a church ministry to the homeless was shut down because it was located on the second floor of a building with no elevator;

d) a church was prohibited by a local city ordinance from feeding more than 50 people per day; and

e) Justice Fellowship reports that a Jewish minimum-security prisoner (CPA in jail for fraud, in 6th year of 8-year term) was denied the right to attend high holy day celebrations.

But Hasn't the U.S. Supreme Court already ruled the RFRA unconstitutional?

The 1993 federal RFRA attempted to use Congress' powers under Section 5 of the 14th Amendment to require both the federal and state governments to use the "compelling interest test" in religious freedom cases.

However, when the Supreme Court struck down the federal RFRA in 1997 (*City of Boerne v. Flores*), the problem wasn't with the "compelling interest test." The test had been used, as mentioned earlier, by the U.S. Supreme Court itself for more than 30 years. Rather, while the Supreme Court recognized the legitimacy of the "compelling interest test," it ruled that Congress could not *require* states to use this test in religious freedom cases.

A widely recognized principle of law is that states are free to protect an individual's right with a much higher standard than the U.S. Constitution itself affords. Under this principle and the *Boerne* decision, states are free to enact their own RFRAs, thereby choosing to apply the higher "compelling interest test" standard in their own religious freedom cases.

Should civil rights laws and ordinances be exempted from application of the Religious Freedom Restoration Act?

No. Religious freedom is one of many civil rights which all Americans should be allowed to enjoy. A civil rights exclusion in the RFRA simply makes religious freedom a "second-class" right, subordinate to all other civil rights. Instead, when a religious freedom right conflicts with another civil right, the two rights should be given the same level playing field by a balancing of interests using the compelling interest test.

In some situations, a civil rights law or ordinance should be upheld even when it conflicts with an individual's religious practice, while in other situations, the religious practice should be accommodated. Using the "compelling interest test" provided by HB 387, a court will be able to properly determine whether the government's interest in enforcing a particular civil rights law is compelling enough to override an individual's religious practice. If, however, civil rights laws are exempted from HB 387, religious freedom will *always* be curtailed when it conflicts with civil rights laws, even if the courts could have made a reasonable accommodation.

Will HB 387 create an increase in litigation?

No. This bill will simply restore the "compelling interest test," which the U.S. Supreme Court established almost 40 years ago as the standard of review for fundamental rights cases.

This "compelling interest test" worked well for over 30 years with no explosion of religious freedom cases. The consistent application of the "compelling interest test" in the courts "evened the playing field," giving people of sincere religious faith a fair chance against state regulations that violated their religious beliefs. Many times, both conservative and liberal religious and civil liberty organizations successfully used the "compelling interest test" to defend individuals' rights to freely exercise their religious beliefs.

As mentioned above, the federal RFRA, which restored the "compelling interest test" in religious freedom cases, was effective from its enactment in 1993 until the U.S. Supreme Court struck it

down in 1997. There is no record of an explosion in religious freedom litigation during this four-year period.

Furthermore, eight states have formally passed RFRAs to specifically restore the application of the "compelling interest test" in religious freedom cases (AL, IL, FL, TX, AZ, CT, RI, and SC). Seven more states, through state court precedents, have established a "compelling interest test" independent of the U.S. Supreme Court's damaging precedence in *Smith* and *Boerne*. (KS, MA, MN, VT, WA, WI, and MI.) None of these 15 states are experiencing an explosion in free exercise litigation.

Based on the lack of examples of excessive litigation during the almost 30 years of experience of using the "compelling interest test" for religious liberty (both before the *Smith* decision and during the federal RFRA years), we believe that restoring this test will generate very little, if any, new litigation. In fact, clarifying the standard for religious liberty under state law may prove to *reduce* the amount of litigation, because a clearly defined legal standard often leads parties to settle disputes before litigation ensues.

Will the passage of HB 387 result in a huge increase in litigation against local governments? Will this also increase the costs for the attorney general's office in defending state officials?

No. The same arguments above apply. The "compelling interest test" is not new. It has been in effect for most of the last 40 years. Local governments and state officials have not been inundated with religious freedom suits.

None of the eight states that have passed state RFRA have experienced any explosion of religious liberty cases, including Rhode Island where the law is seven years old. The "compelling interest test" is time-tested.

Furthermore, the "compelling interest test" is simply a "balancing test." It does not give religious claimants an automatic win. It only "evens the playing field" for the little guy.

Is it acceptable to exclude certain people, such as prisoners, from protection under HB 387?

No. As an inalienable right, religious liberty should not be denied to any class of persons. Home School Legal Defense Association urges states not to deny the protections of a state RFRA to anyone (including prison inmates). Religious liberty is diminished for all if it is denied to any. Once the government excludes one politically unpopular group, it is all too easy to exempt others. Of the states that have enacted RFRAs to date, none has found the need to exclude anyone.

But won't HB 387 create an explosion in frivolous cases filed by prisoners?

No. Studies show no sudden surge in religious freedom litigation filed by prisoners during the four years of the federal RFRA demonstrate there was no explosion of cases. Justice Fellowship compiled the following data (provided by the Statistical Division of Administrative Office of the U.S. Courts):

- Prisoner RFRA cases for the years 1995–1996 accounted for about one-tenth of one percent (0.01%) of cases in U.S. courts.

- The National Federal Court statistics show that in 1995, out of 43,158 total U.S. civil cases nationwide (1110 prisoner cases), only 50 of the cases invoking the federal RFRA were filed by prisoners.

- In 1996, out of 48,755 U.S. civil cases, only 51 RFRA cases were filed by prisoners.

A state-by-state breakdown of information was only available for the following three states:

- In New Mexico, out of 407 U.S. civil cases filed in 1995, 0 were filed by prisoners invoking the federal RFRA. In 1996, out of 492 U.S. civil cases filed, 0 were filed by prisoners invoking the federal RFRA.

- According to the Virginia Attorney General's office, out of 1,099 prisoner lawsuits filed against sheriff departments between 1993 and 1997 only 7 were "religious-styled" cases.

- In Florida, only 5 prisoner religious freedom cases invoked the federal RFRA during 1993–1997.

These statistics show that the federal RFRA caused no explosion of cases filed by prisoners—a group considered most likely to take advantage of such a law.

What is HB 387 based on?

The state RFRA model supported by HSLDA is based on other time-tested state Religious Freedom Restoration Acts. It is a combination of the Rhode Island RFRA (the oldest—passed in 1993) and the Illinois RFRA. The substantive provisions of the bill, its heart, are found in all RFRA states. (e.g. Texas, South Carolina, Arizona, Connecticut, Florida, and Alabama). Of course, the "compelling interest test" is patterned directly after the U.S. Supreme Court's description of the test found in dozens of cases over the last 40 years.

Why can't we simply let the Alaska Supreme Court reestablish the "compelling interest test"?

States which have neither an enacted RFRA nor their own body of case law applying the "compelling interest test" have simply followed whatever the current federal standard is. Courts in these states have always relied on the U.S. Supreme Court's religious freedom standard of review and its interpretation and application of the "compelling interest test." The states need to establish their own standard.

Since *Smith* and *Boerne* set the current federal precedent, this means trouble for Christians and other people of sincere religious faith.

Does HB 387 replace all existing remedies to protect religious freedom?

No. It only creates an additional "track" which a religious claimant can use to protect his free exercise of religion. State constitutional and federal constitutional remedies are still available.

Is there a problem with the lack of definition for "religious belief"? For example, what if a group got together (such as a satanic group) and said it was a "religious group" and wanted to meet in a high school gym, but did inappropriate things? Under this law, would the school have to let everyone (including this group) meet in the gym, or let no one do it? Would schools that allow Fellowship of Christian Athletes or Young Life to meet in the gym also be forced to let everyone else in (or no one)?

The first issue is the concern over the absence of a definition of religious belief.

There is a large body of case law relating to the definition of "religion." (For a good summary of the case law see Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 Notre Dame L. Rev. 581, 609-612 (1995)). For example, in *U.S. v. Seeger*, 380 U.S. 163, 176 (1965), the U.S. Supreme Court defined religious belief as "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by God."

The drafters of the 1993 federal RFRA considered defining "religion" but decided against it primarily because the U.S. Supreme Court had already done so. Since the U.S. Supreme Court has defined religious belief in dozens of cases with sufficient clarity, it is not necessary to define it in a state RFRA.

Secondly, a response to the school hypothetical:

The hypothetical Satanists who are denied access to a school could make claims under the Free Speech Clause, the Free Exercise Clause, and the Equal Access Act. Their case would likely be considered under the Equal Access Act and the First Amendment's Free Speech Clause –not free exercise law. Under the Equal Access Act (effective since 1984), if a school lets one noncurriculum group meet, it must let all noncurriculum groups meet. When Congress was considering the Equal Access Act, people were concerned that it would lead to an explosion of Satanists, Nazis, and hate groups wanting to meet and organize in schools; however, this "explosion" has not occurred.

Under the Free Speech Clause of the First Amendment, religious expression receives the same level of protection as nonreligious expression. See, e.g., *Kunz v. New York*, 340 U.S. 290 (1951) (meeting permit). Free speech rights are essentially a ceiling on free exercise rights. The standard of review for free speech cases is the "compelling interest test" giving individuals who exercise their right to free speech the highest level of protection. See *Heffron v. Int'l Society of Krishna Consciousness*, 452 U.S. 640, 652-53 (1981) (solicitation on state fair grounds).

Thus, once the school lets the Fellowship of Christian Athletes meet after hours, it must let in other groups. This is the case regardless of the standard of free exercise law. The school cannot discriminate among groups except to the extent it needs to regulate disruptive speech. See, e.g., *Tinker v. Des Moines*, 393 U.S. 503 (1969).

In state offices, if a person, because of a religious belief, wanted to have something distasteful on his desk, could his supervisor—under this law—ask for it to be removed?

It depends. If the item was on a teacher's desk, it could probably be removed under the Establishment Clause. If the item was on a desk not open for public view, it may be protected by the employee's free speech rights.

Free speech, the prohibition of establishment of religion, and Title VII considerations all would come into play here. However, like the school example, this scenario is likely going to be considered under the Free Speech Clause. Under U.S. Supreme Court precedent, when government regulates its employees' speech, a different test applies than when government regulates its citizens' speech. It's an easier test for the government to satisfy.

If the dispute over the object on the desk could not be resolved, the state RFRA could be invoked and the courts would have to balance the state's interest with the free exercise claim through application of the "compelling interest test."

CENTER FOR LAW AND RELIGIOUS FREEDOM

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TRANSMITTAL MEMORANDUM

DATE: February 29, 2000

TO: Representative John Harris

FAX: 907 465 3799

FROM: Betty L. Dunkum

RE: **Alaska Religious Freedom Protection Act**

Total Number of Pages (including this cover sheet): 8

COMMENTS:

Attached are some materials regarding the Alaska Religious Freedom Protection Act, HB 387, which is scheduled for a hearing before the Community and Regional Affairs Committee this Thursday, March 2, 2000. Please have someone insert copies of these materials in each committee member's packet. Please call me if you have any questions.

Sincerely yours,

Betty L. Dunkum

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Center for Law
and Religious Freedom

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MEMORANDUM

To: Members of the Alaska House Standing Committee on Community and Regional Affairs

From: Betty L. Dunkum, Esq.

Date: February 29, 2000

Re: **Religious Freedom Statute For Alaska**

For the reasons set out below, religious liberty in many states of the United States lacks adequate legal protection. As the first freedom guaranteed in the First Amendment to the U.S. Constitution, religious liberty should be fully enjoyed by Americans regardless of their state of residence. The Coalition For The Free Exercise Of Religion (presently consisting of over 70 religious faith groups and civil rights organizations) is seeking to enact federal legislation that would provide uniform legal protection in every state. However, because such a federal bill cannot cover as broad a spectrum of religious exercise as state law can, the Coalition is simultaneously assisting with legislation in states, such as Alaska, that appear committed to protecting all their residents and other persons that come within their jurisdiction.

1. Why Alaska Needs Its Own Religious Freedom Restoration Act

Prior to 1990, courts generally found an infringement of the First Amendment's clause protecting the free exercise of religion whenever a law or actions by a government official had the effect (intended or not) of substantially burdening a person's religious belief or practice. For example, pursuant to a state autopsy law, a state medical examiner could order the performance of an autopsy on a person who would have objected to the autopsy because of conflicting religious beliefs. Performance of the autopsy would substantially burden the religious freedom of the individual and his/her family. In another case, a city ordinance designating a church building as an historic landmark meant that the church could not alter its own property (*e.g.*, to expand the sanctuary or social hall or to establish a day-care ministry) without approval by the city landmark preservation board. This substantially burdened the church's collective religious freedom. Whenever courts found such a "free exercise" burden, they generally required that the government (the state medical examiner or the city, in these examples) give the religious person or body (here, the individual or the landmarked church) an exemption from the law.

The only exception to the general rule of free exercise was where the government could prove that denying religious accommodations was the least restrictive means of furthering a compelling government interest. In the historic preservation example above, the city would have

to prove that architectural preservation is a vitally important role for government and that there is no less onerous way to further this interest than to deny religious accommodations. Unlike landmark preservation cases, cities routinely met this "strict scrutiny" when churches sought exemption from fire and safety regulations applicable to their buildings.

But in 1990, the U.S. Supreme Court unexpectedly dropped the "compelling interest" test for most Free Exercise Clause claims. *Employment Division v. Smith*, 494 U.S. 872 (1990). The Court held that the test did not apply to cases where the burden on religion was the result of a law that was generally applicable to all persons and groups. So, using the autopsy example above, the individual's family could not invoke the First Amendment to prevent the autopsy.

This 1990 turnabout by the Court so threatened religious liberty for all faiths that a national coalition of over 65 religious denominations and civil rights groups was formed. They drafted and, in 1993, Congress passed (almost unanimously) the Religious Freedom Restoration Act, which restored the "compelling interest/least restrictive means" test. RFRA required a religious exemption from any government action that substantially burdened the complainant's religious exercise.

However, in 1997, the Supreme Court held that RFRA unconstitutionally exceeded Congress' authority under Section 5 of the Fourteenth Amendment. *City of Boerne v. Flores*, 521 U.S. 507 (1997).[1] Consequently, disparate impacts on religious liberty have no meaningful federal statutory protection against state or municipal law, policy, or practice. The First Amendment Free Exercise Clause is triggered only in the rare case where the state action intentionally discriminates against religious practice.

2. What Alaska Can Do To Restore Religious Liberty Protection

Friends of religious freedom should regularly check on the progress of our federal legislation and be ready to rally local support for a federal "RFRA II"--a bill that would uniformly (albeit less broadly) restore meaningful legal protection in every state.[2]

In addition, a state should enact its own RFRA, such as the Alaska Religious Freedom Protection Act, HB 387, because a state RFRA will affirm the state's commitment to protecting religious liberty. Indeed, eight states—Alabama, Arizona, Connecticut, Florida, Illinois, Rhode Island, South Carolina, and Texas—have already passed their own RFRAs, and a number of other states are in the same process.

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[1] While the high court has not addressed the issue, most scholars (and the Clinton Administration) agree that RFRA still applies against federal law or federal action. *See In re Young*, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 119 S.Ct. 43 (1998) (mem.).

[2] *See* Religious Liberty Protection Act, H.R. 1691, 106th Cong , 1st Sess. (1999) (utilizing federal Commerce Clause and spending power, rather than Section 5 of the Fourteenth Amendment).

The RFRA Coalition urges any state considering enactment of its own law to include the following essential elements.

a) **The Compelling Interest/Least Restrictive Means Test.** State RFRAs should apply this test to any government action that places a substantial burden on a person's religious exercise.

b) **Broad Definition For The "Exercise Of Religion".** The test should be triggered when government burdens an act, or a refusal to act, that is motivated by religious belief, whether or not the burdened religious exercise is compulsory or central to a larger system of religious belief. Reference to the First Amendment and/or the state constitution's religious liberty clauses should be avoided, so as not to imply that previous case law interpreting "the exercise of religion" under those provisions is being incorporated into the bill.

c) **Universal Protection.** As an inalienable right, religious liberty should not be denied to any class of persons. The Coalition urges states not to deny the protections of a state RFRA to anyone. Religious liberty is diminished for all if it is denied to any. And once a law omits one politically unpopular group it will be all too easy to exempt others. The Coalition opposes efforts to pass a state RFRA unless it is free of exemptions for prison inmates, land use claims, civil rights ordinances, etc. In some cases, suitable language can be framed on specific issues; please contact the Coalition if such language is required.

The Alaska Religious Freedom Protection Act, HB 387, presently includes all of the above elements. Please support this bill and oppose any amendments that would create "carveouts" for any group of people.

Please tell the Center for Law and Religious Freedom (703-642-1070, x3501) how we can assist you.

Examples Demonstrating Why Alaska Needs a Religious Freedom Restoration Act

In this document, several leading authorities on religious freedom in this country provide examples of why state RFRAs are needed.

MARK CHOPKO, General Counsel, U.S. Catholic Conference:

- During the years that the federal RFRA was still valid law, the Ninth Circuit found that RFRA had been violated when prison **personnel deliberately intercepted confessional communication.** *See Mockaitis v. Harcleroad,* 104 F.3d 1522 (9th Cir. 1997). Absent a religious freedom law, it is debatable that a prison regulation dictating that all conversations between prisoners and outsiders will be intercepted would have to excuse religious communications.

- The real power in RFRA "lay in its use in negotiation and persuasion in numerous local and administrative disputes . . . **The ability to have some legal basis on which religious persons and organizations could depend** as a starting point in negotiations was an enormous benefit[.]"

- Many dioceses report conflicts over the **loss of land by eminent domain for such things as creation of bicycle paths** or parking lots. In addition, St. Michael's Abbey in Orange County, California, sued the civil authorities to set aside a plan approving large-scale private development on land adjacent to the Abbey's land which had been, until recently, dedicated to private and quiet religious services.

- Officials in Arapahoe County, Colorado, have placed **numerical limits on the number of students that may be enrolled in religious schools**, and indeed, on the size of congregations of various churches as a way of limiting growth.

- In Douglas County, Colorado, administrative officials initially proposed **limiting the operational hours of a church** the same way they do any "commercial" facility. Limiting its operational hours means that a church could not lawfully engage in any act of service of devotion during those prohibited hours.

- In the Grand Teton area of Wyoming, local officials have proposed **limiting the number of persons who may seek spiritual consolation** and retreat at the Camp St. Malo owned by the Archdiocese of Denver. The camp was used by Pope John Paul II during his visit to the United States in 1993 for a day of quiet reflection.

MARC STERN, Senior Counsel, American Jewish Congress:

- A Muslim child won a judgment for injuries which left him physically and, to some degree, mentally handicapped. The child's lawyer sought to invest the judgment in an interest-bearing account as required by stated law, and as would appear, in the child's best interest. The parents objected that their religious beliefs forbid the taking of interest. **The judge ordered the parties to show cause why the lawyer should not be appointed guardian with the obligation, over the parents' objections, to invest the monies in an interest-bearing account.** While there are many financial arrangements that would provide the same "return" and would not violate Islamic law, the state law did not permit alternative investments of this sort.

- The director of an Immigration and Naturalization Service **detention facility refused to provide detainees--some of whom were seeking asylum for religious persecution—pork-free diets.** Because the President ordered federal officials to comply with the federal RFRA (part of which is no longer available) when threatened with a lawsuit, the manager agreed to provide a pork-free diet.

- A school district in **South Carolina banned the wearing of hats in school. The rule applied to a Jewish boy who wished to wear a yarmulke in school** as Orthodox Jewish practice requires. When threatened with a suit under the federal RFRA (an option now unavailable), the school board accommodated the student.

- A Jewish man was killed in an accident involving a commuter train. **The coroner insisted on an autopsy certifying the cause of death. The family of the deceased objected on religious grounds to the performance of an autopsy.** An MRI or CAT scan was offered in compromise. Once a lawsuit was threatened under the federal RFRA (an option now unavailable), the state attorney general advised the coroner to accommodate such a request.

- The **Illinois Athletic Association requires ball players to play bare-headed. This precluded any Orthodox Jewish boys that would wear yarmulkes.** The league defended its rule on grounds of safety. It argued that if players wore hats, the hats might fall of and other players trip over them. When an Orthodox school sought to play in the league and have its students wear yarmulkes, it was told no. The school offered to make the boys attach the yarmulkes to their hair with clips so that they would not fall off, and the Seventh Circuit held that the alternative had to be explored. Today, such a case would likely be dismissed at the initial motions stage, because it is a "facially neutral" law, and it is reasonable.

Alaska Civil Liberties Union
Statement on the Protection of Religious Liberty Before the House Committee on Health, Education & Social Services

Presented by Jennifer Rudinger, Executive Director
March 7, 2000

I. INTRODUCTION

Mr. Chairman and members of the Committee,

The Alaska Civil Liberties Union (AkCLU) greatly appreciates the opportunity to present this position paper on the importance of ensuring that any state legislation enhancing the protection of religious exercise will not cause any unintended harm to the enforcement of state and local civil rights laws. The American Civil Liberties Union (ACLU) historically supports legislation providing stronger protection of religious exercise--even against neutral, generally applicable governmental restrictions. But our concern is that some courts may turn a statutory shield for religious exercise into a sword against state and local civil rights laws.

Thus, the AkCLU regrets that we have no choice but to ask the Committee to refrain from passing House Bill 387 (Alaska Religious Freedom Protection Act, or "ARFPA") unless it will have no adverse consequences on the hard-won civil rights laws enacted and enforced by state and local governments. We offer several amendments, described below, to prevent any unintended adverse consequences. For the past decade, the ACLU has fought in Congress and the courts to preserve or restore the highest level of constitutional protection for claims of religious exercise. We have directly represented persons asserting burdens on their religious beliefs, filed *amicus* briefs with the Supreme Court, and were founding members of the coalition that supported the Religious Freedom Restoration Act in 1993, and the Religious Liberty Protection Act ("RLPA") during most of the last Congress.

However, we are no longer part of the coalition supporting the federal RLPA, as introduced in the House, because we could not ignore the potentially severe consequences that it may have on state and local civil rights laws. Although we believe that courts should find civil rights laws compelling and uniform enforcement of those civil rights laws the least restrictive means, we know that at least several courts have already rejected that position. We agree with Representative Croft that the result reached by the Alaska Supreme Court in *Swanner* is a good result. *Swanner, d/b/a Whitehall Properties v. Anchorage Equal Rights Commission,* 874 P.2d 274 (Alaska 1994). However, we all know that the principle of stare decisis is not absolute. Furthermore, it is not at all clear whether the same compelling interest the *Swanner* Court found in preventing housing discrimination on the basis of marital status would also be extended to preventing discrimination on the basis of other classifications, such as familial status, pregnancy status, disability, sexual orientation, or religion.

There is much disagreement in other jurisdictions about the issues raised in *Swanner.* We have found that landlords across the country have been using state religious liberty claims to

challenge the application of state and local civil rights laws protecting persons against marital status discrimination. None of the claims, including those in *Swanner*, involved owner-occupied housing; all of the landlords owned so many investment properties that they were outside the state laws' exemptions for small landlords. These landlords all sought to turn the shield of religious exercise protections into a sword against the civil rights of prospective tenants.

To confuse matters even more, the U.S. Court of Appeals for the Ninth Circuit (which governs Alaska) recently applied a strict scrutiny standard of review to a local civil rights law in deciding a claim by landlords that compliance with that law protecting unmarried couples from discrimination based on marital status burdened the landlords' religious beliefs. *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692 (9th Cir. 1999). The court held that the governmental interest in preventing marital status discrimination was not compelling. As a result, the landlords did not have to comply with that civil rights law. The AkCLU has submitted an *amicus* brief in this case, arguing that the state does have a compelling interest in preventing discrimination on the basis of marital status in housing, a la *Swanner*, and the case is scheduled to be reheard by an en banc panel of the Ninth Circuit this month.

Besides the Ninth Circuit, the Massachusetts Supreme Court and a plurality of the Minnesota Supreme Court have also found that defendants in similar civil rights cases may have a religious liberty defense against state civil rights claims. The only two state court decisions that found in favor of the civil rights plaintiffs in similar cases are in California and Alaska--but both states are in the Ninth Circuit.

An improperly drafted statute could jeopardize more than marital status protection. The Ninth Circuit's analysis calls into question all state and local civil rights laws which are not motivated by a "firm national policy" in favor of eradicating specific forms of discrimination. Thus, persons protected because of characteristics such as marital status, familial status, pregnancy status, disability, and perhaps religion itself, could find their protections under state or local laws eroded by federal law. If legislation such as an unamended HB 387 becomes law, an applicant for a job or housing may have no state or local law protection against having to answer questions such as: Is that your spouse? Are those your children? Are you straight or gay? Are you pregnant? Are you HIV-positive? Mentally ill? Physically disabled? What is your religion?

Even where a "firm national policy" in eradicating certain types of discrimination could be shown, such as classifications based on race or sex, courts may conclude that such a compelling governmental interest could be achieved without prohibiting the discriminatory conduct of the particular defendant claiming a religious exemption to a civil rights law. I am attaching a paper submitted by the NAACP to Congress in opposition to the federal RLPA. The NAACP paper analyzes this danger in greater detail.

In the wake of recent court decisions around the country and in our very own Ninth Circuit, and in light of the lack of Alaskan precedent on so many of these issues, the Committee should not leave the problem of a state religious liberty statute's potential effect on state and local civil rights laws unresolved. The stakes are too high.

Instead, the AkCLU urges you to consider other alternatives for providing a shield for religious exercise without creating a sword against civil rights laws. As Texas State Representative Scott Hochberg's testimony to Congress (also attached with this paper) explains, Texas Governor George W. Bush signed into law--only last summer--a state RFRA that protects Texas' civil rights laws. In Congress, the ACLU and many other groups are supporting a civil rights amendment to RLPA offered by Congressman Nadler that will have a similar result.

The AkCLU very much appreciates your willingness to consider these concerns as you consider HB 387. We believe that members of the legislature who justifiably care deeply about protecting both religious exercise and state and local civil rights laws should not be forced to choose. It is a false choice because both goals can be made compatible. We hope to work with members of the Committee to resolve this problem. Thank you once again for this opportunity to present our concerns.

II. SCOPE OF THE POTENTIAL PROBLEM

This Committee is presently considering HB 387, the Alaska Religious Freedom Protection Act ("ARFPA"), which would provide extensive statutory protection for religious exercise to replace or enhance the constitutional protection previously afforded religious exercise prior to a 1990 Supreme Court decision that lowered the standard of review for religious exercise claims. HB 387 provides, in relevant part, that:

> A [government entity] may restrict a person's free exercise of religion only if (1.) the restriction is in the form of a rule of general applicability and does not intentionally discriminate against religion or among religions; and (2.) application of the restriction to the person is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.
>
> ... This section may not be construed to create an establishment of religion or to authorize the infringement of a person's individual rights.

As introduced, HB 387 does not have any provision specifically addressing its potential effect on state and local civil rights laws.

The scope of the potential civil rights problem raised by religious freedom statutes is broad. The U.S. Court of Appeals for the Ninth Circuit and four state supreme courts have recently decided five cases with nearly identical fact patterns, namely, landlords claiming that their religious beliefs defeat housing discrimination claims brought by unmarried heterosexual persons based on marital status.[1] The decisions were split, with the Ninth Circuit and the Massachusetts and Minnesota courts holding that a religious liberty defense could defeat civil rights claims based on state or local laws. The courts could apply the reasoning in those decisions to civil rights claims made by members of other groups that also receive less protection from the courts and the federal government. Although the Alaska Supreme Court in *Swanner* upheld the anti-discrimination laws in the context of marital status, it is unclear whether the court's reasoning would extend to other types of civil rights claims.

The intent of at least some of the supporters of federal RLPA is clear. Several witnesses during hearings before the House and Senate Judiciary Committees specifically stated their belief that RLPA could and should be used as a defense to civil rights claims based on gender, religion, sexual orientation, and marital status.

In applying standards of review substantially similar to the ARFPA and RLPA religious exercise standard, numerous courts have recently decided cases in which defendants raised a religious liberty defense to civil rights claims based on state or local laws protecting against discrimination in housing based on marital status. *See Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692 (9th Cir. 1999) (governmental interest in preventing marital status discrimination was not compelling); *Smith v. Fair Employment & Housing Comm'n*, 913 P.2d 909 (Cal. 1996) [hereinafter *"Smith v. FEHC"*] (no substantial burden on religious exercise found); *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (remanding for further

consideration of whether the governmental interest in eliminating discrimination based on marital status was compelling and whether uniform application of the state anti-discrimination law was the least restrictive means); *Swanner, d/b/a Whitehall Properties v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska), *cert. denied*, 115 S. Ct. 460 (1994) (the government's interest in providing equal access to housing was compelling and uniform application of the state anti-discrimination law was the least restrictive means); *Cooper v. French*, 460 N.W.2d 2 (Minn. 1990) ("marital status" did not include unmarried cohabiting couples; a plurality of the court also found no compelling governmental interest in preventing marital status discrimination). Thus, in the Ninth Circuit and Massachusetts and Minnesota, defendants may successfully use their religious beliefs to defeat at least certain civil rights claims based on state or local laws.

In those housing cases, the owner-occupied exceptions found in all state fair housing laws did not apply; the rental properties at issue were *not* owner-occupied, but instead were used solely for investment purposes. *See Thomas*, 165 F.3d 692 (statute provides exception for "space rented in the home of the landlord"); *Desilets*, 636 N.E.2d at 238 n.8 (law applicable only to "dwellings that are rented to three or more families living independently of each other"); *Swanner*, 874 P.2d at __ (statute provides exception for individual home "wherein the renter or lessee would share common living areas with the owner"); *French*, 460 N.W.2d 2 (owner did not live in subject property, a two-bedroom house); *Smith v. FEHC*, 913 P.2d at 912 (Smith "does not reside in any of the four units"). The landlords all claimed that their sincerely held religious beliefs about premarital sexual relations required them to deny housing to unmarried couples, despite state or local laws prohibiting discrimination on the basis of marital status in housing. Although the religious liberty defense was not always successful, the courts were split on whether the anti-discrimination laws impose a substantial burden on the exercise of the landlord's religion, and on whether the governmental interest in eradicating marital status discrimination in housing is compelling and pursued by the least restrictive means.

Defendants in civil rights cases have also raised religious liberty defenses in cases involving such characteristics as race or sexual orientation and in contexts ranging from educational institutions to employment. For example, defendants or courts unsuccessfully raised religious rationales for racially discriminatory practices. *E.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (religious university claimed that its religious beliefs about miscegenation – interracial marriage -- justified racial discrimination in admissions); *see also Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating a Virginia antimiscegenation statute).[2]

Prior to the Supreme Court lowering the standard of review for religious liberty claims in *Employment Division of Oregon v. Smith*, 485 U.S. 660 (1988), the use of religious liberty defenses to civil rights claims was widespread. *See, e.g., Bob Jones Univ.*, 461 U.S. 574, 604; *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982) (religious publishing house claimed that dismissing employee in retaliation for bringing discrimination charges was based on religious doctrine forbidding members of the church from bringing lawsuits against the church); *Minnesota ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985) (health club's owners insisted on hiring only employees whose religious beliefs were consistent with the owners' religious beliefs despite state anti-discrimination law forbidding employment discrimination based on religion, sex, and marital status); *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1 (D.C. App. 1987) (religious university argued that its religious beliefs justified the denial of "university recognition" to gay student group, despite a District of Columbia civil rights law prohibiting discrimination on the basis of sexual orientation).

Currently, Alaska state and local laws also provide protection based on other characteristics that receive less than strict scrutiny, such as disability, sex, age, familial status, or pregnancy. Although the governmental interest in eradicating discrimination has been found compelling in the context of *Swanner*, providing a new defense in civil rights actions will—at a minimum--increase the cost of litigation for plaintiffs. However, the risk for persons claiming civil rights protection based on characteristics that receive lower levels of scrutiny is substantial. Because many of the groups claiming protection under state and local civil rights laws do not currently receive heightened scrutiny for their claims in court, and receive little or no explicit federal statutory protection from Congress, it is likely that at least some courts would find that the governmental interest in ending discrimination against these groups is not compelling. As noted above, courts around the country are divided on these questions, and these decisions have come from states that traditionally have been vigorous and strict in enforcing their civil rights laws.

III. APPLICATION OF THE FOUR-PART ARFPA TEST TO CIVIL RIGHTS CLAIMS

HB 387 provides, in relevant part, that:

> A [government entity] may restrict a person's free exercise of religion only if (1.) the restriction is in the form of a rule of general applicability and does not intentionally discriminate against religion or among religions; and (2.) application of the restriction to the person is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

Thus, in deciding a challenge to a civil rights claim based on a state or local anti-discrimination law, a court must apply a four-part test: (i) is the defendant's discrimination "religious exercise"?; (ii) does the applicable state or local anti-discrimination law "restrict" the defendant's religious exercise?; (iii) is the government's interest in eradicating the discrimination "compelling"?; and (iv) are uniformly applied anti-discrimination laws the least restrictive means of furthering any compelling governmental interest?

A. Is Discrimination "Religious Exercise" Under ARFPA?

The first part of the ARFPA test is whether a refusal to comply with civil rights laws is religious exercise. Because ARFPA does not define what constitutes a religious exercise, any civil rights defendant who can show that his or her discriminatory actions were in any way "restricted" will be able to meet this prong of ARFPA. Under the pre-*Smith* Free Exercise Clause jurisprudence which ARFPA purports to restore, the "Supreme Court free exercise of religion cases have accepted, either implicitly or without searching inquiry, claimants' assertions regarding what they sincerely believe to be the exercise of their religion, even when the conduct in dispute is not commonly viewed as a religious ritual." *Desilets,* 636 N.E.2d at 237 (citing *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 137 (1987); *United States v. Lee*, 455 U.S. 252, 257 (1982); *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 715 (1981)).

Courts have held that refusal to rent an apartment to an unmarried heterosexual couple based on the landlord's religious belief that promoting premarital sex is sinful is religious exercise. *See, e.g., Smith v. FEHC,* 913 P.2d at 923 ("While the renting of apartments may not constitute the exercise of religion, if Smith claims the laws regulating that activity indirectly

coerce her to violate her religious beliefs, we cannot avoid testing her claim under the analysis codified in RFRA."); *Desilets*, 636 N.E.2d at 237 ("Conduct motivated by sincerely held religious convictions will be recognized as the exercise of religion."). Similarly, in the employment context, courts have accepted the argument that hiring decisions are religious exercise, if the employer can demonstrate that the decision was based on religious belief or doctrine. *See, e.g., Pacific Press*, 676 F.2d at 1280 (retaliatory action taken by religious publisher against employee who instituted EEOC proceedings alleging sex discrimination was religious exercise because church doctrine prohibited lawsuits by members against the church).

B. Do State and Local Civil Rights Statutes "Restrict" Religious Exercise?

The purpose of the second part of the ARFPA test should be to avoid litigation over neutral laws that have only a minimal impact on religious exercise. However, "restrict" may be defined so broadly as to encompass *any* infringement on religious exercise, regardless of how slight the impact of that restriction may be. **The AkCLU suggests that the word "restrict" in HB 387 be replaced with the words "substantially burdens" a person's free exercise of religion.** Congress has not defined "substantial burden," and there is no generally applicable test to determine whether a substantial burden exists. *See Smith v. FEHC*, 913 P.2d at 924. However, several circuit courts have adopted a broad reading of "substantial burden," holding that

> a substantial burden on the free exercise of religion, within the meaning of the [RFRA], is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs.

Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996); *see also Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) ("To exceed the 'substantial burden' threshold, governmental regulation must significantly inhibit or constrain conduct or expression that manifests some central tenet of a [person's] individual beliefs."); *Brown-El v. Harris*, 26 F.3d 68, 70 (8th Cir. 1994) (substantial burden imposed when person is compelled, "by threat of sanctions, to refrain from religiously motivated conduct") (quotations omitted). *But cf. Goodall v. Stafford Cty. Sch. Bd.*, 60 F.3d 168, 171-72 (4th Cir. 1995) (substantial burden not imposed where plaintiffs "have neither been compelled to engage in conduct proscribed by their religious beliefs, nor have they been forced to abstain from any action which their religion mandates that they take"); *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995) (same); *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995) (per curiam) (same).

Economic cost alone does not constitute a substantial burden. *See Braunfeld v. Brown*, 366 U.S. 599, 605 (1961); *Smith v. FEHC* at 926-27. However, even those courts that have adopted a narrow definition of substantial burden--where a substantial burden is imposed only where someone is compelled to engage in conduct forbidden by his or her religion, or forbidden to engage in conduct mandated by religious belief--have held that imposing liability on an employer for non-compliance with employment anti-discrimination laws constitutes a substantial burden when compliance would contradict religious belief or doctrine. *See, e.g., Pacific Press*, 676 F.2d at 1280 ("there is a substantial impact on the exercise of religious beliefs because EEOC's jurisdiction to prosecute . . . will impose liability on Press for disciplinary actions based on religious doctrine").

One court has held that compliance with state fair housing laws does not impose a substantial burden, in part because "one who earns a living through the return on capital invested

in rental properties can, if she does not wish to comply with an anti-discrimination law that conflicts with her religious beliefs, avoid the conflict, without threatening her livelihood, by selling her units and redeploying the capital in other investments." *Smith v. FEHC*, 913 P.2d at 925. The court also noted that "the landlord in this case does not claim that her religious beliefs require her to rent apartments; the religious injunction is simply that she not rent to unmarried couples. No religious exercise is burdened if she follows the alternative course of placing her capital in another investment." *Id.* at 926.

Because the court in *Smith v. FEHC* used an analysis for "substantial burden" that may be more stringent than the analysis required by ARFPA, Alaska courts are likely to view the "choice" of engaging in a different occupation or complying with the anti-discrimination law and violating one's religious beliefs as too harsh, and conclude that the burden is substantial. *See, e.g., Desilets*, 636 N.E.2d at 237-38 (substantial burden imposed because the civil rights law "affirmatively obliges the defendants to enter into a contract contrary to their religious beliefs and provides significant sanctions for its violation," and "both their nonconformity to the law and any related publicity may stigmatize the defendants in the eyes of many and thus burden the exercise of the defendants' religion"). Indeed, all courts, other than the court in *Smith v. FEHC*, that have considered the question in the housing context have found that the state or local anti-discrimination law substantially burdened the defendant's exercise of his or her religious beliefs.

C. Is the Governmental Interest in Eradicating Discrimination Compelling?

The third part of the ARFPA test provides that only a compelling governmental interest justifies imposing a restriction on the exercise of religion. The courts that recently decided civil rights cases in which a defendant raised a religious liberty defense have split most sharply on this part of the test.

The governmental interest in eradicating certain types of discrimination, particularly racial and sex-based discrimination, should meet the compelling interest standard. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) ("The governmental interest at stake here is compelling. . . . [T]he government has a fundamental, overriding interest in eradicating racial discrimination in education . . . . That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (the state government's "compelling interest in eradicating discrimination against its female citizens justifies the impact . . . on the male members' associational freedoms"). Such plaintiffs, however, should anticipate incurring litigation costs as defendants raise the defense.

Because sexual orientation, marital status, disability, and other newly protected classes currently do not receive the same level of judicial scrutiny as race and sex, however, it may be more difficult to persuade all courts that the governmental interest in preventing discrimination on those grounds is compelling. For example, courts have reached divided results in determining whether preventing discrimination based on characteristics such as sexual orientation or marital status is compelling. *See, e.g., Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1, 37 (D.C. App. 1987) (District of Columbia's interest in prohibiting educational institutions from denying equal access to tangible benefits on the basis of sexual orientation is compelling); *Swanner*, 874 P.2d at 282-83 (Anchorage's interest in prohibiting marital status discrimination in housing is compelling), *Desilets*, 636 N.E.2d 233 (remanding for further consideration of whether the government's interest in prohibiting marital status discrimination is compelling); *French*, 460 N.W.2d at 10-11 (plurality op.) (no compelling governmental interest in ending discrimination against unmarried couples).

Because ARFPA requires that the "application of the restriction to the person is essential to further a compelling governmental interest", courts could require the government to prove that there is a compelling interest in requiring the specific landlord or employer to comply with the civil rights law. *See, e.g., Desilets*, 636 N.E.2d at 238 (the issue is "whether the record establishes that the Commonwealth has or does not have an important governmental interest that is sufficiently compelling that the granting of an exemption to people in the position of the defendants would unduly hinder that goal"); *French*, 460 N.W.2d at 9 ("French must be granted an exemption . . . unless the state can demonstrate compelling and overriding state interest, not only in the state's general statutory purpose, but in refusing to grant an exemption to French."). However, the majority of courts have considered simply whether the government had a compelling interest in enforcing the law at issue.

When a state or municipality chooses to target and prohibit a specific form of discrimination, presumably it does so because it believes that there is a serious problem. *See EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982) ("By enacting Title VII, Congress clearly targeted the elimination of all forms of discrimination as a 'highest priority.'"). Courts have sometimes found that legislative determination alone, however, is not always dispositive of whether the state's interest is compelling. *See Gay Rights Coalition*, 536 A.2d at 33 ("While not lightly to be disregarded, the Council's strong feelings do not resolve the issue whether its ban on sexual orientation discrimination represents a compelling governmental interest."); *Desilets*, 636 N.E.2d at 240 ("we are unwilling to conclude that simple enactment of the prohibition against discrimination based on marital status establishes that the state has" a compelling interest in ending marital status discrimination in housing).

To the extent that other state or municipal laws or policies discriminate against the class, courts are sometimes less likely to find that the governmental interest in ending discrimination against that class is compelling. Thus, in some states, anti-fornication or sodomy statutes have provided additional support for concluding that there is no compelling governmental interest in protecting against discrimination based on marital status or sexual orientation. *See, e.g., Thomas*, 165 F. 3d at 716-17 (citing state statutes providing less favorable benefits to unmarried couples than to married couples); *French*, 460 N.W.2d at 10 (plurality op.) ("How can there be a compelling state interest in promoting fornication when there is a state statute on the books prohibiting it?"); *Desilets*, 636 N.E.2d at 240 (the existence of a criminal statute against fornication "suggests some diminution" in the state's interest). On the other hand, the Alaska Supreme Court in *Swanner* noted that differential treatment of married and unmarried people in areas other than housing does not prove that the state views marital status discrimination in <u>housing</u> as insignificant.

Courts have taken different positions on defining the scope of the governmental interest at stake in prohibiting discrimination. Defining the governmental interest broadly, the *Swanner* court had no difficulty in concluding that the state's "interest in preventing discrimination based on irrelevant characteristics" is compelling. *Swanner*, 874 P.2d at 282-83. "The government views acts of discrimination as independent social evils even if the prospective tenants ultimately find housing. Allowing housing discrimination that degrade[s] individuals, affronts human dignity, and limits one's opportunities results in harming the government's transactional interest in preventing such discrimination." *Id.; accord Gay Rights Coalition*, 536 A.2d at 37 ("The compelling interests ... that any state has in eradicating discrimination against the homosexually or bisexually oriented include the fostering of individual dignity, the creation of a climate and environment in which each individual can utilize his or her potential to contribute to and benefit

from society, and equal protection of the life, liberty, and property that the Founding Fathers guaranteed to us all.").

In contrast, the Massachusetts Supreme Court in *Desilets* insisted on a much more narrow reading of the governmental interest, noting that "[t]he general objective of eliminating discrimination of all kinds. . . cannot alone provide a compelling State interest that justifies the . . . disregard of the defendants' right to free exercise of their religion. The analysis must be more focused." *Desilets*, 636 N.E.2d at 238. This narrow reading led the court to insist that Massachusetts "demonstrate that it has a compelling interest in the elimination of discrimination in housing against an unmarried man and an unmarried woman who have a sexual relationship and wish to rent accommodations to which [the civil rights statute] applies." *Id.*

D. Are Uniformly Applied Anti-Discrimination Laws the Least Restrictive Means Available?

The fourth part of the ARFPA test is whether the challenged state or local law uses the least restrictive means to achieve the government's compelling interest. Several courts have held that uniform application of anti-discrimination laws is the least restrictive means available. *See, e.g., Swanner*, 874 P.2d at 280, n.9 ("The most effective tool the state has for combating discrimination is to prohibit discrimination; these laws do exactly that. Consequently the means are narrowly tailored and there is no less restrictive alternative."); *Gay Rights Coalition*, 536 A.2d at 39 ("The District of Columbia's overriding interest in eradicating sexual orientation discrimination, if it is ever to be converted from aspiration to reality, requires that Georgetown equally distribute tangible benefits to the student groups."); *McClure*, 370 N.W.2d at 853 ("the state's overriding compelling interest of eradicating discrimination based upon sex, race, marital status, or religion could be substantially frustrated if employers, professing as deep and sincere religious beliefs as those held by appellants, could discriminate against the protected class"). However, the Massachusetts Supreme Court remanded that question when it held that the government may be required to prove that "uniformity of enforcement of the statute . . . [is] the least restrictive means for the practical and efficient operation of the anti-discrimination law." *Desilets*, 636 N.E.2d at 241.

Persons using a religious liberty defense to a civil rights claim have argued that uniform application of civil rights laws cannot be the least restrictive means if the civil rights statute in question contains exemptions for religious organizations and small landlords or employers. Those defendants have argued that a less restrictive means is available, namely, granting an exemption to persons who hold sincere religious beliefs. For example, one court found that "the compulsion of the state's interest appears somewhat weakened because the statute permits discrimination by a religious organization in certain respects . . . if to do so promotes the principles for which the organization was established." *Desilets*, 636 N.E.2d at 240. Similarly, the Ninth Circuit cited the state's "'underenforcement' of its purported interest in eradicating marital status discrimination," as expressed in statutory exemptions within the state fair housing law, as evidence that the state's interest was not compelling. *Thomas*, 165 F.3d at 717. However, another court recognized that while the government permits exemptions for "religious corporations when religious beliefs shall be a bona fide occupational qualification," "the state's overriding interest permits of no exemption to appellants in this case. . . . [W]hen appellants entered into the economic arena and began trafficking in the market place, they have subjected themselves to the standards the legislature has prescribed not only for the benefit of prospective and existing employees, but also for the benefit of citizens of the state as a whole in an effort to eliminate pernicious discrimination." *McClure*, 370 N.W.2d at 853; The split on how to apply

the least restrictive means part of the strict scrutiny test is particularly important when most state and local civil rights laws have numerous exemptions.

Finally, as we pointed out in our introduction to this position paper, we concur with the analysis by the NAACP. We share their concerns, and those of many other civil rights and religious groups, that even where a "firm national policy" in eradicating certain types of discrimination could be shown, such as classifications based on race or sex, courts may conclude that such a compelling governmental interest could be achieved without prohibiting the discriminatory conduct of the particular defendant claiming a religious exemption to a civil rights law.

IV. CONCLUSION AND SUGGESTED AMENDMENTS

The AkCLU urges the Committee, as it addresses the problem of increasing protection for religious exercise against neutral state and local laws, to avoid unintentional harm to the enforcement of state and local civil rights laws. Without careful drafting, a state religious liberty statute could provide a new federal defense against state and local civil rights claims made by persons who already receive the least protection from the courts and the federal government. This Committee should not pass any religious liberty legislation without ensuring that it will not deprive persons of their civil rights under state and local laws.

The AkCLU therefore proposes the following three amendments to clarify the intent of the bill and to protect religious freedom at the same time as it protects civil rights.

(1.) To clarify subsection (d) throughout HB 387, we suggest rephrasing (d) to read, "This section may not be construed to create an establishment of religion or to authorize the infringement of the rights of others by the person claiming a religious exemption to a facially neutral law of general applicability. This Act does not establish or eliminate a defense to a civil action or criminal prosecution under a federal, state, or local civil rights law."

The sponsor has stated that his intent in (d) is to prevent one person's free exercise of religion from infringing on the rights of another person. In other words, everyone has the right to practice his/her religion freely, exempt from laws that burden his/her religious exercise, as long as no one else is injured in the process. The AkCLU agrees with this assertion, and we feel that our amendment clarifies this balancing.

To cite for you a specific example where we <u>support</u> ARFPA, last year the AkCLU looked into a case in which a Muslim couple objected on religious grounds to the State of Alaska performing an autopsy on their deceased infant. Alaska law requires an autopsy to be performed in all SIDS (Sudden Infant Death Syndrome) cases, but the parents in this case sincerely believed, in accordance with their faith, that their baby would not go to Heaven if the baby's body was not presented whole unto God. (FYI, other faiths, such as Orthodox Judaism, also profess this religious tenet.) Since the cause of death can often be determined by "less restrictive" means that do not involve cutting into the corpse – i.e. magnetic resonance imaging, or MRI – HB 387 would protect the rights of relatives to be exempt from the state's generally applicable autopsy laws. Similarly, if the cause of death for suspected SIDS cases can be determined by means that do not infringe on religion, then the state should respect the religious practices of the parents of that infant.

Our suggested amendment fairly balances the religious freedom of the individual with the rights of the rest of society by preventing harm to any third parties from the exercise of an individual's religious rights.

(2.) As we have already pointed out, throughout HB 387, subsection (b) states that a government entity "may restrict a person's free exercise of religion only if...". (Emphasis added.) Our concern is that "restrict" may be read very broadly to include any level of restriction, no matter how minor its impact on the free exercise of religion. The federal RLPA uses a different standard. The federal RLPA provides in relevant part that "a [state or local] government shall not substantially burden a person's religious exercise..." (emphasis added). Courts have defined standards for substantial burdens, as discussed above. We propose that in (b) throughout the bill, the word "restrict" be replaced by "substantially burden".

(3.) Finally, we have some great qualms about the wording of Section (4) in the legislative findings. We think that the intent of (4) is to protect against discrimination, but by limiting the protection to the degree currently set forth in the Alaska Constitution, Section (4) leaves open a lot of gray area where courts have not yet granted compelling interest status to the state's interest in remedying certain types of discrimination. **We suggest the following wording for Section (4): "while it is improper for the legislature to tell the judiciary how to interpret the Constitution of the State of Alaska, it is proper for the legislature to codify protection for the free exercise of religion, so long as that legislative action does not authorize the infringement of the rights of others by the person claiming a religious exemption to a facially neutral law of general applicability."**

ENDNOTES

1In addition, the supreme courts of Michigan and Illinois recently vacated decisions that had held that their respective state fair housing laws protecting persons based on marital status served a compelling governmental interest and were narrowly tailored. *McCready v. Hoffius*, 1999 Mich. Lexis 694 (Mich. April 16, 1999), *vacating and remanding*, 586 N.W.2d 723 (Mich. 1998); *Jasniowskiv. Rushing*, 685 N.E.2d 622 (Ill. 1997), *vacating for lack of case or controversy*, 678 N.E.2d 743 (Ill. App. 1997). The Michigan Supreme Court reversed its own earlier decision after newly elected justices joined the court. The Illinois Supreme Court vacated an intermediate appellate decision for the procedural reason of a lack of a case or controversy.

2In *Loving*, the Supreme Court reversed a decision of the Virginia Supreme Court which had affirmed, in part, a Virginia state trial court decision that stated:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with this arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Decision of Circuit Court for Caroline County (Jan. 6, 1959), (*quoted in Loving*, 388 U.S. at 3).

VON KEETCH, Church of Jesus Christ of Latter Day Saints:

- One city adopted an entirely new Comprehensive Plan covering development within its city. The Plan was based on the "overwhelmingly residential aspect of the City," and limited any new development within the city to single family unit dwellings. **The City's plan set up an "Educational and Religious Zone (ER) " for schools and churches that already existed within the city.** Although any entity could make a request for such a zone change, the zoning would be changed only if *the applicant* seeking the change *could prove* that (1) "the city made a mistake in zoning the property" in the first place; or (2) "a change in condition has occurred making the property more suitable for ER use than for residential use." *See Corporation of the Presiding Bishop v. Board of Comm'rs*, No. 95-1135 (Chancery Ct. Davidson County, Tenn., Jan. 27, 1998).

- **A religious mission for the homeless operated by the late Mother Teresa's order has been shut down because it was located on the second floor of a building without an elevator.**

- **Adult children with strong religious convictions about serving their feeble parents have been prevented form volunteering to care for their elderly parents** housed in government-regulated nursing homes. *See Greater New York Health Care Facilities v. Axelrod*, 770 F. Supp. 183 (S.D.N.Y. 1991).

- **One district court held that an unnecessary autopsy on a young Hmong man did not constitute a violation of the Free Exercise Clause,** despite the religiously-based belief of his family that the autopsy condemned the spirit of the deceased. The court had originally ruled in favor of the family, but after Smith, felt compelled to reverse its earlier ruling. The judge, when issuing its order against the family, remarked that "I have seldom, in twenty-four years on the bench, seen such a sincere instance of emotion displayed." *You Vang Yang v. Sturner*, 750 F. Supp. 558, 558 (D.R.I. 1990); *see also Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990), *aff'd*, 940 F.2d 661 (6th Cir. 1991) (compelling autopsy despite contrary, deeply felt, conservative Jewish beliefs).

- **The strict confidentiality of communications between member and clergy has come under strong attack,** with litigants attempting to gain information or otherwise discover sacred confessional information for use in pursuance of their civil claims. *See, e.g., Hadnot v. Shaw*, 826 P.2d 978 (Okla. 1992); *Scott v. Hammock*, 870 P.2d 947 (Utah 1994).

- Local governments have attempted to impair or altogether eliminate proselytizing by Church missionaries by passing "generally applicable" laws that happen to place **severe restrictions on the times and places that missionaries may contact door-to-door.** Local officials have attempted to curtail church proselytizing in such cities as Mundelein, Illinois; Dover, New Jersey; Flemington, New Jersey; Chester, Connecticut; Valencia, California; Media, Pennsylvania; Downers Grove, Illinois; Marin County, California; and Seven Hills, Ohio.

STEVE McFARLAND, former director of the Center for Law and Religious Freedom at the Christian Legal Society:

- **An Orthodox Jewish rabbi was threatened with criminal prosecution for leading morning and evening prayers in a converted garage in one of Miami's single-family residential areas.** The U.S. Court of Appeals for the Eleventh Circuit held that the city's interest in an exception-free zoning plan outweighed the rabbi's interest, because the services "are not integral to [his] faith" and because the burden on the rabbi and his friends of having to relocate "plainly does not rise to the level of criminal liability, loss of livelihood, or denial of a basic income sustaining public welfare benefit [unemployment compensation]."

- **A federal judge in Philadelphia granted judgment for the city against a Seventh-Day Adventist church to which the city had issued a building permit and then revoked it *after construction had commenced*** when the city discovered it had erred in calculating the number of parking spaces its code would require.

- **Religious student groups or clubs are penalized if they require that their student leaders share a particular religious belief.** Many campuses deny official charter status to any group that discriminates in its leadership selection based on religion. This means that the chapter cannot meet on campus, use campus media to announce their activities, or distribute literature to their peers. Legal battles have taken place at: University of Arizona, University of Minnesota, University of Kansas, University of Toledo, Texas Institute of Technology, Johnson State University (VT), California State University - Monterey Bay, and Georgia Institute of Technology.