

**HB**

**387**

(7)

# HOUSE COMMITTEE REPORT

Date Referred to Committee: March 15, 2000

FURTHER REFERRALS:

Judiciary

Date of Committee Action: 4/4/00

The STATE AFFAIRS Committee considered:

HB 387

HOUSE BILL NO. 387

FREEDOM OF RELIGION

"An Act prohibiting governmental entities, including municipalities and school districts, from restricting a person's free exercise of religion."

recommends it be replaced with the following committee substitute CSHB 387 (HES)  the same title  a new title

additional referral to \_\_\_\_\_ Committee  
 attached amendment(s)

ADOPTS: \_\_\_\_\_ Letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal note(s) All

fiscal note(s) \_\_\_\_\_

zero fiscal note(s) \_\_\_\_\_

zero fiscal note(s) \_\_\_\_\_

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
<i>Jeanette James</i>	✓			
<i>John Kertulis</i>		✓		
<i>Joseph P. ...</i>	✓			
<i>Bill Hudson</i>				✓
<i>M. ...</i>	✓			
<i>Scott ...</i>	✓			

CHAIR'S SIGNATURE Jeanette James



**STATE OF ALASKA**  
**LEGISLATIVE AFFAIRS AGENCY**  
**DIVISION OF PUBLIC SERVICES**

DATE: 3/30/00

Please accept the enclosed original(s) of written testimony  
for the House State Affairs teleconference hearing that was  
scheduled on 3/30/00.

A copy of this testimony was transmitted to your committee via  
fax on 3/30/00.

Thank you,

LEGISLATIVE AFFAIRS AGENCY  
Sitka Legislative Office  
210 Lake Street  
Sitka, Alaska 99835  
747-6276



# Alaska State Legislature

Please enter into the record my testimony to the House State Affairs Committee  
 committee name  
 committee on HB 387, dated 3-30-00  
 bill/subject

*I support Housebill 387. I believe it is a necessary reinforcement of the right to freedom of religious practice as stated in the Bill of Rights. I support this bill as it is stated and believe that any carveouts would make it ineffective. Please vote to pass this bill.*

Signed: Steven Pzd  
 Testifier

Representing (Optional)

PO Box 1236, Sitka

Address

(907) 966-2235

Phone No.



# Alaska State Legislature

Please enter into the record my testimony to the House State Affairs Committee  
 committee name  
 committee on HB 387, dated 3-30-00  
 bill/subject

I support Bill HB387 with my whole heart. I am very thankful for representative Croft bringing this Bill. AGAIN I give full support.

Sincerely

*Keith Fredrickson*

Signed: *Keith Fredrickson*  
 Testifier  
 Self

Representing (Optional)  
1111 Furuhelm st, Sitka, AK 99835  
 Address  
907-747-3389  
 Phone No.

Exempt ① prisons ② Civil Rights ??

1-LS1461NH

**CS FOR HOUSE BILL NO. 387(HES)**

**IN THE LEGISLATURE OF THE STATE OF ALASKA**

**TWENTY-FIRST LEGISLATURE - SECOND SESSION**

**BY THE HOUSE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE**

**Offered: 3/15/00**

**Referred: State Affairs, Judiciary**

**Sponsor(s): REPRESENTATIVES CROFT, Coghill, Dyson, Halcro, Cissna, Whitaker**

**A BILL**

**FOR AN ACT ENTITLED**

1 "An Act requiring governmental entities, including municipalities and school  
2 districts, to meet certain requirements before placing a substantial burden on a  
3 person's free exercise of religion."

4 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 \* **Section 1.** The uncodified law of the State of Alaska is amended by adding a new  
6 section to read:

7 **SHORT TITLE.** This Act may be cited as the "Alaska Religious Freedom Protection  
8 Act."

9 \* **Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section  
10 to read:

11 **FINDINGS.** The legislature finds that

12 (1) the First Amendment to the Constitution of the United States and art. I,  
13 sec. 4, Constitution of the State of Alaska, recognize and protect the right of free exercise of  
14 religion;

1 (2) in 1990, the United States Supreme Court retreated from over 200 years  
 2 of respect for the right to free exercise of religion in *Employment Division v. Smith*, 494 U.S.  
 3 872 (1990), an opinion written by Justice Scalia, by holding that the government no longer  
 4 had to make reasonable exceptions to general laws in order to accommodate the religious  
 5 beliefs of its citizens;

6 (3) while the Alaska Supreme Court has not chosen to follow this retreat from  
 7 protection for religion, the free exercise rights of Alaska citizens are so vital and fundamental  
 8 that it is in the public interest to provide a statutory guarantee of these rights to secure against  
 9 a change in judicial interpretation; and

10 (4) while it is improper for the legislature to tell the judiciary how to interpret  
 11 the Constitution of the State of Alaska, it is proper for the legislature to establish different  
 12 rights or to secure established rights in a different manner or to a different degree than the  
 13 minimum set by the Constitution of the State of Alaska as long as that legislative action does  
 14 not interfere with the rights of other persons.

15 \* Sec. 3. The uncodified law of the State of Alaska is amended by adding a new section  
 16 to read:

17 INTENT. It is not the intent of the legislature, by protecting the individual free  
 18 exercise of religion, to create an establishment of religion or an official state religion.

19 \* Sec. 4. AS 14.14 is amended by adding a new section to article 1 to read:

20 **Sec. 14.14.210. Personal exercise of religious freedom protected.** (a) A  
 21 school board or school district may not place a substantial burden on a person's free  
 22 exercise of religion unless

23 (1) the burden is in the form of a rule of general applicability and does  
 24 not intentionally discriminate against religion or among religions; and

25 (2) application of the burden to the person is essential to further a  
 26 compelling governmental interest and is the least restrictive means of furthering that  
 27 compelling governmental interest.

28 (b) A person may bring a civil action against a school board or school district  
 29 for a violation of this section, and the court may grant appropriate relief.

30 (c) This section may not be construed to create an establishment of religion  
 31 or to authorize the infringement of the individual rights of a third party.

1 \* **Sec. 5.** AS 29.10.200 is amended by adding a new paragraph to read:

2 (60) AS 29.71.070 (personal exercise of religious freedom protected).

3 \* **Sec. 6.** AS 29.71 is amended by adding a new section to read:

4 **Sec. 29.71.070. Personal exercise of religious freedom protected.** (a) A

5 municipality may not place a substantial burden on a person's free exercise of religion  
6 unless

7 (1) the burden is in the form of a rule of general applicability and does  
8 not intentionally discriminate against religion or among religions; and

9 (2) application of the burden to the person is essential to further a  
10 compelling governmental interest and is the least restrictive means of furthering that  
11 compelling governmental interest.

12 (b) A person may bring a civil action against a municipality for a violation of  
13 this section, and the court may grant appropriate relief.

14 (c) This section may not be construed to create an establishment of religion  
15 or to authorize the infringement of the individual rights of a third party.

16 (d) This section applies to home rule and general law municipalities.

17 \* **Sec. 7.** AS 44.62 is amended by adding a new section to article 2 to read:

18 **Sec. 44.99.130. Personal exercise of religious freedom protected.** (a) A

19 state agency may not place a substantial burden on a person's free exercise of religion  
20 unless

21 (1) the burden is in the form of a rule of general applicability and does  
22 not intentionally discriminate against religion or among religions; and

23 (2) application of the burden to the person is essential to further a  
24 compelling governmental interest and is the least restrictive means of furthering that  
25 compelling governmental interest.

26 (b) A person may bring a civil action against a state agency for a violation of  
27 this section, and the court may grant appropriate relief.

28 (c) This section may not be construed to create an establishment of religion  
29 or to authorize the infringement of the individual rights of a third party.

30 (d) In this section, "state agency" means a department, institution, board,  
31 commission, division, authority, public corporation, committee, or other administrative

- 1 unit of the executive branch of state government, including the University of Alaska,
- 2 the Alaska Railroad Corporation, and the Alaska Aerospace Development Corporation.



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 8<sup>th</sup> 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.

THE  
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FACSIMILE TRANSMISSION SHEET

DATE: MARCH 30, 2000

TO: Jeanette JAMES

COMPANY: \_\_\_\_\_

FAX NUMBER: 1-907-465-2381

FROM: Rebecca A. Glidden

FAX NUMBER: (907) 883-5245

NUMBER OF PAGES INCLUDING COVER SHEET: 2

MESSAGE: Concerning RERA Bill of Alaska -  
HB 387

Jeanette James  
State Affairs Office  
1-907-465-2381

Dear Ms James,

I am greatly concerned about the possibility of the  
loss of our religious freedom - due to no bill effective in  
our state at this time. If the state of Alaska does not  
have to show "Burden of Proof" to restrict us, we have  
indefinitely lost our religious rights afforded to us when  
our nation was established.

Please help us by letting Jeanne know that  
we need the RFRA Bill for Alaska - HB 387.

Thank you,

Rebecca G. Glidden

P.O. Box 104  
Mile 1320 AK Hwy  
Tok, Alaska 99780  
1-907-883-5245

TOK CLINIC

P.O. BOX 289  
TOK, AK 99780  
(907) 883-5855

FACSIMILE TRANSMISSION SHEET

DATE: 3/30/00

TO: Jeanette James - Chair

COMPANY: State Affairs Committee

FAX NUMBER: 907-465-2381

FROM: Francine Lee

FAX NUMBER: (907) 883-5245

NUMBER OF PAGES INCLUDING COVER SHEET: 1

MESSAGE: I wish to register My Support  
of Bill HB 287. I want  
See The burden of Proof Put back  
on Government To Guarantee My  
First Amendment Rights

Thanks  
Francine

FACSIMILE TRANSMISSION FROM THE  
ALASKA CIVIL LIBERTIES UNION FOUNDATION

P.O. Box 201844 Anchorage, Alaska 99520-1844  
907-258-0044, Fax 907-258-0288, E-Mail: akclu@alaska.net

TO: Rep. Jeannette James FAX NO: 465-2381  
WITH: Chair, House State Affairs Committee  
FROM: Jennifer Rudinger DATE: 3-29-2000  
NO. PAGES IN TRANSMISSION (INCLUDING COVER SHEET): 3

THIS IS A PRIVILEGED AND CONFIDENTIAL COMMUNICATION, TRANSMITTED FOR THE EXCLUSIVE USE OF THE ADDRESSEE. IT MAY NOT BE COPIED OR DISSEMINATED EXCEPT BY THE ADDRESSEE. SHOULD YOU RECEIVE THIS COMMUNICATION IN ERROR, PLEASE CALL ME IMMEDIATELY BY COLLECT PHONE CALL AND MAIL THE COMMUNICATION TO ME AT THE ABOVE ADDRESS BY FIRST CLASS MAIL. THANK YOU.

NOTES:

Dear Rep. James  
My Board President (June Pinnell -  
Stephens) and I enjoyed meeting with you  
to discuss this bill on Friday, March 10<sup>th</sup>.  
I am attaching a packet of materials, as  
promised, and I would appreciate it if  
you would distribute this packet to the other  
members of the State Affairs Committee  
Thursday morning before the hearing on  
CSHB 387.

I look forward to testifying to  
the Committee to explain the AKCLU's  
concerns and our suggestions for how to  
clarify in the bill that religious exercise  
should get the highest level of protection  
AS LONG AS OTHER PEOPLE DON'T GET  
HURT IN THE PROCESS.

- Jennifer

## **Alaska Civil Liberties Union**

*An Affiliate of the American Civil Liberties Union*

P. O. Box 201844, Anchorage, AK 99520-1844

Phone: (907) 258-0044 Fax: (907) 258-0288 Email: akclu@alaska.net

To: House Committee on State Affairs  
From: Jennifer Rudinger, Executive Director  
Date: March 30, 2000  
Re: CSHB 387 ("ARFPA")

Enclosed please find the following materials, to be included in the State Affairs Committee's bill packets for CSHB 387:

- (1.) 1-page summary of amendments suggested by AkCLU
- (2.) 11-page AkCLU position paper on CSHB 387
- (3.) Two 2-page letters by NAACP in opposition to federal RLPA unless civil rights are protected
- (4.) 2-page testimony by Texas Representative Scott Hochberg regarding the civil rights amendment to the Texas RFRA, signed into law by Gov. George W. Bush
- (5.) 2-page letter from National Fair Housing Alliance urging civil rights amendment in federal RLPA
- (6.) 2-page letter from Coalition for the Free Exercise of Religion opposing federal RLPA because it could jeopardize civil rights laws
- (7.) 1-page letter from the Episcopal Church withdrawing support for federal RLPA because of civil rights concerns
- (8.) 3-page letter from a consortium of church organizations (United Church of Christ, Friends Committee on National Legislation, United Synagogues of Conservative Judaism, Evangelical Lutheran Church in America, and Union of American Hebrew Congregations) opposing federal RLPA without civil rights protections
- (9.) 4-page Jewish Telegraphic Agency on-line article citing withdrawal of support for federal RLPA by Baptist and Jewish religious groups

I expect to be able to testify via teleconference from Anchorage on CSHB 387 in the House State Affairs Committee at 8:00 a.m., Thursday, March 30<sup>th</sup>, and I thank the Committee for allowing me to speak to our proposed amendments. Please feel free to call me at 258-0044 if I may be of assistance.

Sincerely,



## **Alaska Civil Liberties Union**

*An Affiliate of the American Civil Liberties Union*

P. O. Box 201844, Anchorage, AK 99520-1844

Phone: (907) 258-0044 Fax: (907) 258-0288 Email: [akclu@alaska.net](mailto:akclu@alaska.net)

To: House Committee on State Affairs  
From: Jennifer Rudinger, Executive Director  
Date: March 30, 2000

Re: Summary of Proposed Amendments Submitted re: CSHB 387 ("ARFPA")

The AkCLU proposes the following three amendments to clarify the intent of CSHB 387 and to protect religious freedom at the same time as CSHB 387 protects the rights of others.

- To clarify subsection (d) throughout CSHB 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, but we feel that our amendment clarifies the necessary balancing and gives the court more guidance than the current language of (d). 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.

- We have some qualms about the wording of Section (4) in the legislative findings. We think that the intent of (4) is to protect the rights of others, 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."
- Finally, we urge the Committee to adopt a legislative finding that clarifies that this bill is not intended to alter the application of the *Swanner* decision.

**Alaska Civil Liberties Union  
Statement on the Protection of Religious Liberty  
Before the House Committee on State Affairs**

**Presented by Jennifer Rudinger, Executive  
Director**

**March 30, 2000**

**I. INTRODUCTION**

Madam Chairperson 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 respectfully urges the Committee to amend the CS for House Bill 387 (Alaska Religious Freedom Protection Act, or "ARFPA") to clarify that the exercise of an individual's religious freedom will have no adverse consequences on the rights of others. We offer several amendments, described at the end of this paper, 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 the Sponsor of ARFPA 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, or even 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, an en banc panel of the U.S. Court of Appeals for the Ninth Circuit (which governs Alaska) is currently reviewing a case brought by two commercial landlords in Anchorage who claim that compliance with state and municipal anti-discrimination laws protecting unmarried couples from discrimination based on marital status burdens the landlords' religious beliefs. *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692 (9th Cir. 1999), *vacated and reheard en banc*. In a January, 1999, decision which has since been vacated, a three-judge panel of the Ninth Circuit originally held 2-1, with a very strong dissent, that the governmental interest in preventing marital status discrimination was not compelling. As a result, the landlords did not have to comply with those laws. However, as I have noted, this was a split decision which has since been vacated so that a larger panel of the Court could review this case. *Thomas* was reheard by the larger en banc panel just last Thursday, March 23<sup>rd</sup>. 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*. It is not known when the Ninth Circuit will issue its decision.

In addition, 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 and might be governed by *Thomas*.

An improperly drafted statute could jeopardize more than marital status protection. The application of strict scrutiny in these types of cases 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. 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 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 ACLU very much appreciates your willingness to consider these concerns as you consider ARFPA. 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 CSHB 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. CSHB 387 provides, in relevant part, that:

A [government entity] may not place a substantial burden on a person's free exercise of religion unless (1.) the burden 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 burden 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 the individual rights of a third party.

As currently drafted, CSHB 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 is considering, 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. The decisions were split, with the vacated panel of 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 *Sivanner* 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 the 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 *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/h/u 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).

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 *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).<sup>2</sup>

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

CSHB 387 provides, in relevant part, that:

A [government entity] may not place a substantial burden on a person's free exercise of religion unless (1.) the burden 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 burden 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 "substantially burden" 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 "substantially burdened" 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 "Substantially Burden" Religious Exercise?**

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.

*Muck v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996); see also *Werner v. McCotter*, 40 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 added litigation costs as defendants raise the defense.

Because 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 burden 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., *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 housing 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 degrades 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. 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 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 Alaskans 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 CSHB 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, but we feel that our amendment clarifies the necessary balancing and gives courts more guidance than the current language of (d).

To cite for you a specific example where we support 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 Hmong and Orthodox Jews, 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 - CSHB 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.) We have some qualms about the wording of Section (4) in the legislative findings. We think that the intent of (4) is to protect the rights of others, 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. For

purposes of clarification, 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."

- (3.) Finally, we urge the Committee to adopt a legislative finding that clarifies that HB 387 is not intended to alter the application of the Alaska Supreme Court's decision in *Swanner*.

#### ENDNOTES

<sup>1</sup>In 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); *Jasniewski v. 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.

<sup>2</sup>In *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).



NAACP LEGAL DEFENSE  
AND EDUCATIONAL FUND, INC.

Regional Office  
10th Floor  
1444 Eye Street, NW  
Washington, DC 20005 (202) 682-1300 Fax: (202) 682-1312

## THE POTENTIAL HARMFUL EFFECTS OF THE RELIGIOUS LIBERTIES PROTECTION ACT OF 1999 IN RACE DISCRIMINATION CASES

### ◆ **RLPA Will Permit Defendants in Civil Rights Cases to Avoid Liability by Claiming Their Discriminatory Acts are Protected under RLPA.**

RLPA would establish a defense for all persons who claim that their discriminatory acts were compelled by their religious beliefs. As a result, landlords, employers, motel and restaurant operators, schools, and many others who would discriminate against persons on the basis of race could attempt to avoid liability under state and local antidiscrimination laws by asserting that their religious beliefs prevented them from treating persons equally. Lawyers hired to defend claims of discrimination are likely routinely to inform their clients that such a defense is available.

### ◆ **RLPA Will Force Plaintiffs to Prove the Justification for Each Antidiscrimination Law.**

An individual victim of discrimination proceeding under an anti-bias statute could overcome a RLPA defense only by proving that the antidiscrimination statute serves a compelling interest and that the statute is the least burdensome means to achieve that compelling interest. As a result, a RLPA defense would place the burden on private citizens in a discrimination case to gather substantial historical and contemporary materials that prove a state or locality's commitment to racial equality. The plaintiff would also be required to prove that the state or locality's design of the statute does not unnecessarily burden others. Regardless of the ultimate outcome of each RLPA defense, RLPA will create an additional burden for individuals attempting to vindicate their civil rights.

### ◆ **RLPA Defenses May Preclude Plaintiffs from Proceeding under Some Laws Prohibiting Racial Discrimination.**

Even if plaintiffs are ultimately successful in demonstrating that states and localities have a compelling interest in eradicating racial discrimination, courts may conclude that such an interest could be achieved without prohibiting the discriminatory conduct of the defendant. Any defendant raising a RLPA defense will be able to identify other exemptions in the relevant state or local antidiscrimination law and may be able to argue successfully that exempting one more entity or group from the application of the law would not impede the eradication of discrimination. For example, many state fair housing statutes do not apply to the rental of rooms in owner-occupied single-family dwellings. A court may conclude that if the state can achieve its goal of eradicating racial discrimination in housing rentals without applying its fair housing statute to the numerous rental transactions involving owner-occupied single-family dwellings, then the state may also achieve its goal if the statute did

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National Office  
Suite 1600  
99 Hudson Street  
New York, NY 10013  
(212) 969-2200  
Fax: (212) 226-7593

Regional Office  
Suite 208  
315 West Ninth Street  
Los Angeles, CA 90015  
(213) 624-2405  
Fax: (213) 624-0075

not apply to rental transactions made by landlords with religious beliefs that could cause them to discriminate on the basis of race. The result could be to close off large areas of everyday life from state or local protections against discrimination.

◆ **The RLPA Defense May Be Invoked in a Variety of Circumstances.**

The RLPA defense will likely be often raised in the context of discrimination against persons because of their interracial associations. Cases of landlords refusing because of claimed religious beliefs to rent to interracial couples are not uncommon. The asserted burden on a landlord's exercise of religion if forced to rent to an interracial couple has been a defense raised in fair housing cases, including those filed with the United States Department of Housing and Urban Development. Some defendants may raise the RLPA defense even when they discriminate against persons simply because they are minorities. For example, white separatist groups have begun owning and operating racially exclusive rental housing and defending that exclusivity on the grounds that it is required by their religious beliefs. Further, RLPA defenses may disproportionately affect African Americans and other minorities in the context of discrimination against other groups, such as unwed mothers. RLPA defenses will also arise in cases involving discrimination based on religion that may have a larger impact on persons of a particular race or national origin.

◆ **Defendants in Race Discrimination Cases Have Successfully Used RLPA-like Defenses.**

Although ultimately reversed by an appellate court, a federal district court in Virginia upheld a religious school's RLPA-like defense in a case challenging the school's dismissal of a student on the grounds that her interracial relationship violated the school's religious tenets. *Fielder v. Marumco Christian School*, 486 F. Supp. 960 (E.D. Va.), reversed, 631 F.2d 1144 (4<sup>th</sup> Cir. 1980). In Cincinnati, a man relied in part on a RLPA-like defense when successfully overturning his conviction for publishing material that promoted racial hatred. *City of Cincinnati v. Blake*, 8 Ohio App. 2d 143 (1966). In *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310 (5<sup>th</sup> Cir. 1977), the district court found that a sectarian school's policy of barring children from enrolling on the grounds of their race was not one adopted in the exercise of religion. One of the appellate judges voting to overturn that ruling argued that "no court should have the power to compel any church to admit any student to any school operated for religious reasons." *Brown*, 556 F.2d at 326 (Coleman, J., dissenting). Six judges found a serious conflict between the free exercise clause and antidiscrimination policy and voted to remand the case to the district court for further consideration. *Brown*, 556 F.2d at 326 (Roney, J., dissenting).

◆ **RLPA's Harmful Effect on Anti-Discrimination Laws Can Be Eliminated by a Provision Exempting Civil Rights Laws.**

Defendants would be unable to invoke RLPA to avoid liability for their discriminatory acts if RLPA contained a provision stating that the Act shall not be construed to provide a defense to any civil rights law. A civil rights exception would permit plaintiffs to vindicate their civil rights without affecting RLPA's purpose of enhancing religious liberties in other contexts.



NAACP LEGAL DEFENSE  
AND EDUCATIONAL FUND, INC.

Regional Office  
10th Floor  
1444 Eye Street, NW  
Washington, DC 20005 (202) 682-1300 Fax: (202) 682-1312

July 14, 1999

Congressman John Conyers, Jr  
2426 Rayburn Office Building  
Washington, D.C. 20515-2214

Dear Congressman Conyers:

The NAACP Legal Defense and Educational Fund, Inc. ("LDF"), urges you to oppose final passage of H.R. 1691, The Religious Liberty Protection Act of 1999 ("RLPA"). LDF litigates civil rights cases throughout the country on behalf of African Americans and other minorities in an effort to preserve equity, fairness and justice in education, employment, housing, health care, environment, criminal justice, and voting rights. RLPA poses a potential threat to this type of litigation as RLPA may be used in a manner to limit African Americans and other minorities' rights to seek protection from discrimination under state and local antidiscrimination laws.

Defendants in discrimination cases brought under state or local fair housing, employment, etc., laws may seek to avoid liability by claiming protection under RLPA. This would require individuals and groups proceeding under such state and local antidiscrimination laws to prove that the law they wish to utilize is a least restrictive means of furthering a compelling governmental interest. This requirement would significantly increase the litigation time and expense of pursuing even workaday antidiscrimination actions and as a result could hinder or preclude some plaintiffs from pursuing their claims.

Even if the courts ultimately rule, as they should, that the various state and local antidiscrimination statutes are least restrictive means to further compelling governmental interests, the uncertainty of whether statutes will withstand a RLPA defense may dissuade plaintiffs from seeking redress under antidiscrimination statutes. Of course, if any court were to determine that a particular antidiscrimination statute were not a least restrictive means of furthering a compelling governmental interest, a successful RLPA defense would completely bar a plaintiff from proceeding under that statute. In either event, RLPA will create an additional burden for plaintiffs attempting to vindicate their civil rights.

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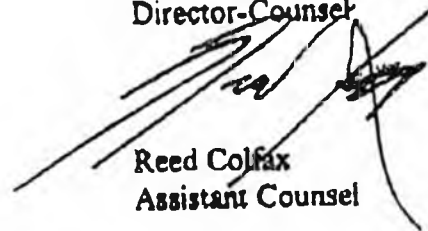
The NAACP Legal Defense & Educational Fund, Inc. (LDF) is not part of the National Association for the Advancement of Colored People (NAACP) although LDF was founded by the NAACP and shares its commitment to equal rights. LDF has had for over 30 years a separate Board, Programs, staff, and budget.

National Office  
Suite 1600  
99 Hudson Street  
New York, NY 10013  
(212) 961-2300  
Fax: (212) 226-7392

Regional Office  
Suite 208  
315 West Ninth Street  
Los Angeles, CA 90015  
(213) 624-2405  
Fax: (213) 624-0075

For these reasons, LDF asks that you oppose RLPA, which may be used as a mechanism to limit African Americans and other minorities from proceeding under the state and local laws that prohibit discrimination in a wide range of areas.

Sincerely,  
Elaine R. Jones  
Director-Counsel



Reed Colfax  
Assistant Counsel

The State of Texas  
House of Representatives



Scott Hochberg  
DISTRICT 132

P.O. BOX 2910  
AUSTIN, TEXAS 78768-2910  
512-463-0482  
FAX 512-463-8294

4650 BEECHNUT, #248  
HOUSTON, TEXAS 77096  
713-460-7783  
FAX 713-461-6817  
EMAIL scott.hochberg@house.texas.gov

TESTIMONY OF TEXAS STATE REPRESENTATIVE SCOTT HOCHBERG  
SENATE JUDICIARY COMMITTEE - JUNE 23, 1999

Mr. Chairman and Members of the Committee,

I appreciate the opportunity to share some thoughts with you today.

Two weeks ago, Governor George W. Bush signed the Texas Religious Freedom Restoration Act (Texas RFRA) into law. I was privileged to work with Gov. Bush as the House author of this important bill. And I'm proud of the bill, because I believe it strengthens religious freedom in Texas without weakening other fundamental individual rights.

Long before I ever heard of the Smith case or the federal RFRA, I knew how hard it was for individuals to assert their first amendment religious freedoms against the bureaucracy. I've fought battles with our prison system over allowing Jewish prisoners to practice their faith. And I found I had to pass a law before I could be sure that judges would not repeat the incident that occurred in a Houston courtroom, where an Orthodox Jewish man was required to remove his skullcap, in direct conflict with his religious practice, before he could testify.

So when the American Jewish Committee and the Anti-Defamation League, on whose local boards I serve, put the state Religious Freedom Restoration Act on their legislative agendas, I was eager to become the lead sponsor. And I was certainly encouraged by the early and strong support of Gov. Bush, who announced just before the opening of our legislative session that Texas RFRA would be one of his legislative priorities as well.

Of course you know that no bill is a simple bill. Early on, I saw that the model RFRA language left open a possibility that the act could be used to get around Texas' civil rights laws. That concern was first raised to me by the AJC, and then later by the ADL, the two groups that had initially brought me the legislation, and two groups with long histories of defending civil rights internationally.

Clearly, the intended purpose of this bill was not to weaken civil rights laws. When Gov. Bush talked about the need for RFRA, he cited examples, including the skullcap situation, where RFRA could be used to help protect a person's religious practice from government interference. None of the examples were about giving any individual the right to deny

another person's equal protection rights.

The Texas Constitution is very clear about the primacy of civil rights. The third and fourth sections of our Bill of Rights guarantee equal protection under the law. The next three sections protect religion and guarantee freedom of worship. So, clearly, our framers saw these fundamental rights as being on the same plane.

I wanted to pass a strong RFRA in Texas, but not one that would rewrite Texas civil rights laws. So I added language clarifying that the act neither expanded nor reduced a person's civil rights under any other law. That language drew no objection initially.

But later, some RFRA coalition members argued that to completely move civil rights out from under RFRA might imply that even a religious organization could not use religion as a criteria in hiring - an exemption that is included in our state labor code as well as in federal law.

So coalition members helped craft language to apply RFRA to the special circumstances of religious organizations, while continuing to leave the task of balancing religious and equal protection rights to the courts. That language was unanimously adopted in a bipartisan amendment on the House floor, and remained intact in the bill as it was signed by Gov. Bush.

The RFRA coalition in Texas endorsed the civil rights language and strongly supported the bill, from the Texas Freedom Network on the left to the Liberty Legal Institute on the right. I must tell you, however, that one or two conservative groups in this very broad coalition objected and went so far as to ask Gov. Bush to veto the bill. He chose not to do so. Those particular groups said that they had hoped to use RFRA to do exactly what others had feared - to seek to override, in court, various civil rights laws that they had not been able to override legislatively.

I urge you to adopt a strong law to reinforce what we have done in Texas. But in so doing, I would also ask that you follow the wisdom of our governor and our legislature and include language to protect state civil rights laws.

I offer whatever assistance I can be to help develop and refine the language of this bill so that those goals are met.

This is too important a bill to be lost as a result of a fear of weakening civil rights. But likewise, national and state civil rights policies are too important to be weakened as an unintended by-product of a bill with the noble purpose of strengthening religious rights.

Thank you again for your consideration, your time and your hard work.

# NATIONAL FAIR HOUSING ALLIANCE

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Jonathan Wilson  
Cincinnati, OH

### Executive Director

Shanna L. Smith  
Washington, DC

July 26, 1999

The Honorable Orrin G. Hatch  
131 Senate Russell Building  
1<sup>st</sup> & C. Streets, NE  
Washington, D.C. 20515

Senator Edward M. Kennedy  
315 Senate Russell Building  
1<sup>st</sup> & C. Streets, NE  
Washington, D.C. 20515

Dear Senators Hatch and Kennedy:

The National Fair Housing Alliance (NFHA), a consortium of over 100 groups across the country dedicated to enforcement of fair housing laws at the federal, state and local level, urges you to support the amendment of the Religious Liberty Protection Act (RLPA) to include an exception for civil rights laws. As written, the bill would inadvertently become an unintended shield for grossly discriminatory conduct and undercut carefully crafted exceptions already contained in civil rights laws.

Without a civil rights amendment to RLPA, Americans currently protected against discrimination in housing based on race, religion and national origin could find themselves at the mercy of discriminators who claim that discrimination is justified by their religious beliefs. The federal Fair Housing Act, which was passed in 1968 and amended in 1988 with strong bipartisan support, protects Americans from discrimination in housing based on race, color, religion, national origin, sex, disability and familial status (the presence of children in a household). It already contains a carefully crafted exemption, included in the law since its initial passage, allowing housing operated in conjunction with religious organizations to favor members of that religion unless membership in the religion is limited based on race, color or national origin. Similar state and local laws with similar exemptions have been passed throughout the country, some also protect against discrimination based on marital status and sexual orientation.

Passage of RLPA without an exception preserving these civil rights protections would inadvertently create a new, broad defense to civil rights laws. Conduct that is currently prohibited by civil rights laws would be allowed in the name of religion.

For example, as it currently stands, RLPA would allow:

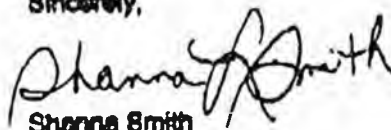
- A private landlord with a 200-unit apartment complex to refuse to rent to interracial couples because racial mixing violated his religious beliefs.
- Members of a religious organization that supported racial separatism and religious hatred to develop a subdivision which excluded African Americans and Jews in the name of religion.

- A KKK member to refuse to sell his home to a person of color if he cited the Bible in support of his refusal.
- The same KKK member to act criminally by burning a cross or physically threatening a person of color who moved into his neighborhood.
- A landlord who refused to rent to a single woman who was pregnant, and later claimed it was because of personal religious beliefs.
- A property management company which refused to handle transactions with unmarried couples because it violated the religious beliefs of its owner.

And, in a most ironic reversal of the intended consequences of RLPA, it would permit a private housing provider to use religious beliefs to discriminate based on religion. A large private landlord could exclude people who were not Christian if he defended the denial of housing due to his Christian beliefs. The manager of a housing authority could decide not to rent to a Black Muslim, ostensibly based on his religious beliefs. Seventh Day Adventists could be preferred or A.M.E. members refused or Baptists evicted in favor of Presbyterians. Or, as was reported to NFHA just last week, the owner of twelve rental units could advertise for white, Christian, male tenants and claim religious beliefs for the preference.

NFHA strongly urges your continued support for fair housing rights for all Americans by voting for an amendment to RLPA which protects federal, state, and local civil rights laws and their existing exemptions from the ambit of RPLA. NFHA joins with other organizations in urging you not to defeat civil rights protections when you act to protect religious tolerance.

Sincerely,

  
Shanna Smith  
Executive Director

September 24, 1999

Dear Senator:

The undersigned members of the Coalition for the Free Exercise of Religion are writing to inform you that we have reluctantly withdrawn our support for the Religious Liberty Protection Act (RLPA). Our decision does not represent a change in commitment. We remain strongly committed to finding a solution that would undo the damage to religious liberty done by the Supreme Court's 1990 ruling in *Employment Division v. Smith*. We are convinced that the compelling state interest standard is the proper standard to apply when governmental actions substantially burden the free exercise of religion. Religious liberty is a cherished part of American life and deserves a high level of protection.

However, we have become convinced that our efforts should be refocused to deal specifically with areas where the threat to religious liberty is currently the greatest and Congress's power to act is strongest, such as land use.

Initially, three rulings handed down by the Supreme Court in late June, shortly before the House passed RLPA, coupled with previous Court rulings have raised serious concerns about whether the current Supreme Court would strike down any broad-based legislation such as RLPA. These three rulings—in *Alden v. Maine*, *College Savings Bank v. Florida Prepaid*, and *Florida Prepaid v. College Savings Bank*—continue a trend by the Court to reduce Congress's power to impose legislative restrictions on state activity, making it more likely that this particular Court would overturn RLPA.

The prospect that the Court would overturn RLPA raises further concerns. First, it would delay and further erode the effort to restore legal protections to those most seriously damaged by *Smith*. Second, a ruling overturning RLPA could set a precedent that could jeopardize civil rights and other laws that are based on similar constitutional principles as RLPA.

In addition, some Religious Right leaders, organizations, and allies have made statements that suggest a rejection of one of the fundamental principles behind this bill—the principle of outcomes neutrality. The bill was designed to create a framework within which to resolve religious liberty claims, not to dictate a specific outcome in a particular set of cases.

Some of the same people have signaled an intention to use RLPA as a means to restrict others' civil rights. We and others in the civil rights community are deeply concerned about this possibility. While we believe that this strategy would not prevail ultimately, we also believe that this battle would harm both civil rights and religious liberty by producing a divisive, rancorous public climate that would pit our fundamental liberties against each other.

All of these concerns have led us to agree that the best way to proceed is to focus on those areas where there has been the greatest abridgement of religious liberty or where legislation is most likely to be upheld by the Supreme Court. For example, the idea that a locality can forbid Orthodox Jews from congregating in their own homes to pray is intolerable in our country. We believe it is important to begin now to address such problems. We are confident that we can address these and other areas.

We urge you to consider this alternative approach and look forward to working with you.

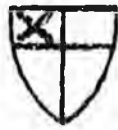
Sincerely,

Carole Shields  
*People For the American Way*

Barry Lynn  
*Americans United for Separation of  
Church and State*

Hilary Shelton  
*Washington Bureau  
NAACP*

Russell Siler  
*Lutheran Office for Governmental  
Affairs*



## THE EPISCOPAL CHURCH OFFICE OF GOVERNMENT RELATIONS

110 Maryland Avenue, NE, Suite 309, Washington, D.C. 20002  
Telephone: (202) 547-7300, (800) 228-0515, Fax: (202) 547-4457

October 7, 1999

Dear Senator:

On behalf of the Episcopal Church, I wish to communicate our decision to withdraw support for the Religious Liberty Protection Act (RLPA) at this time. We remain firmly committed to the principles upon which this legislation was founded and believe that strict scrutiny or the "compelling interest test" should continue to be the legal standard for judging free exercise of religion claims, as it is for free speech and free press claims. However, we believe that recent concerns voiced about the bill are valid enough to be explored further.

The Episcopal Church was part of the original coalition that worked to construct a bill that would withstand Supreme Court scrutiny after the Religious Freedom Restoration Act was held unconstitutional. We were among the large coalition of religious organizations to support House passage of RLPA.

Just prior to and since House consideration, there has been increasing concern that support for RLPA could conflict with other civil rights concerns. We are troubled at the possible use of religious liberty as a tool to restrict the civil rights of others in areas such as housing and employment. While case law does not currently indicate a trend in this direction, we are nonetheless sufficiently concerned at the possibility to step back and review the situation.

Additionally, recent decisions by the Supreme Court curtailing Congress's power to regulate the activities of state and local governments indicate a strong possibility that the Court could strike down RLPA. We take very seriously the assessment of some other organizations that have withdrawn their support for RLPA that such a decision would further delay efforts to restore legal protections to those most seriously damaged by the Supreme Court's 1990 ruling in *Employment Division v. Smith*. We would hope that modified legislation could protect them without risking rejection by the Supreme Court.

For these reasons, we are neither supporting nor opposing RLPA at this time and are considering other possible solutions to the problems caused by *Smith*. If you or your staff have additional questions, please feel free to contact our office.

Thank you for your consideration.

Sincerely,

Thomas H. Hart  
Director of Government Relations

**United Church of Christ - Office of Church In Society  
 Friends Committee on National Legislation  
 United Synagogues of Conservative Judaism  
 Lutheran Office for Governmental Affairs - Evangelical Lutheran Church in America  
 Union of American Hebrew Congregations**

**c/o 2027 Massachusetts Ave. N.W. - Washington, DC 20036 - 202/387-2899**

October 8, 1989

Dear Senator:

We write to inform you that we have withdrawn our support for the Religious Liberty Protection Act (RLPA) *at this time*. As organizations that have worked in support of RLPA, we have not reached this decision easily, but we believe it is in the best interest of the cause of religious liberty.

We want to be clear about what our decision means, and what it does not mean. Most importantly, we have not changed our view about the central principle underlying RLPA - that religious liberty requires and is entitled to the highest level of constitutional protection possible. We have, however, come to believe that advancing the legislation at this time would harm, rather than help, the cause of religious liberty. It is that concern which is driving our decision-making.

Why if we supported the bill in the House are we not supporting it in the Senate? Since the House vote, we have seen significant and interrelated developments in three areas - erosion of support for religious liberty and growing schisms in the broad-based coalition of support the bill has and should enjoy, the legal landscape, and the political outlook for the bill.

1. In arguing against the bill (whether for valid or, as we are convinced, largely misplaced reasons), Members of Congress and traditional coalition partners are inadvertently eroding the respect and protection heretofore accorded Religious Liberty. In the process, there has been significant damage to some of our most valued coalitional relationships. While we wholeheartedly share and are committed to working toward the goals of the civil rights groups that have raised concerns about this legislation, we nevertheless believe that those concerns with regard to RLPA are misplaced. We believe those concerns can and should be addressed using RLPA's "compelling state interest" test. But none of this mitigates the damage the debate has done - and is doing - not only to our working relationships with traditional allies, but to the cause of religious liberty. The greatest danger is that in the current political climate, with debate on this issue already heated and the pressure of the congressional calendar mounting, positions against the bill

## Religious Liberty Protection Act

October 8, 1999

Page 2

(and against affording religion the highest level of Constitutional protection) will harden.

The fact that some groups have been talking about using RLPA as part of a broader campaign against the civil rights of gays and others has only further inflamed the atmosphere and hardened positions.

With more segments of the Civil Rights community being drawn into opposition to RLPA, we need significant time to work through these issues with our allies, and to restore severed connections to the importance of the "compelling state interest" test. That is simply not possible in this atmosphere. We need to step back, allow all sides to cool off, and begin that work.

2. **The legal ground has shifted.** There have always been concerns about the constitutionality of RLPA. It was crafted in response to the Supreme Court's decision striking down RFRA, and we did our best to ensure it would pass constitutional muster. But it's never been certain that this Court would uphold its constitutionality. Just around the time of the House vote, the Court handed down a trio of cases redefining the relationship between the federal and state governments. It is difficult to read those cases without feeling that they increase the likelihood that this Court would strike down RLPA.
3. **Finally, it has become clear that RLPA, as passed by the House, is not going to be approved by Congress in the foreseeable future.** The strongest evidence, perhaps, was the House debate itself. While the votes saw the majority of members, including many courageous Democrats, uphold the principle of our indivisible right to religious liberty, that debate saw too many members stand up and speak against the bill, many of them members who care deeply about religious liberty. We saw the broad bi-partisan consensus in support of an indivisible, highest level of protection for religious liberty – a consensus that helped RFRA to pass without a dissenting vote – seriously damaged.

It's now October. Absent a time agreement, it seems unlikely the bill will even reach the floor before Congress recesses for the year. And it is clear that any debate would be a heated, divisive, and unruly one – a debate that would do only damage to the cause of religious liberty.

*So, with concern that this very debate was doing damage to our long-term interest in protecting religious liberty, with the growing possibility that even if passed RLPA would be struck down, and with Senate passage unlikely, and we have withdrawn our support and urge the Senate not to take the bill up.*

Religious Liberty Protection Act

October 8, 1988

Page 3

While we are addressing the long-term problems that have arisen among our traditional allies, we are quite interested in exploring a "fast track" approach for a more limited bill than RLPA, one that maintains the critically important "compelling state interest" test, but would address only the most urgent areas or those most likely to be upheld by the Court. Such a bill would focus on land use and, possibly, prisons, i.e. areas in which the record of discrimination is strongest, and in which there is the most urgent compelling need for legislation. We believe it is possible to pass such a narrow bill this Congress, and that doing so would be a significant contribution to protection of our religious freedom. By focusing on the most urgent issues, we are circumstantially dealing with concerns that raise no divisive substantive issues with either the rest of the civil rights or the rest of the religious communities.

We urge you to consider this alternative approach, and look forward to working with you to protect our "first freedom."

Sincerely,

Rabbi David Saperstein  
Director, Religious Action Center of Reform Judaism

/s/  
Rev. Jay Lintner  
Director, Washington Office of United Church of Christ

/s/  
Florence Kimball  
Friends Committee on National Legislation

/s/  
Rev. Russell Siler  
Director, Lutheran Office for Governmental Affairs  
Evangelical Lutheran Church in America

/s/  
Saraa Crane  
Director, Committee on Social Action and Public Policy  
United Synagogues of Conservative Judaism



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## BEHIND THE HEADLINES

### Jewish groups drop out of coalition

#### of Religious Liberty Protection Act

By Daniel Kurtzman

WASHINGTON, Sept. 21 (JTA) -- There was a time when the task of securing greater protections for religious freedom in America seemed relatively unobjectionable.

A diverse coalition of religious and civil liberties groups formed to pursue that goal following a landmark 1990 Supreme Court decision that struck down key protections for free religious practice. Congress passed legislation in 1993 to restore those protections, and President Clinton signed it.

Even when the Supreme Court struck down that act as unconstitutional in 1997, religious leaders and members of Congress were determined to draft a new bill to fill the void left by the court.

But now, with the Religious Liberty Protection Act pending in Congress, that coalition -- which spans the ideological gamut and includes every major Jewish organization -- finds itself in tatters.

The coalition broke down last week when several groups -- including the Religious Action Center of Reform Judaism, the Anti-Defamation League, the National Council of Jewish Women, the National Council of Churches and the Baptist Joint Committee -- announced they could no longer support the bill in its current form.

The groups say they continue to support the bill's principle of creating a law that allows people to practice their religion free from government intrusion. But concerns about whether religious liberty or civil



rights laws should take precedence when the two come into conflict have complicated the matter.

The measure, which passed the House of Representatives in July by a 306-118 vote, would prevent state and local governments from placing a "substantial burden" on an individual's free exercise of religion unless officials make a compelling case for doing so -- and only then through the "least restrictive means."

The legislation seeks to remedy what supporters say are numerous cases in which laws have needlessly interfered with religious practices.

Supporters have pointed, among other things, to city ordinances that have prevented synagogues and other houses of worship from expanding, policies that prohibit Jewish children from wearing yarmulkas in schools and laws that conflict with the Orthodox prohibition against autopsies, and the practice of giving sacramental wine to minors.

Although the House adopted the bill by a wide margin, liberal Democrats, including the majority of Jewish lawmakers, voted against it, citing civil rights concerns.

As Rep. Jerrold Nadler (D-N.Y.), an original sponsor of the bill who opposed it in the end, put it: "RLPA should be a shield for the religious liberty of all -- not a sword against the civil rights of some."

At issue for the lawmakers, as well as some of the religious groups that withdrew their support last week, is the question of whether the proposed legislation could be used to justify violations of state or local anti-discrimination laws. Opponents argue that landlords and employers in states and cities with laws prohibiting discrimination against homosexuals could invoke their religious principles as a defense for refusing to rent to or hire gays and lesbians.

Mark Pelavin, associate director of the Religious Action Center, said his group decided to withdraw support for the bill out of political expediency and concern over contentious debate on the issue in the Senate.

Looking at the political landscape, he said, it became clear there was "no realistic chance of this bill being passed this year" and that "any debate would be a bruising one.

"It would be bruising," he added "not just for the participants, but more importantly for the concept of religious liberty."

It remained unclear, however, whether the Religious Action Center and other groups would actively oppose the bill or simply remain silent on it.

ADL, for its part, said it remained firmly committed to the principles behind the act and would continue to work with other faith and civil rights groups to enact the broadest possible protections for religious liberty in light of the opposition.

The ADL might ultimately support a narrower version of the legislation that focuses on areas such as zoning ordinances, prisoner's rights and autopsies, according to Michael Lieberman, the group's Washington counsel. Such a bill would avoid the civil rights controversies related to housing and employment

At the same time, Lieberman said the ADL will continue to lead an effort to enact individual religious freedom statutes on a state-by-state basis.

Nathan Diament, director of the Orthodox Union's Institute for Public Affairs and a leading proponent of the bill, said the breakdown of Jewish support for RLPA nevertheless was "very disappointing," adding that it's "unfortunate" that the groups decided protecting religious practice is "not a high enough priority."

Marc Stern, co-director of the American Jewish Congress' legal department and one of the drafters of RLPA, said he thought the coalition had struck a "reasonable balance" between religious liberty and civil rights concerns in the legislation.

He held out the possibility, though, that some of the concerns expressed by opponents could be addressed through changes in the legislation.

Indeed, some of the Jewish groups that left the coalition indicated they would be open to re-examining an altered bill.

It remains to be seen, however, what impact the dissolution of the coalition will have on the bill's prospects for passage -- and whether the Senate will even decide to take up the controversial measure.

Without firm backing from the religious community, "surely it's more complicated now and conceivably impossible" to win passage, Stern said.

"One of the great strengths of the coalition," he added, "was its very breadth." And now, with groups on the left withdrawing their support, "the coalition has lurched politically in terms of people's impressions, way off to the right."

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**NORTHWEST  
RELIGIOUS LIBERTY  
ASSOCIATION**

**Joseph Story**

6 387 Government Relations Representative  
For the Seventh-day Adventist Church in Alaska

1507 Davidoff Street  
Sitka, AK 99835

Sitka (907) 966-2654  
Juneau (907) 790-1054  
E-Mail: [story@ptialaska.net](mailto:story@ptialaska.net)



NRLA

# NORTHWEST RELIGIOUS LIBERTY ASSOCIATION

Chairman  
Jere D. Patzer

March 2, 2000

Vice Chairman  
Bryce Pascoe

Alaska State Legislature  
House Community and Regional Affairs Committee

President  
Gregory W. Hamilton

Re: HB 387 - The Alaska Religious Freedom Protection Act

Vice President  
Diana K. Justice

Honorable Chairman and Committee Members,

#### Government Relations

Joseph Story, Alaska  
L. H. Opp, Idaho  
Morris Brusett, Montana  
Dan McCulloch, Oregon  
H. J. Bergman, Washington

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. Verner* (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 (494 U.S. 872 at 897).

Mailing: P.O. Box 16670  
Portland, OR 97292-0670

Location: 10225 E. Burnside St.  
Portland, OR 97216

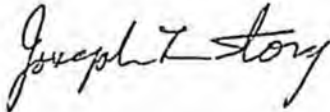
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★ HISTORICAL RATIONAL

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 trust 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,

A handwritten signature in cursive script that reads "Joseph L. Story".

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



# NORTHWEST RELIGIOUS LIBERTY ASSOCIATION

Chairman  
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March 30, 2000

Vice Chairman  
Bryce Pascoe

Alaska State Legislature  
Alaska State Affairs Committee

President  
Gregory W. Hamilton

**Re: HB 387 - The Alaska Religious Freedom Protection Act**

Vice President  
Diana K. Justice

Honorable Chair and Committee Members,

#### Government Relations

Joseph Story, Alaska  
L. H. Opp, Idaho  
Morris Brusell, Montana  
Dan McCulloch, Oregon  
H. J. Bergman, Washington

We strongly support House Bill 387 for several reasons but I wish to express my appreciation to the sponsor and cosponsors of this bill. First, we support this bill and 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, the sponsors efforts to restore the "compelling state interest" and "least restrictive means" tests as established in *Sherbert v. Verner* (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 (494 U.S. 872 at 897).

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Portland, OR 97292-0670

Location: 10225 E. Burnside St.  
Portland, OR 97216

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Fax: (503) 253-2455  
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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 "fundamental" of all the rights Americans could claim, the one right that placed the greatest trust 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, Government Relations Representative  
Northwest Religious Liberty Association



# Alaska State Legislature

Please enter into the record my testimony to the House State Affairs Committee  
committee name

committee on HB 387, dated 3-30-00  
bill/subject

*I support Housebill 387. I believe it is a necessary reinforcement of the right to freedom of religious practice as stated in the Bill of Rights. I support this bill as it is stated and believe that any carveouts would make it ineffective. Please vote to pass this bill.*

Signed: *Steven Paul*  
Testifier

Representing (Optional)  
PO Box 1236, Sitka  
Address  
(907) 966-2235  
Phone No.



# Alaska State Legislature

Please enter into the record my testimony to the House State Affairs Committ  
 committee name  
 committee on HB 387, dated 3-30-00  
 bill/subject

I support Bill HB387 with my whole heart. I am very thankful for representative Croft bringing this Bill. AGAIN I give full support.

Sincerely

Signed: Keith Fredrickson  
 Testifier

Self

Representing (Optional)  
1111 Furuhelm st, Sitka, AK 99835  
 Address

907-747-3389  
 Phone No.

David Levy  
Anc Equal Rights Comm.

343-4340

Barbara Jones

343-4339

Noting When  
Schedule HB387

LM  
3/28/50

	<p>job qualifications are equal, a veteran or prisoner of war shall be given preference over a person who was not a veteran or prisoner of war, and the veteran or prisoner of war shall be kept on the job. This subsection may not be interpreted to amend the terms of a collective bargaining agreement.</p>	<p>not be counted. If a position in the classified service is eliminated, employees shall be released in accordance with rules adopted under AS 39.25.150(13). In the case of a comparison of employees with equal qualifications on the factors adopted under AS 39.25.150(13), a veteran or former POW shall be given preference over a person who was not a veteran or former POW, and the veteran or former POW shall be kept on the job.</p>	<p>If collective bargaining agreements allow it, veterans or former POWs should be given "super seniority," and laid off after non-veterans.</p>
<p><b>Section 6</b> <b>Page 6</b> <b>Line 14-31</b></p>	<p><b>AS 39.25.159(c)</b> Similar to veterans and POW preference in AS 39.25.159(a), except applies to a member of the national guard.</p>	<p>Similar revisions to those set out above re: AS 39.25.159(a).</p>	<p>Applies the protections granted in the previous section to members and former members of the National Guard.</p>
<p><b>Section 7</b> <b>Page 7</b> <b>Line 7</b></p>	<p><b>AS 39.25.159(d)</b></p>	<p>Add a new paragraph (4) to read: "consideration" means reviewing a person's entire application in order to determine whether the person should be selected, rejected, or admitted to further steps in the assessment or selection process.</p>	<p>New paragraph that defines the word "consideration" in the context of WPA.</p>



# Center for Law and Religious Freedom

4208 Evergreen Lane, Suite 222  
Annandale, Virginia 22003-3264  
703/642-1070  
FAX: 703/642-1075  
Website: [www.christianlegalsociety.org](http://www.christianlegalsociety.org)  
[clrf@clsnet.org](mailto:clrf@clsnet.org)

Carl H. Esbeck  
*Director*

Gregory S. Baylor  
*Associate Director*

Kimberlee W. Colby  
*Senior Legal Counsel*

Betty L. Dunkum  
*Legal Counsel*

Virginia E. Hartman  
*Executive Assistant*

## 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).<sup>1</sup> 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.<sup>2</sup>

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 RFRA's, and a number of other states are in the same process.

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<sup>1</sup> 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 (8<sup>th</sup> Cir. 1998), *cert. denied*, 119 S.Ct. 43 (1998) (mem.).

<sup>2</sup> See Religious Liberty Protection Act, H.R. 1691, 106<sup>th</sup> Cong., 1<sup>st</sup> 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 RFRA's 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.

ACLU wants amendment  
making exception for  
gay people -

mainly for housing purposes.

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Copies of minutes listed below were originally included in this file. The minutes are available on the legislative computer database. In order to save space copies of minutes have not been left in the files.

Mary Pagenkopf


HCRA 3/2/00 8:10 am

## REPRESENTATIVE ERIC CROFT

### Memorandum

TO: Rep. Jeanette James, Chair  
House State Affairs Committee

FROM: Rep. Eric Croft



DATE: 3/7/00

RE: HB 378, Alaska Religious Freedom Protection Act

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I am requesting a hearing, pending referral from the HESS Committee, for HB 378. I believe this legislation is undergoing a very thorough public process. I welcome a hearing in your committee.

For your information I have enclosed:

- 1) copy of the bill
- 2) sponsor statement
- 3) letters of support
- 4) pertinent backup



**Subject: HB 387**

**Date: Thu, 09 Mar 2000 10:20:39 -0900**

**From: Sam Shepard <Sam\_Shepard@legis.state.ak.us>**

**Organization: Alaska State Legislature**

**To: Barbara Cotting <Barbara\_Cotting@legis.state.ak.us>**

I put in a hearing request for the religion bill but only had the CS work draft. It hasn't been read across from HESS so there's no "official" version. The bill you get will be the same just without the "workdraft".

Thanks for your help today...and the hearing!!!

Sam

# HOME SCHOOL LEGAL DEFENSE ASSOCIATION

*Advocates for Family & Freedom*

MICHAEL P. FAIRUS, ESQ.  
PRESIDENT (DC, WA)

J. MICHAEL SMITH, ESQ.  
VICE PRESIDENT (CA, DC, VA)

CHRISTOPHER J. KLICKA, ESQ.  
SENIOR COUNSEL (VA)

DEWITT T. BLACK, III, ESQ.  
SENIOR COUNSEL (AR, SC, DC)

SCOTT W. SOMERVILLE, ESQ.  
ATTORNEY (VA)

DAVID E. GORDON, ESQ.  
LITIGATION COUNSEL (VA, TN, DC)

SCOTT A. WOODRUFF, ESQ.  
ATTORNEY (VA, MO)

BRADLEY P. JACOB, ESQ.  
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 act 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 90<sup>th</sup> 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 14<sup>th</sup> 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 RFRA's, 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 RFRA's 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 RFRA's 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."

**I**n 1991 the archbishop of San Antonio was denied a permit to enlarge St. Peter's Catholic Church in Boerne, Texas. The archbishop's challenge of the denial led to *City of Boerne v. Flores*,<sup>1</sup> in which the U.S. Supreme Court struck down as unconstitutional the Religious Freedom Restoration Act (RFRA) of 1993. As a result, many religious people are like the homeless—without shelter.

As with many church-state cases, the real issue here isn't the particular; it's the universal behind it. In *Flores* the problem wasn't the denial of the building permit per se, but the rationale the Court used in upholding the denial, which was that RFRA was unconstitutional.

RFRA arose in response to the Supreme Court's decision in *Employment Division v. Smith*,<sup>2</sup> which eradicated what many court observers believed to be bedrock constitutional principle first established in *Sherbert v. Verner*<sup>3</sup> and amplified in *Wisconsin v. Yoder*.<sup>4</sup> Under *Sherbert/Yoder*, when a governmental requirement conflicted with an individual's religious practices, in order for the requirement to prevail over the individual's religious practices the government had to demonstrate a compelling state interest that showed why the practice should not be allowed. Then, even if the government was able to demonstrate that interest, it had to prove further that there was no less restrictive means by which to achieve its secular purpose. In other words, the onus and burden was on the government to show that it had a very good reason to restrict a religious practice; if not, then those seeking an exemption or accommodation to a law that restricted their practice should, ideally, have gotten it.

But in a radical departure from precedent, the *Smith* Court stated that the free exercise clause of the First Amendment "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on

the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."<sup>5</sup>

According to *Smith*, the only time the *Sherbert/Yoder* test applies is in the hybrid situation in which the free exercise claim is raised (1) "in conjunction with other constitutional protections, such as freedom of speech and of the press"<sup>6</sup> or (2) "where the state has in place a system of individual exemptions," such as in unemployment compensation cases. In the latter situation, the state "may not refuse to extend that system to cases of 'religious hardship' without compelling reason."<sup>7</sup>

Thus *Smith* relegated the Free Exercise Clause to only an antidiscrimination provision leaving unprotected individuals whose religious beliefs may be somewhat different from society's mainstream. The *Smith* justices reduced free exercise protection while completely aware that their action might have a disparate effect on those who are members of minority religions. The Court stated:

"It may fairly be said that leaving accommodation to the political process will place at relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."<sup>8</sup>

This diminished understanding of free exercise protection was not shared by much of the American religious community, the Congress, or the president. The result was RFRA, which mandated that federal, state, and local government be subject to the compelling state interest/least restrictive alternative test

*Lee Boothby is an attorney with Boothby and Yungst in Washington, D.C.*

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when free exercise claims were raised by an individual who found his or her religious practices were in conflict with governmental law, regulation, or action.

When Congress enacted the RFRA, it relied primarily on its Fourteenth Amendment enforcement power. The Fourteenth Amendment provides in relevant part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

their treatment of religion."<sup>11</sup> As the Court noted, "in most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry."<sup>12</sup>

In summary, the Supreme Court instructed that "when the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles."<sup>13</sup> The Court argued that once interpretation of the Free Exercise Clause was made by the courts, "it is this Court's prece-

## So for now, Americans are without it comes to free exercise

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The courts have repeatedly held that the religion clauses of the First Amendment are applicable to the states by reason of the Fourteenth Amendment to the United States Constitution. Thus those who argued that under Section 5 of the Fourteenth Amendment Congress had the right to enact RFRA contended that "Congress . . . is only protecting by legislation one of the liberties guaranteed by the Fourteenth Amendment's due process clause, the free exercise of religion, beyond what is necessary under *Smith*."<sup>9</sup>

However, the Court held that in adopting RFRA, Congress went beyond its Fourteenth Amendment authority. Because the *Smith* Court had decided the scope of the Establishment Clause, when Congress enacted RFRA, it went too far:

"Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."<sup>10</sup>

Also, the Court concluded that "RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of

dent, not RFRA, which must control."<sup>14</sup>

The *Flores* decision, of course, did not settle the argument or end the problem. On the contrary.

First, it was argued that although RFRA has been held unconstitutional as far as the federal legislation may be applied to state and local governments, it is not unconstitutional with reference to federal agencies. This is because the Fourteenth Amendment, the basis of the *Boerne* decision, does not apply to the federal government. In a recent case, *In re: Young Christians v. Crystal Evangelical Free Church*,<sup>15</sup> the Eighth Circuit Court of Appeals held that the Bankruptcy Act also violated RFRA. (In these cases, bankruptcy trustees recovered from churches the tithes paid by bankruptcy debtors.) The court concluded that RFRA was an appropriate means by which Congress could modify the United States bankruptcy laws.


Second, in *Flores* three of the justices dissenting from the majority argued *Smith* itself should be reexamined. Justice O'Connor, joined by Justice Breyer, concluded that the Court in *Flores* may well have been correct in ruling that Congress did not have the power under the Fourteenth Amendment to enact RFRA in light of the Court's earlier *Smith* deci-

sion. But she observed that the *Flores* decision "is premised on the assumption that *Smith* correctly interprets the Free Exercise Clause."<sup>16</sup> Justice O'Connor then stated that "this is an assumption that I do not accept."<sup>17</sup> She continued, explaining that the Free Exercise Clause "is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law."<sup>18</sup>

In his *Flores* dissent, Justice Souter had "serious doubts about the precedential value of the *Smith* rule and its entitlement to adher-

modation is aimed at avoiding religious discrimination. Nor is it without detractors (see pp. 10-14). Besides this law, a broad-based coalition of religious organizations is currently asking state legislatures to pass legislation requiring the application of the *Sherbert/Yoder* test in each state."<sup>24</sup>

The bottom line in this free exercise mess is that though the *Sherbert/Yoder* test was hardly perfect, it did provide some level of judicial protection for the free exercise of religion. After *Smith* and now *Boerne*, that protection, with rare exceptions, is all but gone. Even worse, among many scholars who oppose the jurisprudence behind *Smith*, and who see a need for greater free exercise protection, much disagreement exists on the best way to reinstate these protections.

So for now, Americans are without shelter when it comes to free exercise of religion. A sad state of affairs, especially for a nation that views the free exercise of religion as one of the most basic of all human rights, to be protected. 

## shelter when of religion.

ence."<sup>19</sup> He stated he was "not now prepared to join Justice O'Connor in rejecting it [*Smith*] or the majority in assuming it to be correct."<sup>20</sup> But he called for "a full adversarial consideration" of the issue. Justice Souter stated that "this case should be set down for reargument permitting plenary examination of the issue."<sup>21</sup>

The *Flores* case continues to generate much heat. Professors Eisgruber and Sager argued that RFRA was "practically unworkable" and that in *Flores* the Court "was renouncing a congressional vision of religious liberty that was at radical odds with its own."<sup>22</sup> In contrast, Oliver Thomas, special counsel for religious and civil liberties of the National Council of Churches, compared *Flores* with the century-old *Dred Scott* decision, saying the "decision . . . is a blow not only to the sovereignty of the Congress but to the American people as well."<sup>23</sup>

In June of this year federal legislation was introduced to reinstate the compelling state interest/least restrictive alternative test as part of federal law applicable not only to the federal government but also to state and local governments. But the new legislation, called the Religious Liberty Protection Act, is limited to situations that involve or affect interstate commerce, when the burdensome state program is a recipient of federal funds, and when the accom-

### FOOTNOTES

<sup>1</sup>117 S. Ct. 2157 (1997).

<sup>2</sup>494 U.S. 872 (1990).

<sup>3</sup>374 U.S. 398 (1963).

<sup>4</sup>406 U.S. 205 (1972).

<sup>5</sup>*Smith*, 494 U.S. 879.

<sup>6</sup>*Ibid.*, p. 881.

<sup>7</sup>*Ibid.*, p. 884.

<sup>8</sup>*Ibid.*, p. 890.

<sup>9</sup>*Flores*, 117 S. Ct. 2163.

<sup>10</sup>*Ibid.*, p. 2164.

<sup>11</sup>*Ibid.*, p. 2171.

<sup>12</sup>*Ibid.*

<sup>13</sup>*Ibid.*, p. 2172.

<sup>14</sup>*Ibid.*

<sup>15</sup> \_\_ F.3d \_\_, No. 93-2267 (8th Cir. 1998).

<sup>16</sup>*Flores*, 117 S. Ct. 2176 (O'Connor, J., dissenting).

<sup>17</sup>*Ibid.*

<sup>18</sup>*Ibid.*, p. 2177.

<sup>19</sup>*Ibid.*, 2186 (Souter, J., dissenting).

<sup>20</sup>*Ibid.*

<sup>21</sup>*Ibid.*

<sup>22</sup>Eisgruber and Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 Sup. Ct. Rev. 79, 83.

<sup>23</sup>Clarence Page, "Keeping the Faith: Religious Freedom Act Could Turn Into Worthy Amendment Scheme," *Chicago Tribune*, July 2, 1997, p. 19.

<sup>24</sup>See *Liberty*, July/August 1998, p. 8.

Mrs Campbell's

**FREE  
COUP**



*Special* **EXIB**

A Compelling Case AGAINST

Imagine living in a quiet residential neighborhood when a nearby homeowner (call her Mrs. Campbell) starts running a soup kitchen from her garage. Some neighbors object, fearful that the soup kitchen will increase traffic and attract "undesirables" to the area. They persuade town officials to enforce their zoning ordinance and stop Mrs. Campbell.

Mrs. Campbell sues, seeking to exempt her charitable project from the zoning ordinance. At the hearing the judge says, "Now, Mrs. Campbell, I need to know whether you are running this soup kitchen because of your religious beliefs. If you are, then I'll permit you to go ahead. If you're not, I won't."

Surely the judge's question is an affront to religious liberty. Perhaps one can sympathize with Mrs. Campbell, and believe that charitable endeavors ought to enjoy special exemptions from zoning laws. Or perhaps one sympathizes with the unhappy neighbors, and believes that Mrs. Campbell ought to move her otherwise laudable project to a more suitable location. But either way her right to do good works and her right to use her property as she wishes ought not to depend upon her religious beliefs.

Consider the bizarre and uncomfortable questions that would arise in the colloquy between the judge and Mrs. Campbell. Suppose Mrs. Campbell has long felt it intolerable for people to go hungry as a matter of simple justice, but also felt that her religion counsels that people should aid the needy. Does it matter whether she has more than one reason for doing good works? Or suppose, while Mrs. Campbell's faith requires her to care for the needy, it recognizes that there are many forms such care can take. Or suppose that within her faith charitable acts are regarded as good but not requisite for leading a religious life. Does it matter just how specific and how demanding Mrs. Campbell's religion is? Does it matter whether Mrs. Campbell attends regular church services? Would she be religious in the

right way if she were moved to a life of good works by what she called "Christian ethics," even if she had little or no interest in Christian theology? And suppose Mrs. Campbell shared responsibility for the soup kitchen with her husband, an avowed secular humanist. Would the kitchen be legally permissible on days that she ran it, but not on days when he alone was present?

Is it preposterous to imagine—in a nation that loves liberty and especially prizes freedom of belief—that Mrs. Campbell could be called to account for her beliefs and commitments in this way? No. In fact, it has become fashionable for the government to make rights contingent on religious belief in just this manner, and thus to require judges to act like the judge in Mrs. Campbell's case. The paradigmatic example of this is the Religious Freedom Restoration Act (RFRA).<sup>1</sup> As its name indicates, RFRA was enacted in the service of religious liberty. Yet it was a misguided attempt to achieve a laudable purpose.

Under RFRA some churches were able to duck zoning laws and operate soup kitchens in residential neighborhoods when everyone else was prohibited from the same.<sup>2</sup> Some bankrupt religious debtors were able to circumvent bankruptcy laws and make charitable contributions when all other debtors were prevented from doing so.<sup>3</sup> Some religious landlords claimed that they should be able to defy civil rights laws that prohibited everyone else from discriminating against unwed couples.<sup>4</sup> It was even the case that some religious men who flouted child-support obligations were excused from contempt sanctions imposed upon other "deadbeat dads."

In *City of Boerne v. Flores*,<sup>5</sup> the Supreme Court held that RFRA was unconstitutional, at least insofar as it purported to constrain state and local governments. But the era of RFRA has not

*Christopher L. Eisgruber is professor of law at the New York University School of Law, and Lawrence G. Sager is the Robert B. McKay professor of law at the same institution.*

By  
CHRISTOPHER L.  
EISGRUBER  
and  
LAWRENCE G.  
SAGER

# EXEMPTIONS?

*"Compelling State Interest"?*

necessarily passed. RFRA itself may continue to apply to federal legislation like the bankruptcy laws, since *Flores* focused on Congress's power to apply the act to state and local laws. Meanwhile, many states are considering statutes patterned upon RFRA, and some members of Congress are considering legislation that would reproduce the effects of RFRA but would try to circumvent *Flores*.

What explains RFRA's popularity? Its defenders point out that laws that are neutral on their face can nevertheless impair the ability of religious believers to practice their faith. That is true, and it's a problem of great concern. RFRA's supporters accordingly believe that this leaves Americans in a kind of Free Exercise dilemma. Special privileges to disobey otherwise valid and reasonable laws, reserved for the truly religious alone, may be awkward—but such privileges are the only way to accommodate the needs of religious believers.

There is, however, a better way to promote a strong version of free exercise. First, judges and legislators should take a generous view of personal liberty, not just for religious believers, but for all people. Second, when the government carves out special exceptions for the benefit of secular interests, it should be required to do the same for comparable religious interests. And finally, when the government imposes broad, generally applicable restrictions on conduct, it should show the same sensitivity to minority religious interests that it shows to mainstream religious and secular interests.

Start with the idea that the Constitution should be understood to guarantee a generous share of liberty for all people. It's easy to see how that liberty will benefit religious believers. For example, in the famous case of *West Virginia v. Barnette*,<sup>7</sup> some schoolchildren refused to comply with a state law requiring them to salute the flag. They had religious grounds for their choice: they were Jehovah's Witnesses, and their faith forbade them from honoring any graven image. The Supreme Court upheld the children's right to opt out of the flag salute ceremony, but it did so without creating any special privilege for religious believers. The Court declared that the state simply had no power to compel anybody to salute the flag.

As a second example, consider one of the more appealing claims that arose under RFRA. Orthodox Jews have sought relief from zoning decisions that prohibited them from using their

homes as *shiteebles*—that is, from using them for small regular worship services. Orthodox Jews should have the right to conduct such services. They should have it, though, not as the result of any special privilege unique to religious believers, but because the Constitution protects the right of all people to invite friends, acquaintances, and neighbors to gather with them in their homes for peaceful purposes. One might even construe this right broadly enough to encompass Mrs. Campbell and her soup kitchen (and, of course, if Mrs. Campbell enjoys such a right, so too should any church operating in a residential neighborhood).

Home schooling provides a third illustration. Religious parents may have special reasons for wishing to educate their children at home. They may, for example, want to protect their children from influences that might damage their faith. Or they may think it desirable to provide a pervasively religious learning experience of a kind that is, in their judgment, not available from any school in their area. Such parents should have the right to school their children at home. But it should be recognized that their religious interests are a specific version of a more widely shared interest—the interest that all parents have in providing the best possible education and upbringing for their children. And the constitutional right protecting them should be equally broad: it should respect the autonomy of all parents, not merely those who have religious motives for their decision.

Consider now the second prong of this approach to religious liberty, which demands that government not turn a blind eye to religious interests when it crafts exemptions for secular ones. A recent First Amendment case from Newark, New Jersey, nicely illustrates the point. Newark's police department requires that its officers be clean-shaven. Two Islamic policemen sought an exemption on religious grounds; their faith required that they wear beards. The police department refused to relax its rule, but a federal district court granted relief. The court pointed out the police department made an exception for police officers with sensitive skin, who would suffer a rash if forced to shave. Since the department was willing to accommodate the special interests of officers susceptible to skin rashes, it was obliged to be equally receptive to the religious interests of the Islamic officers.<sup>8</sup>

So far these recommendations have been quite consistent with the Supreme Court's cur-

rent reading of the Free Exercise Clause. The third suggestion makes a departure from the Court's free exercise doctrine. In *Department of Employment Services v. Smith*,<sup>9</sup> the Court addressed a claim from practitioners of a Native American religion who sought exemption from an Oregon law. The Native American faith involved the ritual consumption of peyote. Oregon law prohibited the possession or use of peyote.

In *Smith* the Supreme Court distinguished sharply between laws such as Newark's police department regulation, which included exceptions, and laws such as the Oregon peyote regulation, which did not. The Court announced a broad per se rule to deal with any exemption

the practices of minority religious believers. Just as Newark made special exceptions to benefit those with special health problems but not those with special religious needs, Oregon's controlled substance laws included exceptions for the benefit of mainstream faiths but not minority ones.

Though it's possible to offer good reasons that peyote and alcohol should be treated differently, the basic point is clear: neutral and generally applicable laws may reflect a failure by the government to show equal regard for minority religious interests. Insofar as the Court in *Smith* was insensitive to the problem, its free exercise doctrine is unsatisfactory.

RFRA was passed in reaction to *Smith*, and the most generous way to view the statute is as

## *The justices did not want the impossible task of deciding which religious people deserved what privileges....*

claim directed at laws such as Oregon's: "The right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."<sup>10</sup>

The justices did not want the impossible task of deciding which religious people deserved what privileges in cases about zoning, bankruptcy, education, and virtually every other imaginable topic of legal regulation. The Court's unease is understandable. But it does not justify a stark distinction between laws that include exceptions and laws that do not.

For example, the Oregon law against peyote consumption may have looked like a clean, bright-line rule with no exceptions. Suppose, though, one steps back and looks at the law in its larger context. Oregon had a host of laws dealing with drug abuse. Among these was a law permitting counties to prohibit alcohol consumption. That law, however, contained an interesting provision: it required dry counties to make exceptions for the benefit of religious faiths (notably, Christian faiths) that use alcohol in religious rituals. Thus Oregon's laws may have reflected a failure to show equal regard for

an effort to cure the insensitivity of the *Smith* decision toward the requirement of equal regard for the needs of all citizens, including members of minority religious faiths. So understood, the goal of RFRA was impartiality, not special privilege. But so understood, RFRA was doomed from the outset. It incorporated the toughest test known to constitutional law, "the compelling state interest test." To defeat an exemption claim, the government had to show either that its law imposed no "substantial burden" on religious practices, or that it had a "compelling interest" to justify the burden. In the law's eyes, few interests count as "compelling." As a result, whatever RFRA was aiming at, it produced a stark, inequitable privilege available only to those who were religious, and religious in the right way.

This claim is not mere conjecture or academic argument. In one area after another courts found that RFRA demanded that some religious persons be excused from obeying reasonable and evenhanded laws, while secular persons who were otherwise in exactly the same position and religious persons who were acting on the basis of secular motives—however lofty and altruistic their motives might be—were required to obey those laws.

RFRA's defects were not merely the product of clumsy legislative drafting. They emanated from a profoundly mistaken view of what it means to be "strong on free exercise." That view supposes that religious exercise is free only if religious conduct is presumptively and uniquely immune from any form of government regulation—and hence only if religious believers are presumptively entitled to special exemptions not available to others.

Professor Michael McConnell, an exponent of this idea, says that constitutional law should aspire to match a "hypothetical world in which individuals make decisions on the basis of their own religious conscience, without the influence of government."<sup>11</sup> Government should, of course, stay out of church affairs, and it should not manipulate people's religious beliefs. But government cannot help having an enormous influence on the activities of churches and religious individuals, just as it has an enormous impact on all groups and individuals within any modern society. Government provides the security, resources, and stability without which religious faith and activity would be resoundingly difficult, if not impossible, to pursue. It inculcates and enforces principles of morality—such as, for example, the principle that persons enjoy equal status regardless of their race, faith, or sex, or the principle that speech should be free—which are more congenial to some religions than others. And it doles out ownership rights without which it would be impossible even to conceptualize questions about whether Mrs. Campbell can use her house to run a soup kitchen, whether for religious reasons or any other reason.

Churches and religious individuals live within a society permeated by law. They cannot help benefiting from the existence of the legal regime that surrounds them; indeed, it would be deeply unjust to deny them any of the benefits that are available to everyone else. So too, churches and religious individuals must respect the boundaries set by reasonable, evenhanded rules that everyone else is required to obey. That is the inevitable price that accompanies the benefits of the rule of law. Any law drafted in service of a conception of free exercise that fails to accept this simple proposition is likely to do far more harm than good to religious believers and to religious liberty itself.

RFRA is a case in point. Far from reducing the impact of government upon religion, RFRA overtly manipulated religious belief. Imagine

Mrs. Campbell's reaction when she learned, from the judge or her lawyer, that the fate of her soup kitchen depended upon whether her motives were religious and religious in just the right sort of way. She would have an obvious incentive not just to characterize her motives in the most favorable way but to reconceive them in order to justify her characterization of them. There is something deeply insidious about a law that puts well-motivated persons in the position of giving skewed witness to their own beliefs, under penalty of denying them the license to pursue those beliefs.

RFRA's demise has sparked a new round of legislative activity, including the so-called Religious Liberty Protection Act. Unfortunately, this bill, like nearly all the statutes now percolating in Congress and in the legislatures of many states, repeats RFRA's central error: they invoke the "compelling state interest" test. That is a great misfortune. Religious liberty is a laudable legislative concern, but it can be furthered only by legislation that expands the liberties available to everybody, or legislation that seeks to ensure that all interests (religious and secular, mainstream and minority) are treated impartially. Until legislators are ready to leave the mistakes of RFRA behind them, the legislation they produce will be ill conceived, counterproductive, and unconstitutional. □

#### FOOTNOTES

<sup>12</sup>42 U.S.C. §§ 2000bb (1994).

<sup>1</sup>*Western Presbyterian Church v. Board of Zoning Adjustment of D.C.*, 862 F. Supp. 538 (D.D.C. 1994); *Stuart Circle Parish v. Board of Zoning Appeals of Richmond*, 946 F. Supp. 538 (E.D. Va. 1996).

<sup>2</sup>See, e.g., *In re Young*, 82 F. 3d 1047 (8th Cir. 1996), vacated and remanded, 117 S. Ct. 2502 (1997), reinstated, 1998 U.S. App. LEXIS 7348 (8th Cir. 1998).

<sup>3</sup>*In Smith v. Fair Employment and Housing Commission*, 12 Cal. 4th 1143, 913 P. 2d 909 (Cal. 1996), the California Supreme Court rejected this claim by a 4-3 vote; an intermediate appellate court had granted the claim.

<sup>4</sup>*Hunt v. Hunt*, 162 Vt. 423, 648 A. 2d 843 (1994).

<sup>5</sup>117 S. Ct. 2157 (1997).

<sup>6</sup>319 U.S. 624 (1943).

<sup>7</sup>*Fraternal Order of Police v. City of Newark*, No. 97-2672 (D.N.J., July 29, 1997) (unpublished decision). The Newark case is remarkably similar to a hypothetical discussed in Christopher L. Eisgruber and Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 *U. Chi. L. Rev.* 1245, 1264-65 (1994).

<sup>8</sup>494 U.S. 872 (1990).

<sup>9</sup>494 U.S. 879 (internal quotation marks omitted).

<sup>10</sup>Michael W. McConnell, "Religious Freedom at a Crossroads," *University of Chicago Law Review* 59 (1992): 115, 169.



In the wake of the U.S. Supreme Court's invalidation of RFRA, Congress is considering legislation (The Religious Liberty Protection Act) that would once again enable religious believers and institutions to challenge, in court, government interference with religious practice. Under this bill, believers could obtain exemptions, or accommodations, if the government lacks a sufficiently strong justification (a "compelling state interest") for hindering religious practices that conflict with the law. This has been the principal free exercise jurisprudence for the latter half of the twentieth century.

Some people, however, oppose the principle behind the bill, which they believe is unconstitutional. What are their arguments—and why are they wrong?

To begin, until 1990 the Supreme Court had interpreted the Free Exercise Clause of the First Amendment of the United States Constitution as protecting the free exercise of religion from governmental burden, subject to the "compelling state interest" test. A new conservative majority on the Court, however, overruled prior decisions and held that the Free Exercise Clause provides no shield against "neutral laws of general applicability," no matter how severely they may trench upon religious freedom. Additional

*Michael W. McConnell is a presidential professor at the University of Utah College of Law.*

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By  
MICHAEL W. MCCONNELL

# EXERCISE

A Compelling Case FOR "Compelling State Interest"

protection for religious freedom, the Court held, is left to the political process.

By overwhelming bipartisan majorities, Congress responded in 1993 with legislation under its power to "enforce" the provisions of the Fourteenth Amendment (including the Bill of Rights). But the Supreme Court held last year that Congress's Fourteenth Amendment enforcement power does not go so far. In response, Congress is considering more modest legislation that would accomplish much the same objective.

The problem arises from the fact that few infringements on religious freedom in this country result from deliberate bigotry or perse-

some or all clergy positions to men could be forced to hire female priests or ministers. In a case in San Francisco, which prohibits discrimination on the basis of sexual orientation, a church would have been forced to hire an openly gay organist, contrary to its moral teaching. In Maryland officials tried to force a Catholic hospital to provide training in abortions. A Presbyterian church in Washington, D.C., had to go to court when zoning administrators ruled that churches cannot perform their age-old function of feeding the poor if located in residential neighborhoods. Because of religious dietary restrictions, Muslim and Jewish prisoners require special food; Hindu

## *If Eisgruber and Sager are correct, then it is constitutional to recognize a priest-penitent privilege without also recognizing privileges for new*

cution, but occur rather when thoughtless legislators and zealous bureaucrats insist on applying restrictions across the board, without regard to their special consequences for religious practice.

For instance, almost all citizens can be required to give evidence in court if they have information relating to a criminal act. But if applied without exception, this requirement means that information a Roman Catholic priest obtains in the confessional must be divulged in a court, a move that would destroy the confidentiality of a sacrament considered holy by the church. Since the first cases began, in the early 1800s, courts have uniformly recognized that the free exercise of religion requires an exception—the "priest-penitent" privilege—from the otherwise generally applicable requirement to testify.

Another example involved a Seventh-day Adventist denied unemployment compensation benefits because she refused to work on Saturday. Without an exception, based on religious belief, for refusing otherwise suitable work, citizens who observe the Sabbath would be forced to choose between forfeiting benefits or violating their faith.

Absent exceptions, churches that limit

girls sometimes need special gym uniforms in school; and churches of every denomination need exceptions from employment discrimination laws to be able to hire clergy of their own religious faith.

In many cases religious freedom claims can be protected by appealing to legislatures or other political bodies. But as the Supreme Court candidly admitted, small and unpopular churches will be at a "relative disadvantage" if their rights are dependent on the political process. For this reason Congress is attempting to establish a procedure wherein every person or institution whose religious freedom is threatened by "neutral and generally applicable" laws can go to court, and the government will bear the burden of showing that the imposition on religious exercise is necessary to a "compelling" (meaning genuinely important) governmental interest.

Of course, the "compelling state interest" standard doesn't guarantee victory. Because the exercise of religion involves conduct, and conduct affects other people, the government will frequently have a legitimate right to interfere. Religious motivation doesn't justify child sacrifice, scalping, or refusal to pay taxes. But persons of all religions—small as well as large, unfamiliar as well as mainstream—will have an

equal chance to protect their rights before an impartial tribunal. This process, in turn, will make it far more likely that government officials will be willing to work out reasonable accommodations without the need to go to court.

This protection is what the proposed Religious Liberty Protection Act is supposed to reinstate. The bill enjoys widespread support—from the ACLU to the Southern Baptist Convention.

In testimony before the House and Senate Judiciary Committees, however, several constitutional law professors have asserted that under Establishment Clause jurisprudence it is unconstitutional for Congress to protect the rights of

governmental interference under the discrimination laws, then it must similarly exempt labor unions and secular charities from the discrimination laws.

If these results sound outlandish, it is because the constitutional argument is outlandish. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Whatever protection the Free Exercise Clause provides, that protection is applicable only to "religion," and not to moral, political, professional, artistic or creative, or family commitments. "Religion" is singled out for special treatment. If professors Eisgruber and Sager were correct that the First Amendment forbids "singling out" the exercise of religion for special protections that are not given to "the other deep concerns and interests of members of our society," then the First Amendment violates itself.

The decision to single out religion—to treat religion differently from "other deep concerns and interests"—was deliberate. The framers considered a number of different formulations of what is now the First Amendment, some of which protected the "free exercise of religion," and some of which protected the "rights of conscience." Indeed, at one point the House of Representatives adopted a version that would have protected both: "Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."

In dictionaries of the day the word "conscience" applied to secular as well as religious moral judgments. Samuel Johnson's great dictionary defined "conscience" as "[the] knowledge or faculty by which we judge of the goodness or wickedness of ourselves." Noah Webster's first dictionary defined it as "the faculty that decides on the right or wrong of actions in regard to one's self." Had the framers adopted the "liberty of conscience" formula, the First Amendment would have come closer to resembling the Eisgruber-Sager First Amendment. (It would still have been narrower. "Conscience" does not apply to all "deep concerns and interests," but only those rooted in the distinction between right and wrong.)

But the First Congress rejected the "conscience" language in favor of the free exercise of "religion," making clear that the protections of the amendment were applicable to religious commitments only. That did not prevent

*would be unconstitutional  
the law of evidence  
paper reporters.*

religious conviction unless Congress extends similar protections to nonreligious conviction. Professors Chris Eisgruber and Larry Sager, for example, testified that it violates the Establishment Clause for the government to favor religious commitments over "other deep concerns and interests of members of our society," such as "political," "professional," "artistic or creative," and "family" commitments.

If Eisgruber and Sager are correct, then it would be unconstitutional to recognize a priest-penitent privilege in the law of evidence without also recognizing privileges for newspaper reporters. It would mean that it is unconstitutional to excuse Sabbatarians from unemployment compensation requirements (such as willingness to work on Saturday) unless we also excuse workers who wish to spend time with their families. It would mean that prisons cannot provide kosher or hallel meals unless they supply special diets to those who wish to engage in political boycotts of certain foods. Dry counties could not permit the serving of sacramental wine without also allowing alcoholic beverages for "artistic" purposes. If the Equal Employment Opportunity Commission allows churches free rein to choose their priests and ministers on religious grounds, without

Congress or the state legislatures from protecting other forms of conscience as appropriate, but the Constitution itself gives "religion" special protection. James Madison explained the reason:

"The religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. The right is in its nature an unalienable right. . . . It is unalienable also because what is here a right towards men is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of civil society."

This did not—and could not—mean that religious believers are exempt from law. But it did mean, in Madison's words, that a liberal state should make generous provision for the freedom of religion "in every case where it does not trespass on private rights or the public peace."

It was common for the 13 original states, even before passage of the First Amendment, to exempt believers from obligations known to be inconsistent with their religious convictions. The most common forms of accommodation had to do with military service, oath taking, and mandatory tithing. Even in the most desperate hours of the American Revolution, when the fate of the nation depended on its supply of

young soldiers, the Continental Congress exempted religious pacifists (such as Quakers and Anabaptists) from military service, while calling upon them to serve the nation in ways "consistent with their religious principles." As George Washington wrote to the Quakers, "in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness: and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit."

The modern Supreme Court has continued this tradition of religious accommodation. Although in recent years the Court has held that the First Amendment does not create a *legal right* to religious accommodation, it has consistently encouraged legislatures to do so—whether or not other nonreligious concerns and interests are similarly protected. In an important decision called *Corporation of Presiding Bishop v. Amos*, the Court unanimously upheld a federal statute exempting religious organizations from the religious nondiscrimination requirements of the Civil Rights Act. According to the Court, "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious

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missions." Specifically rejecting the constitutional argument now made again at the Religious Liberty Protection Act, the Court stated that "where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities."

In the face of this clear evidence from constitutional text, history, and precedent, opponents of the Religious Liberty Protection Act nonetheless claim that it is "unfair" to protect religious liberty without protecting other concerns. And of course, there are some specific cases where it *would* seem unfair—usually because there is a strong constitutional tradition for protection independent of religious motivation. Most would agree, for example, that parents should have a right to home-school their children, whether for religious reasons or not. That is because most of us believe in a right of parental control over education. Even most supporters of abortion rights would agree that doctors should not be forced to perform abortions, whether their objection is religious or secular. This is because they believe that the status of the fetus is a matter for individual judgment. But these examples should not be generalized into a rule requiring religious accommodations of all sorts to be extended to secular concerns. The state should be able to protect the confidentiality of communications made to a priest or minister without having to extend the privilege to your next-door neighbor.


In its broad form, the claim that religious commitments may not be given special protection overlooks the deep logic of the First Amendment. The religion clause of the First Amendment has two parts: the Free Exercise Clause, which protects religious freedom, and the Establishment Clause, which prevents government support for religion. Those who complain that the Free Exercise Clause singles out religion for special protection rarely note that the Establishment Clause also singles out religion—this time, preventing religious institutions and commitments from receiving governmental advocacy and support. The two halves of the religion clause create a balance.

By the same token, religious concerns would be protected by the Religious Liberty Protection Act while artistic and creative concerns would not. But art can be subsidized through the National Endowment for the Arts. A National Endowment for Religion would—and should—be unconstitu-

tional. Religion is "singled out" in two ways—with respect to burdens *and* with respect to benefits.

That is the logic of the First Amendment. This logic could not be extended to all "other deep concerns and interests of members of our society." Churches would be protected by the Religious Liberty Protection Act and environmentalist groups (for example) would not. But environmentalist groups can go to Congress and obtain passage of environmental legislation. Comparable laws promoting religion would be flatly unconstitutional. Similarly, public schools can—and do—inculcate environmental beliefs and values in schoolchildren, in ways that would be unthinkable for religious beliefs and values.

Government is free to pass legislation promoting or disadvantaging most political, professional, or other interests in our society. That's politics. But government is not free to pass legislation promoting or disadvantaging religion. As nearly as is possible, consistent with its neutral and secular objectives, government should leave decisions about whether and how to practice religion to individuals and groups. The government should neither induce nor penalize the practice of religion.

Critics of the Religious Liberty Protection Act would preserve the Establishment Clause limits on the power of government to promote religion, while rejecting the Free Exercise Clause limits on the power of government to burden religion. This would produce a lopsided, antireligious constitutional regime wholly unlike the benevolent neutrality toward religion envisioned by the framers. From the beginning this nation has recognized that each person's duty to God is a matter committed to his or her own conscience. Religion is exempt from the power of civil society except when interference is necessary to protect "private rights or the public peace." From the beginning, therefore, the states and the federal government have found ways to accommodate the free exercise of religion, insofar as "the protection and essential interests of the nation may justify and permit." The Religious Liberty Protection Act stands in this great tradition, protecting religious freedom from government imposed burdens unless the government can show those burdens serve a compelling interest. The suggestion that protections for religious conscience can go no further than protections for political or professional concerns is contrary to a constitutional understanding as old as the nation itself. 

Thanks very much, Shari.

Barbara

Shari Kochman wrote:

law will be doing an updated note. it will remain indeterminate; but the analysis will be updated

Barbara Cotting wrote:

- > Hi Shari,
- >
- > I have scheduled HB 387 (HES) for hearing next Tuesday, March 28. Will
- > I need an updated fiscal note for the HES CS, or is the original one OK?
- >
- > Barbara

Re: fiscal note

**Subject: Re: fiscal note**

**Date:** Thu, 23 Mar 2000 15:04:22 -0900

**From:** Shari Kochman <shari\_kochman@gov.state.ak.us>

**Organization:** Alaska Office of the Governor

**To:** Barbara Cotting <Barbara\_Cotting@legis.state.ak.us>

**CC:** Joan M Kasson <joan\_kasson@law.state.ak.us>

i think the original note from law can still apply.  
joan -- do you agree?

Barbara Cotting wrote:

> *Hi Shari,*

>

> *I have scheduled HB 387 (HES) for hearing next Tuesday, March 28. Will*

> *I need an updated fiscal note for the HES CS, or is the original one OK?*

>

> *Barbara*

Questions and Answers about

# State Religious Freedom Acts



Council on Religious Freedom  
Nicholas P. Miller, Esq.

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# What Are State Religious Freedom Acts?

State Religious Freedom Restoration Acts (State RFRAs) are a response to the recent significant loss of religious liberty protection at the federal level. State RFRAs are laws passed by state legislatures that restore the historic standard protecting religious freedom known as the "compelling state interest test." In short, this standard requires that any state law or action that inhibits the religious freedom or belief of any person be justified by showing that that law or action is needed to further or protect a "compelling state interest."<sup>1</sup>

Such interests would include the protection of the life, liberty, property and health of others, and similarly strong community interests. The test also generally requires that the state show that there are no other reasonable ways of protecting this interest that do not conflict with someone's religious convictions. This is sometimes referred to as the "least restrictive means" prong of the "compelling state interest test."<sup>2</sup>

In 1998 alone, more than twenty of these bills were introduced in as many states across the country. These bills became law in three states, Florida, Alabama and Illinois.

## Doesn't the U.S. Constitution Already Protect Our Religious Liberty?

No, not like it used to anyway. In the last ten years the U.S. Supreme Court has greatly diminished the strength of the religious guarantees of the First Amendment to the U.S. Constitution.

Prior to 1990, the First Amendment was interpreted to give protection to religious belief and conduct in all cases where such belief or conduct was not outweighed by some compelling government interest in protecting life, liberty, property or some other similarly weighty community concern.<sup>3</sup> But in the 1990 case of *Employment Division v. Smith*,<sup>4</sup> the Court decided that the First Amendment should, in most instances, only provide protection if a

law or regulation was explicitly targeted at some religious group or practice.

To illustrate: Under the Court's reasoning a law specifically forbidding orthodox Jews from wearing yarmulkes on government property would be unconstitutional. However, if the law forbade all people from wearing hats on state property, it would be constitutional, even though such a law would require orthodox Jews to violate either their consciences or the law to walk on government property. In this latter case, because the law was "neutral" towards religion and "generally applicable" to all persons, the First Amendment would remain mute.

As most difficulties faced by minority religions are caused by legislative ignorance or insensitivity and not by open malice, religious minorities were dealt a severe blow by the *Smith* decision. As the Harvard Law Review put it, this decision effectively "eviscerated" and "gutted" the Free Exercise Clause of the First Amendment.<sup>5</sup>

## Wasn't There A Federal Religious Freedom Restoration Act?

Yes. But it no longer applies to state laws and actions. In response to the drastic change in the law described above, a national Coalition for the Free Exercise of Religion was formed. It was made up of uncommon bedfellows that included more than sixty Jewish, Muslim, Christian and secular civil rights groups. This diverse group urged the passage of a federal statute restoring the old First Amendment compelling state interest standard.

With unlikely allies such as the Christian Legal Society, the ACLU and People for the American Way all supporting it, The Religious Freedom Restoration Act, or RFRA, was passed by a virtually unanimous Congress in 1993. But the Supreme Court had the last word. In June of 1997 in the case of *City of Boerne v. Flores*,<sup>6</sup> the Court declared that RFRA was an unconstitutional exercise of Congressional power, insofar as it applied to the states.

In *Boerne*, the Court said that the federal RFRA violated the principle of separation of powers between the legislative and judicial branches and was also an infringement on the "traditional prerogative and general authority" of the states.<sup>7</sup> The "free-exercise" coalition took the Court at its word. It turned its attention to bringing the traditional authority of the states to bear on the problem of protecting religious freedom through the vehicle of state RFRAs.

The coalition is also seeking replacement federal legislation for the defunct federal RFRA, but given the present legal and political barriers, it is unlikely that any such substitute will be adequate. Thus, there is still a great need to continue to move ahead on the state front.

## **B**ut as a Practical Matter, Do We Really Need State RFRAs?

Yes. In most places, anyway. A few states have strong protection provided by their state constitutions, and a few others already have a state RFRA. But the majority of states do not have adequate safeguards. Unless your state is one of the following, you are in need of a state RFRA: Alabama, Connecticut, Florida, Illinois, Kansas, Massachusetts, Michigan, Minnesota, Rhode Island, Washington and Wisconsin.<sup>8</sup>

Some ask this question at a less legal, more practical level, and wonder if there is actually a real world need for state RFRAs. Most of us are not daily confronted with overt religious discrimination. But this is not proof that some faith groups, especially minority ones, are not experiencing real difficulties. Virtually by definition, the problems of minority groups do not impact most of us most of the time. But stories of mistreatment of minority faiths are growing, and include Orthodox Jewish home churches closed down by zoning laws, Mormon groups zoned out of whole towns, church soup kitchens closed and prisoners denied the observance of their holy days.<sup>9</sup>

Further, because a legal protection exists in the abstract, its

sudden absence may not be immediately noticed. This is especially true for a right that is generally held with regard and respect by society at large. The widespread, though arguably shallow, esteem for religious freedom found in America may serve to temporarily restrain religious discrimination. But history shows that during times of social or economic crisis, religious minorities often serve as scapegoats and targets for the discontent of the majority. If we wait until such a dark day arrives before we restore religious freedom, we will have waited too long.

## Who Opposes State RFRA's and Why?

Some opposition to state RFRA's arises from the bureaucratic self-interest of certain state and local agencies that do not want to "hassle" with the religious convictions of the citizens they serve. Among these groups are some correctional agencies, zoning and land use boards, associations of county attorneys and the occasional state attorney general.

In fairness, these groups are generally well intended, and view themselves as safeguarding the time and resources of their agencies. However, they overlook the fact that the RFRA protection they oppose was in operation for several decades prior to 1990, and did not impose unreasonable burdens on their offices and staffs. If this historical fact is pointed out, opposition from these groups can often be muted. The substance of the concerns raised by these groups, such as a feared "prisoner litigation explosion" and rampant church zoning violations, are dealt with in greater detail in later questions.

Certain portions of the civil rights community, most notably the gay lobby, have begun to take an active role in opposing state RFRA's. They fear that state RFRA's may be used by religious landlords and employers to deny housing or employment to persons based on marital status or sexual orientation. This issue has caused at least one civil liberties group, the ACLU, to reassess its support of RFRA's and in some instances to oppose these bills.

The discrimination concerns voiced by these groups overlooks the fact that RFRA's do not create a certain, or even presumptive, victory for religious landlords or employers in a contest with gay or unmarried couple applicants. Rather, a state RFRA would restore balance to an arena in which the rights of privacy, association and religion sometimes compete.

On the other hand, the choice not to pass a state RFRA will mean that, in some states, the right to choose and flaunt alternate moral lifestyles, no matter what the forum, will always triumph over the rights of personal religious conviction. Supporters of state RFRA's are merely requesting that religious freedom be given its place back among the pantheon of fundamental rights, without determining ahead of time what result would be achieved in a balancing of those rights. (For a further discussion of this issue, see "Will State RFRA's Cancel Other Civil Rights Laws?" below.)

## Will State RFRA's Cause An Explosion Of Prison Litigation?<sup>10</sup>

No. History indicates that no such explosion will take place. A state RFRA creates no further opportunities for prisoner suits beyond those found under the federal RFRA during its period of operation from 1993 to 1997. A review of the statistics during that period indicates that while there may be some marginal increase of prisoner litigation under a state RFRA, the increase will be very small in real numbers.

What increase there may be will have minimal impact against the larger background of shifts in prisoner litigation generally. Further, there are no cases that can be pointed to during this period where a court granted an inmate a religious right that threatened the security or operations of a correctional facility.

At its height, the federal RFRA only produced an increase in reported prisoner religious freedom decisions, in both state and federal court, by an average of about 1.5 cases per state per year. (Numbers went from about 1.5 per state in 1993 to about 3 per state in 1996) The state attorney generals' own reported data show

that RFRA caused an increase of only about 3.5 prisoner religious freedom filings per year per state.<sup>11</sup> Both of these numbers are insignificant compared to the large volume of other prisoner lawsuits brought every year during this same period, more than 4,000 per state.

Federal legislation was passed in 1996 to curtail frivolous suits brought by prisoners (the Prison Litigation Reform Act). This is the right way to deal with excessive prisoner lawsuits, rather than exempting them, as some would attempt, from RFRA legislation. While state RFRA's will have a very minor affect on prisoner litigation, in terms of number of cases, it will be vital in allowing genuine claims for religious freedom by prisoners to be vindicated.

Prisoners are the most highly regulated and controlled segment of society. But this control does not legitimately extend to all matters of the soul and spirit. Prisoners may lose their physical freedom, but not their humanity. Their duties before God must receive a reasonable regard from society. State RFRA's would ensure no more than this.

## Will State RFRA's Allow Churches to Ignore Land Use and Zoning Regulations?

No, but frequently land use rules are used as a tool to target unpopular religious activity. Pastor Wiley Drake and the First Southern Baptist Church in Buena Park, California, run a welfare and rehabilitation program for the neighborhood homeless.<sup>12</sup> Concerned by the "undesirable element" this program attracted, city leaders asked Pastor Drake to end his church's ministry to the poor. When the church continued its mission of mercy, both the church and Pastor Drake were charged with eleven criminal counts of land use violation.

Pastor Drake and the church were convicted of four of these misdemeanor charges. No charge had to do with safety or health issues, but they all hinged on whether the religious facilities were put to an appropriate "use." The city would not accept that to feed

the hungry and to shelter the homeless was a proper religious use. Pastor Drake faced possible fines and jail time, but in the end was sentenced, appropriately enough, to 1500 hours of community service. His church was placed on three years probation, with periodic police inspections to monitor its activity.

While Pastor Drake's experience is a dramatic example of the use of land use laws to discriminate against religion, the practice is widespread. In almost all states, zoning and land use regulations are used by local governments to prevent the expansion of a church, or to keep unwanted churches out of certain neighborhoods or even entire cities. Not surprisingly, it is minority religions that bear the brunt of the regulatory burden.

In a recent study, it was shown that small religious groups (those with 1.5% of the population or less), which as a group represent only 9% of the population, were involved in over 49% of the cases seeking to build a religious structure.<sup>13</sup> These figures show that minority religions have a much harder time obtaining approval for construction of a house of worship than do majority religions.

A state RFRA would not force local governments to allow churches to be built anywhere or to remove all limits on the use of church property. A church or synagogue or mosque would still be bound by regulations related to fire and structural safety. But a state RFRA would ensure that the state only took into account legitimate public health, welfare and safety considerations in enforcing its zoning regulations against a religious body. Such a law would protect minority religions from discriminatory zoning practices and procedures, and would also protect churches and their ministers from the kind of targeted regulatory persecution experienced by Pastor Wiley Drake and his church.

## **W**ill State RFRAs Cancel Other Civil Rights Laws?<sup>14</sup>

Some have raised the concern that state RFRAs will somehow undermine anti-discrimination laws. This is simply not true. The

U.S. Supreme Court, under the First Amendment's old compelling interest standard, held that claims of religious conviction would not override the government's interest in preventing private acts of racial discrimination. The leading case on this issue is *Bob Jones University v. United States*,<sup>15</sup> where the Court upheld the IRS's denial of tax exemption to the University because of its racially discriminatory policies. This and other federal court decisions have made it apparent that overcoming racial discrimination, even when practiced by private church-related schools, is a government interest certain to outweigh virtually any religiously based claim.<sup>16</sup>

The outcome may be less certain when non-racial characteristics are the basis of religiously motivated discrimination, such as gender or sexual orientation or marital status. However, even these interests have been found by some courts to override religiously based employment or housing choices.<sup>17</sup> Other courts have held differently, protecting the freedom of choice of the landlord or employer with religious scruples in declining to rent to or hire persons on the basis of their moral behavior.<sup>18</sup>

The lesson from this is that each instance will likely require its own weighing of the facts and circumstances. A devout widow who rents the apartment over her garage or who is a live-in landlord at a four unit complex may be protected in her conviction that she does not want to facilitate and live around immoral conduct. However, the claim of an absentee religious landlord who owns a forty-unit facility will probably come out differently, with the balance tipping in favor of the privacy and associational rights of the renters.

While most people agree that anti-discrimination laws protect important and even fundamental rights, almost all people agree that religious liberty is also a fundamental right. For many years courts have developed a body of law to deal fairly with conflicts between and among individual and societal rights. Those complaining that state RFRA's will skew the balance of civil rights in favor of religion overlook the fact that the status quo is profoundly skewed against religion. State RFRA's are merely an attempt to restore balance to a system that has lost its equilibrium.

## Will State RFRA's Disrupt the School System?<sup>19</sup>

No. A state RFRA could provide religious students in a public school the right to form student religious and Bible clubs, the ability to opt-out of some types of objectionable curriculum, the option to wear religious clothing or ornamentation and the right to have their holy days or religious holidays respected in the scheduling of classes and exams. Any argument that any or all of these claims would prove disruptive to America's educational system is undermined by the fact that in the decades prior to 1990 these claims did have legal protection and this protection did not undermine the public school system.

The above types of claims could not be made against private schools because a RFRA only protects against the actions of the state. However, a state RFRA would provide some protection to private religious and home schools against intrusive government regulation. But these entities, especially the latter, are already protected in most states by state legislation or regulation. In most instances, state RFRA's would not add much beyond existing protections for home schools. But it would provide a back up if the existing protections were altered, and would of course be useful in bolstering claims in those states where legislative protections are weak or non-existent.

It should be noted that a state RFRA would not add to the ability of religious schools to attempt to claim a right to state funds. The rule that prevents state funds from being given to parochial schools is based on the Establishment Clause of the First Amendment to the Constitution. A state statute, which a state RFRA would be, cannot override the provisions of the federal Constitution. Thus, a state RFRA would leave this element of the Establishment Clause untouched.

## Are State RFRA's Constitutional?<sup>20</sup>

As state RFRA's are nearly identical to the failed federal RFRA, might not they suffer from the constitutional problems found in the

federal bill? The answer is no, and is based on a fundamental difference between the authority of state and federal governments. As high school civics students learn, the federal government is one of limited and express powers. In other words, its authority is limited to those powers expressly delegated to it by the Constitution.

All other powers of governing, also known as the broad police power of the state, are expressly recognized by the Tenth Amendment of the Constitution to reside in state governments. These police powers held by state governments are generally understood to be as broad and expansive as the needs of the community, being only limited by constitutional guidelines such as state and federal bills of rights.

In the *Boerne* decision, the Supreme Court said that the U.S. Congress had exceeded its express powers in protecting religious freedom beyond the level required by the First and Fourteenth Amendments. However, in light of the Tenth Amendment and their own inherent police powers, state governments can, and frequently do, create substantive legal rights to protect their citizens beyond those found in their own state constitutions. As long as a state RFRA is worded in a way that makes it apparent that the state legislature is creating a new, substantive right, and not merely telling the courts how to interpret the state constitution, then there will be no separation of powers problem.

At times the claim is made that state RFRA's violate the federal Establishment Clause because they have the purpose and affect of advancing religion. This argument has only garnered the support of a single Supreme Court Justice. It ignores the fact that the compelling state interest test was applied in protecting religion for nearly fifty years prior to 1990, and the Supreme Court never ruled that this was a violation of the Establishment Clause.<sup>21</sup>

The existence of the Free Exercise Clause, which especially protects religion, shows that the founders envisioned the Establishment clause as allowing the special protection and treatment of religion vis a vis secular ideologies and groups. Perhaps the most telling point against the Establishment Clause objection is that the accommodation of religion is not the same as the advancement of

religion. The act of a state lifting a regulatory burden that it has placed upon religion is not the same thing as a state singling out religion for favor, advancement or support. Rather, such an accommodation is merely recognition by the state that its initial regulatory burden intruded beyond the limits of the state's jurisdiction.

## Should Churches, Synagogues, Mosques and Other Religious Groups Become Involved in Supporting State RFRA's?

Yes. While religious organizations are legally forbidden from endorsing individual candidates for political office, such groups can support legislation, as long as such support is an "insubstantial" part of their activities. "Insubstantial" is understood to mean less than five percent of total budget expenditures. As most churches and other religious groups spend most of their time in worship, scripture study, education and community welfare programs, they are generally safe in supporting the occasional bill or legislative proposal.

A state RFRA is just the type of legislation that a religious group should involve itself with, as these bills go to the heart of a religious organization's ability to carry out its religious missions and functions free from government interference. Safeguarding the individual conscience is a precept found, in one form or another, in the traditions of many of the world's great religions, including the Jewish, Christian and Islamic faiths. The advocacy of state RFRA's can be an opportunity for religious groups to share their views about the importance of personal and spiritual freedom in their respective traditions.

The Council on Religious Freedom has a philosophy based on the Protestant Christian tradition. We view state RFRA's as an embodiment of one of the pillars of the Protestant Reformation, the freedom of the human conscience before God. German princes who supported Martin Luther articulated this key precept at the Diet of Spire when they "protested" an edict of the emperor by declaiming that in matters of conscience, "the majority have no power."<sup>22</sup> This belief grew out of a view of a God of great love and

mercy, who in His desire to have a voluntary relationship of love with His creation refuses to coerce any man or woman to receive His grace or obey Him. If God Himself extends this freedom to us, how can the state do any less? We believe that state RFRAs embody this great historic truth of God and humanity, and that these bills deserve the attention of religious people everywhere.

## ENDNOTES

<sup>1</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *McDaniel v. Paty*, 435 U.S. 618 (1978); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987).

<sup>2</sup> Despite recent claims to the contrary, the "least restrictive means" prong of the compelling interest test was firmly embedded in Supreme Court jurisprudence prior to 1990. *Thomas v. Review Board*, 450 U.S. 707, 718 (1981) (Test is whether intrusion on religious conduct "is the least restrictive means of achieving some compelling state interest."); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) (State must "demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.")

<sup>3</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963) (Sabbath-keeper's convictions protected); *McDaniel v. Paty*, 435 U.S. 618 (1978) (State cannot inquire into religious belief as condition of employment); *Thomas v. Review Board*, 450 U.S. 707 (1981) (Jehovah's witness protected in conviction against making war materials); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (Employee protected in observing holy days even when conversion occurred after hiring); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish protected in conviction re need to educate children at home after age of 14).

<sup>4</sup> 494 U.S. 872 (1990).

<sup>5</sup> 104 *Harr. L. Rev.* 204 (1990).

<sup>6</sup> 117 S. Ct. 2157; 138 L.Ed. 2d 624 (1997).

<sup>7</sup> *Id.*, 138 L.Ed. 2d 624 at 648 (1997).

<sup>8</sup> This list loses its currency at the time of printing. To get an up-to-date list of states with sufficient protections, visit the Council on Religious Freedom's web page at [www.c-r-f.org](http://www.c-r-f.org) and look at the "Freedom: State by State" page.

<sup>9</sup> These and other stories were reported at the "Restoring Religious Freedom in the States" conference sponsored by the Council on Religious Freedom at Georgetown University on January 28-29, 1999. A summary of the panel where these issues was discussed can be obtained from the Council, or found published in the 1999 Spring Symposium issue of *U.C. Davis Law Review* Vol. 32, No. 3. While these stories can help illuminate the problem, there is nothing like a local example to help focus the minds of state civil and political leaders on the problem. Files of like incidents should be collected in each locality where a state RFRAs is being considered.

<sup>10</sup> Much of the material for this section comes from Boothby, Miller "Prisoner Claims for Religious Freedom and State RFRAs," 32 *U.C. Davis Law Rev.* (forthcoming 1999).

<sup>11</sup> The number of cases filed is always more than cases with reported decisions, as many cases, especially those filed by prisoners, are often disposed of summarily with no written opinion.

<sup>12</sup> Pastor Drake's story has been reported in a number of newspaper articles including, 'Haunted by Memory, Pastor Defends the Homeless,' *The New York Times*, Friday, August 22, 1997, A14; 'Drakes Shelter Keeps Growing,' *The Orange County*

Register, Tuesday, November 18, 1997, Metro 1.

<sup>11</sup> The report, entitled "Discrimination Against Minority Churches in Zoning Cases," was prepared by a group spearheaded by Professor Cole Durham, Jr. of Brigham Young University's J. Reuben Clark Law School in conjunction with the law firm of Mayer, Brown & Platt in Chicago. Copies are available from the offices of the Council on Religious Freedom.

<sup>14</sup> Material from this section was drawn from O'Neil "Religious Freedom and Non-Discrimination: State RFRA Laws Versus Civil Rights," 32 *U.C. Davis Law Rev.* (forthcoming 1999). Those wishing to benefit from a more in depth analysis of this issues are directed to this paper.

<sup>15</sup> 461 U.S. 574 (1983).

<sup>16</sup> *Brown v. Dade Christian Schools*, 556 F.2d 310 (5<sup>th</sup> Cir. 1977).

<sup>17</sup> *McCready v. Hoffius*, 459 Mich. 131; 586 N.W. 2d 723 (1998); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Ak. 1994); *Smith v. Fair Employment and Housing Comm'n*, 12 Cal. 4<sup>th</sup> 1143; 913 P.2d 909 (1996).

<sup>18</sup> *State v. French*, 460 N.W.2d 2 (Minn. 1990); *Thomas v. Anchorage Equal Rights Comm'n*, 1999 U.S. App. LEXIS 440 (9<sup>th</sup> Cir. 1999).

<sup>19</sup> Materials for this section were taken from Berg, "State Religious Freedom Statutes in Private and Public Education," 32 *U.C. Davis Law Rev.* (forthcoming 1999).

<sup>20</sup> Materials for this section were taken from Chemerinsky, "Do State Religious Freedom Restoration Acts Violate the Establishment Clause or Separation of Powers?" 32 *U.C. Davis Law Rev.* (forthcoming 1999).

<sup>21</sup> To the contrary, the Court considered this claim and explicitly rejected it. *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.")

<sup>22</sup> It was actually from this "protest" that the Protestant movement took its name. The full story is reported in J.H. Merle D'Aubigne, *History of the Reformation*, b. 13, ch. 5, 517-520 at 519 (Baker Book House, Grand Rapids, 1st Ed. 1846; Rpted. 1987).

## Council on Religious Freedom

For nearly 15 years, the Council on Religious Freedom has been an advocate for the free exercise rights of all Americans. Through education and legal advocacy, the Council strives to communicate the rights and responsibilities contained in the religious clauses of the First Amendment to the U.S. Constitution. Nicholas Miller, Executive Director of the Council, is a civil rights attorney who has spoken and written widely on First Amendment issues.

# Do you have religious liberty protection in your state?

Legal protection of our religious rights is something that's easy to take for granted – until it's gone. Many Americans still don't know that the level of free exercise protection in the United States is substantially less now than it was in 1990. What does this mean for your church, your community, your family? This book explains what state Religious Freedom Restoration Acts are and how they can increase the level of religious freedom protection in your state.

"As we begin a new millennium," says the author Nicholas Miller, "restoring the proper relationship between religion and the state will be one of our greatest challenges. And the role that ordinary Americans play will be crucial."

## REVIEWERS' COMMENTS

"... a helpful primer on ... state religious freedom bills and why they are needed. ... chock full of information, but easily understood by a layperson. No religious liberty activist should enter the statehouse without it."

*J. Brent Walker, Chief Counsel, Baptist Joint Committee, and co-chair of the Coalition for the Free Exercise of Religion.*

"In plain but accurate terms, CRF has defined what should be at the top of the legislative agenda for most states. This is a compelling call to action on behalf of our First Freedom."

*Steven T. McFarland, Director of the Center for Law and Religious Freedom, Christian Legal Society.*

COUNCIL ON RELIGIOUS

*Freedom*

Council on Religious Freedom  
110 N. Washington St., Suite 404  
Rockville, MD 20850

Phone (888) 590-8766 or (301) 294-8766  
Fax (301) 294-8909  
Email: [freedom@c-r-f.org](mailto:freedom@c-r-f.org)  
Website: [www.c-r-f.org](http://www.c-r-f.org)

# FISCAL NOTE

STATE OF ALASKA  
2000 LEGISLATIVE SESSION

BILL NO. CSHB 387 (HES)

Revision Date/Time (Note if correction) \_\_\_\_\_ Dept. Affected All  
 Title "An Act requiring governmental entities, .... before BRU  
placing a substantial burden on a person's free exercise of religion Component \_\_\_\_\_  
 Sponsor Representative Croft  
 Requester House State Affairs Committee 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						
<b>TOTAL OPERATING</b>	*****	*****	*****	*****	*****	*****

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

FUND SOURCE	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
<b>TOTAL</b>	*****	*****	*****	*****	*****	*****

Estimate of any current year (FY2000) cost: \_\_\_\_\_

**POSITIONS**

POSITIONS	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Full-time						
Part-time						
Temporary						

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

CSHB 387 (HES) prohibits a school board or school district, a municipality, or a state agency from placing a substantial burden on a person's free exercise of religion unless the burden is in the form of a rule of general applicability and does not intentionally discriminate against religion or among religions, and application of the burden is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental 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 "appropriate relief."

Prepared by: Joan M. Kasson *Joan M. Kasson*  
 Division Attorney General's Office  
 Approved by Commissioner *Bruce M. Botelho* Bruce M. Botelho, Attorney General  
 Agency Department of Law

Phone 465-5370  
 Date/Time 3/29/00, 9:33 AM  
 Date 3/29/00

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## FISCAL NOTE

STATE OF ALASKA  
2000 LEGISLATIVE SESSION

BILL NO. CSHB 387 (HES)

### ANALYSIS CONTINUATION

The Department of Law is unable to quantify the increased costs to the state that are likely to arise from passage of this legislation, but anticipates they will occur in the following areas:

**Increased prisoner litigation:** Prisoners are a very litigious group, and it is not unusual for them to "find religion" while incarcerated, and claim those beliefs are connected to a new or traditional religion. The inmates then wish to engage in religious practices or rituals that can cause serious security and administrative problems. Passage of this legislation will provide them with a new state remedy to pursue this type of litigation and experience indicates they will do so.

**Increased time to defend cases:** This bill potentially alters the standard the state must meet to justify the burden on an individual's religion. The state must show a compelling governmental interest, and use the least restrictive means when it substantially burdens religion. This is the most demanding test known in constitutional law. Cases will be more difficult to defend, requiring more legal resources.

**Employee accommodation costs:** This bill would apply to the state as an employer. The high standard of compelling governmental interest could require the state to provide more accommodation for employees' religious beliefs. These accommodations may come at a financial cost.

**Damages:** Under existing law, individuals who sue the state claiming their right to free exercise of religion has been infringed cannot seek damages from the state and have only limited ability to get damages from state officials under federal law. This bill may create a new civil action for damages, because damages are not specifically excluded from the appropriate relief the court may award. 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.

# FISCAL NOTE

Bill Version: HB 387

(H) Publish Date: 3/3/00

**STATE OF ALASKA  
2000 LEGISLATIVE SESSION**

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						
<b>TOTAL OPERATING</b>	*****	*****	*****	*****	*****	*****

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE (Thousands of Dollars)**

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

Estimate of any current year (FY2000) cost: \_\_\_\_\_

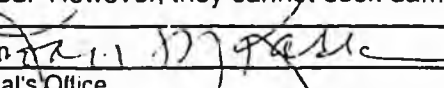
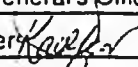
**POSITIONS**

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

Prepared by: Joan M. Kasson  Phone 465-5370  
 Division Attorney General's Office Date/Time 3/1/00, 3:13 PM  
 Approved by Commissioner  Bruce M. Boletho, Attorney General Date 3/1/00  
 Agency Department of Law

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FISCAL NOTE

STATE OF ALASKA  
2000 LEGISLATIVE SESSION

BILL NO. HB 387

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.