HB 195

Alaska State Legislature

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REPRESENTATIVE FRED DYSON

MEMORANDUM

March 22, 2001

To: Representative Coghill Chair
State Affairs

From: Fred Dyson
State Representative

RE: Request for consideration of HB 195

HB 195 protects our Constitutionally given Freedom of Religion by inserting the long-standing "compelling interest" standard into statute so the judicial system cannot easily introduce a new direction.

I respectfully request that you schedule it for public hearing at your earliest convenience. Thank you.

FACSIMILE TRANSMISSION FROM THE
ALASKA CIVIL LIBERTIES UNION FOUNDATION

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TO: Rep. Coghill FAX NO: 465-3258

WITH: House State Affairs Committee

FROM: Jennifer Redinger DATE: ~~4-9-01~~ 4-10-01

NO. PAGES IN TRANSMISSION(INCLUDING COVER SHEET): 32

NOTES: Please distribute to House State Affairs Committee prior to Tuesday morning meeting.

I will testify on HB [redacted] 195.

Thank you!

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Alaska Civil Liberties Union

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To: House State Affairs Committee
From: Jennifer Rudinger, Executive Director
Date: April 10, 2001
Re: HB 195 ("ARFPA")

Enclosed please find the following materials, to be included in the State Affairs Committee's bill packets for HB 195, ***in addition to this cover sheet:***

(1.) 1-page summary of amendments suggested by AkCLU

(2.) 12-page AkCLU position paper on HB 195

(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 then-Texas 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 will testify via teleconference from Anchorage on HB 195 in the House State Affairs Committee at 8:00 a.m., Tuesday, April 10th, and I thank the Committee for allowing me to address our proposed amendments. Please feel free to call me at (907) 258-0044 if I may be of further assistance.

Sincerely,

Jennifer Rudinger

Alaska Civil Liberties Union

To: House State Affairs Committee
From: Jennifer Rudinger, Executive Director
Date: April 10, 2001

Re: Summary of Proposed Amendments Submitted re: HB 195 ("ARFPA")

The AkCLU proposes the following **four amendments** to clarify the intent of HB 195 and to protect religious freedom at the same time as HB 195 protects the rights (including the *religious* rights) of others.

(1.) **Delete "individual rights of a third party" on Page 2, line 27, and insert "rights of others by a person claiming a religious exemption to a law. This section does not establish or eliminate a defense to a civil action or criminal prosecution under a federal, state or local anti-discrimination law."**

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

(2.) **Insert the modifier "substantial" before the word "burden" on Page 2, line 19 and in the bill title, Page 1, line 1.**

HB 195 states that a government entity "may not place a burden on a person's free exercise of religion..." (Emphasis added.) Our concern is that "burden" may be read very broadly to include any level of restriction, no matter how minor its impact on the free exercise of religion. The proposed federal RLPA used a different standard. The proposed federal RLPA provided in relevant part that "a [state or local] government shall not substantially burden a person's religious exercise..." (emphasis added).

(3.) **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."**

We have some great qualms about the wording of Section (4) in the legislative findings. We think that the intent of (4) is to protect against discrimination, but 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.

(4.) **We respectfully urge the deletion of "with clear and convincing evidence" on Page 2, line 21.** This evidentiary standard may actually drive up the costs of this type of litigation by forcing an evidentiary hearing.

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

Presented by Jennifer Rudinger, AkCLU Executive Director
April 10, 2001

I. INTRODUCTION

Mr. Chairman and members of the Committee,

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

Thus, the AkCLU respectfully urges the Committee to refrain from passing House Bill 195 (Alaska Religious Freedom Protection Act, or "ARFPA") unless it is amended to clarify its apparent intent that the exercise of an individual's religious freedom will have no adverse consequences on the rights of others. We offer several amendments, described below, to prevent any unintended adverse consequences. For the past decade, the ACLU has fought in Congress and the courts to preserve or restore the highest level of constitutional protection for claims of religious exercise. We have directly represented persons asserting burdens on their religious beliefs, filed *amicus* briefs with the Supreme Court, and were founding members of the coalition that supported the Religious Freedom Restoration Act in 1993, and the Religious Liberty Protection Act ("RLPA") during most of the Congress in which it was introduced.

However, we stopped 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 those in the Alaska Legislature who believe 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 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.

Then, last year, Congress passed a federal law called the Religious Land Use and Institutionalized Persons Act (RLUIPA) that the ACLU and more than 60 groups supported, and that President Clinton signed into law. Some of the concerns raised in testimony in last Thursday's hearing on HB 195 in the Alaska House State Affairs Committee (i.e. a rabbi who was told he could not hold services in his garage) are exactly the types of concerns protected by the new RLUIPA. This new federal law is basically a narrow version of the original Religious Liberty Protection Act that covers the two biggest areas in which religious liberty and generally applicable public laws butt heads: zoning/land use and people in state facilities (hospitals, prisons, group homes). At the same time, the RLUIPA does NOT provide religious exemptions from other types of generally applicable laws like anti-discrimination laws.

An improperly drafted Alaska statute could jeopardize more than marital status protection. Some courts' analyses call into question all state and local civil rights laws that 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. If legislation such as unamended HB 195 becomes law, an applicant for a job or housing may have no state or local law protection against having to answer questions such as: Is that your spouse? Are those your children? Are you 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, then-Texas Governor George W. Bush signed into law – only a year and a half ago – a state RFRA that protects Texas' civil rights laws. In Congress, the ACLU and many other groups supported a civil rights amendment to RLPA offered by Congressman Nadler that would have had a similar result.

The AkCLU very much appreciates your willingness to consider these concerns as you consider HB 195. We believe that members of the legislature who justifiably care deeply about protecting both religious exercise and state and local civil rights laws should not be forced to choose. It is a false choice because both goals can be made compatible. We hope to work with members of the Committee to resolve this problem. Thank you once again for this opportunity to present our concerns.

II. SCOPE OF THE POTENTIAL PROBLEM

This Committee is presently considering HB 195, the Alaska Religious Freedom Protection Act ("ARFPA"), which would provide extensive statutory protection for religious exercise to replace or enhance the constitutional protection previously afforded religious exercise prior to a 1990 Supreme Court decision that lowered the standard of review for religious exercise claims. HB 195 provides, in relevant part, that:

> A governmental entity may burden a person's free exercise of religion only if (1.) the governmental entity demonstrates by clear and convincing evidence that (2.) application of the burden to the person is essential to further a compelling governmental interest and (3.) 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 introduced, HB 195 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. An original panel of the U.S. Court of Appeals for the Ninth Circuit and four state supreme courts have recently decided five cases with nearly identical fact patterns, namely, landlords claiming that their religious beliefs defeat housing discrimination claims brought by unmarried heterosexual persons based on marital status.[1] The decisions were split, with the original Ninth Circuit (opinion was later vacated on other grounds) and the Massachusetts and Minnesota courts holding that a religious liberty defense could defeat civil rights claims based on state or local laws. The courts could apply the reasoning in those decisions to civil rights claims made by members of other groups that also receive less protection from the courts and the federal government. Although the Alaska Supreme Court in *Swanner* upheld the anti-discrimination laws in the context of marital status, it is unclear whether the court's reasoning would extend to other types of civil rights claims.

The intent of at least some of the supporters of federal RLPA was 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 Alaska RFPA and federal RLPA religious exercise standard, numerous courts have recently decided cases in which defendants raised a religious liberty defense to civil rights claims based on state or local laws protecting against discrimination in housing based on marital status. *See Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692 (9th Cir. 1999) (governmental interest in preventing marital status discrimination was not compelling), later vacated for lack of a justiciable case or controversy; *Smith v. Fair Employment & Housing Comm'n*, 913 P.2d 909 (Cal. 1996) [hereinafter *"Smith v. FEHC"*] (no substantial burden on religious exercise found); *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (remanding for further consideration of whether the governmental interest in eliminating discrimination based on marital status was compelling and whether uniform application of the state anti-discrimination law was the least restrictive means); *Swanner, d/b/a Whitehall Properties v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska), *cert. denied*, 115 S. Ct. 460 (1994) (the government's interest in providing equal access to housing was compelling and uniform application of the state anti-discrimination

law was the least restrictive means); *Cooper v. French*, 460 N.W.2d 2 (Minn. 1990) ("marital status" did not include unmarried cohabiting couples; a plurality of the court also found no compelling governmental interest in preventing marital status discrimination). Thus, in the Ninth Circuit and Massachusetts and Minnesota, defendants may successfully use their religious beliefs to defeat at least certain civil rights claims based on state or local laws.

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

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

Prior to the Supreme Court lowering the standard of review for religious liberty claims in *Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990), 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 FIVE-PART ALASKA RFPA TEST TO CIVIL RIGHTS CLAIMS

HB 195 provides, in relevant part, that:

> A governmental entity may burden a person's free exercise of religion only if (1.) the governmental entity demonstrates by clear and convincing evidence that (2.) application of the burden to the person is essential to further a compelling governmental interest and (3.) 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 five-part test: (i) is the defendant's discrimination "religious exercise"?; (ii) does the applicable state or local anti-discrimination law "burden" the defendant's religious exercise?; (iii) is the government's interest in eradicating the discrimination "compelling"?; (iv) are uniformly applied anti-discrimination laws the least restrictive means of furthering any compelling governmental interest; and (v) has the government demonstrated (iii) and (iv) above with clear and convincing evidence?

A. Is Discrimination "Religious Exercise" Under ARFPA?

The first part of the ARFPA test is whether a refusal to comply with civil rights laws is religious exercise. Because ARFPA does not define what constitutes a religious exercise, any civil rights defendant who can show that his or her discriminatory actions were in any way "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 "Burden" Religious Exercise?

The purpose of the second part of the ARFPA test should be to avoid litigation over neutral laws that have only a minimal impact on religious exercise. However, "burden" may be defined so broadly as to encompass *any* infringement on religious exercise, regardless of how slight the impact of that burden may be. **The AkCLU suggests that the word "burden" in HB 195 be replaced with the words "substantially burdens" a person's free exercise of religion.** Congress has not defined "substantial burden," and there is no generally applicable test to determine whether a substantial burden exists. *See Smith v. FEHC*, 913 P.2d at 924. However, several circuit courts have adopted a broad reading of "substantial burden," holding that

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

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

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

One court has held that compliance with state fair housing laws does not impose a substantial burden, in part because "one who earns a living through the return on capital invested in rental properties can, if she does not wish to comply with an anti-discrimination law that conflicts with her religious beliefs, avoid the conflict, without threatening her livelihood, by selling her units and redeploying the capital in other investments." *Smith v. FEHC*, 913 P.2d at 925. The court also noted that "the landlord in this case does not claim that her religious beliefs require her to rent apartments; the religious injunction is simply that she not rent to unmarried

couples. No religious exercise is burdened if she follows the alternative course of placing her capital in another investment." *Id.* at 926.

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

C. Is the Governmental Interest in Eradicating Discrimination Compelling?

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

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

Because marital status, disability, and other 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., Thomas*, 165 F. 3d at 716-17 (citing state statutes providing less favorable benefits to unmarried couples than to married couples); *French*, 460 N.W.2d at 10 (plurality op.) ("How can there be a compelling state interest in promoting fornication when there is a state statute on the books prohibiting it?"); *Desilets*, 636 N.E.2d at 240 (the existence of a criminal statute against fornication ""suggests some diminution" in the state's interest). On the other hand, the Alaska Supreme Court in *Swanner* noted that differential treatment of married and unmarried people in areas other than housing does not prove that the state views marital status discrimination in 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 compel[illegible] 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.

E. Has the Government Met Its Strict Scrutiny Burden With Clear and Convincing Evidence?

The standard of "clear and convincing evidence" is not commonly applied in the kind of civil constitutional cases that would arise out of ARFPA. Strict scrutiny is already the highest level of scrutiny that can be applied to any statute ("essential to further a compelling governmental interest"). Courts would have a very difficult time resolving cases at the summary judgment stage if they also have to weigh factual evidence. This evidentiary requirement could make the litigation more costly for the person claiming a religious exemption because the government would have to demand an evidentiary trial, even where the government would otherwise have stipulated to the facts as stated in the pleadings. **The AkCLU respectfully suggests that the "clear and convincing evidence" standard be stricken from ARFPA.**

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 persons of their civil rights under state and local laws.

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

(1.) **Delete "individual rights of a third party" on Page 2, line 27, and insert "rights of others by a person claiming a religious exemption to a law. This section does not establish or eliminate a defense to a civil action or criminal prosecution under a federal, state or local anti-discrimination law."**

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

To cite for you a specific example where we support ARFPA, two years ago the AkCLU looked into a case in which a Muslim couple objected on religious grounds to the State of Alaska performing an autopsy on their deceased infant. Alaska law requires an autopsy to be performed in all SIDS (Sudden Infant Death Syndrome) cases, but the parents in this case sincerely believed, in accordance with their faith, that their baby would not go to Heaven if the baby's body was not presented whole unto God. (FYI, other faiths, such as Orthodox Judaism, also profess this religious tenet.) Since the cause of death can often be determined by "less restrictive" means that do not involve cutting into the corpse – i.e. magnetic resonance imaging, or MRI – HB 195 would protect the rights of relatives to be exempt from the state's generally applicable autopsy laws. Similarly, if the cause of death for suspected SIDS cases can be

determined by means that do not infringe on religion, then the state should respect the religious practices of the parents of that infant.

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

(2.) As we have already pointed out, HB 195 states that a government entity "may not place a burden on a person's free exercise of religion..." (Emphasis added.) Our concern is that "burden" may be read very broadly to include any level of restriction, no matter how minor its impact on the free exercise of religion. The proposed federal RLPA used a different standard. The proposed federal RLPA provided in relevant part that "a [state or local] government shall not substantially burden a person's religious exercise..." (emphasis added). Courts have defined standards for substantial burdens, as discussed above. **We propose that the modifier "substantial" be inserted before the word "burden" on Page 2, line 19, and in the bill title, Page 1, line 1.**

(3.) We have some great qualms about the wording of Section (4) in the legislative findings. We think that the intent of (4) is to protect against discrimination, but 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."**

(4.) For reasons discussed above, **we respectfully urge the deletion of "with clear and convincing evidence" on Page 2, line 21.** This evidentiary standard may actually drive up the costs of this type of litigation by forcing an evidentiary hearing.

Thank you very much for your consideration of this important matter. I can be reached at our office in Anchorage at 258-0044 if you have any further questions.

ENDNOTES

[1]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); *Jasniowskiv. Rushing*, 685 N.E.2d 622 (Ill. 1997), *vacating for lack of case or controversy*, 678 N.E.2d 743 (Ill. App. 1997). The Michigan Supreme Court reversed its own earlier decision after newly elected justices joined the court. The Illinois Supreme Court vacated an intermediate appellate decision for the procedural reason of a lack of a case or controversy.

[2]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).