

ALASKA LEGISLATURE COMMITTEE FILES 1999-2000 86/2

9795 HOUSE COMMUNITY & REGIONAL AFFAIRS

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 duct 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 *shateebles*—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, even-handed 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>1</sup>42 U.S.C. §§ 2000bb (1994).

<sup>2</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>3</sup>Sec., eg., *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>4</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>5</sup>*Hunt v. Hunt*, 162 Vt. 423, 648 A. 2d 843 (1994).

<sup>6</sup>117 S. Ct. 2157 (1997).

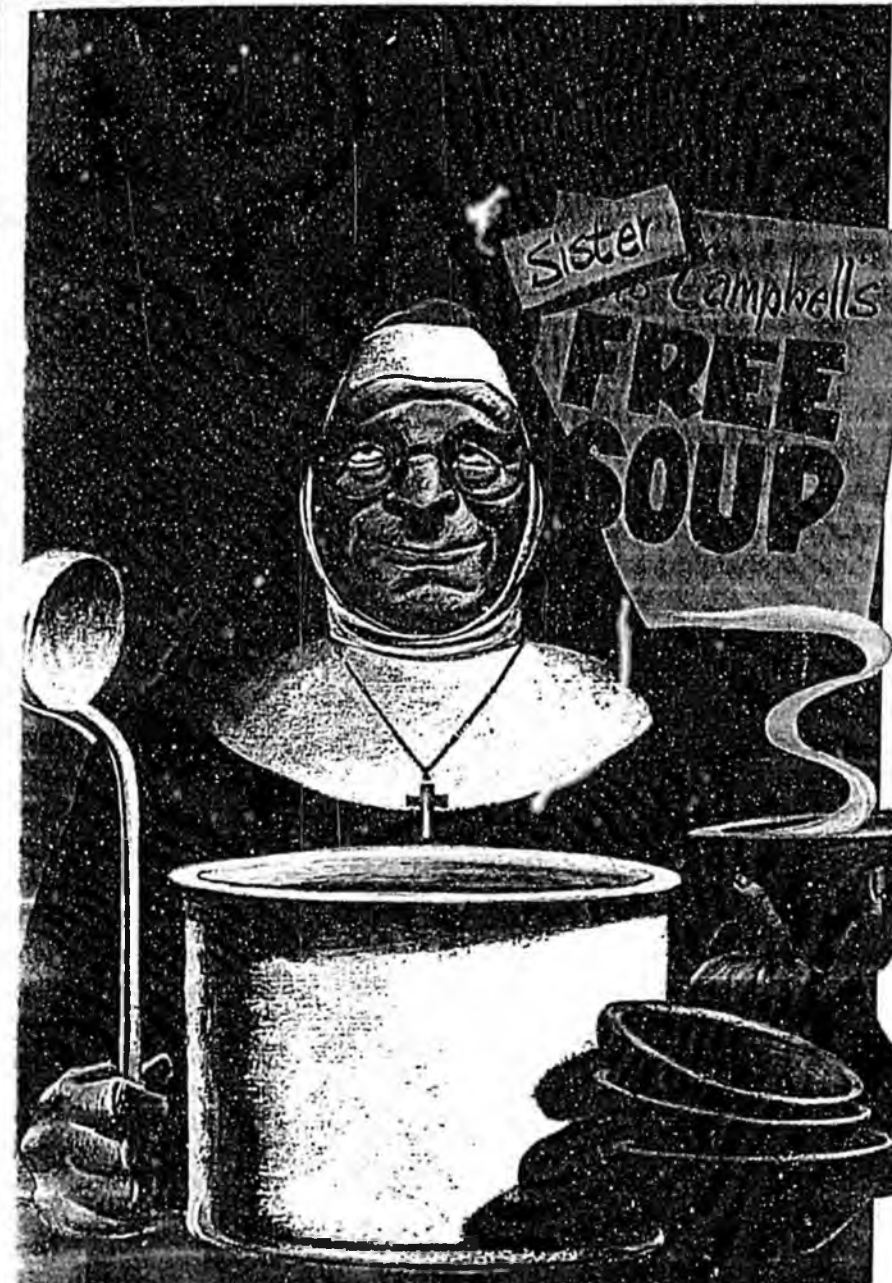
<sup>7</sup>319 U.S. 624 (1943).

<sup>8</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>9</sup>494 U.S. 872 (1990).

<sup>10</sup>494 U.S. 879 (internal quotation marks omitted).

<sup>11</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.*

PROTECTING

# Free EXERCISE

*A Compelling Case  
State Interest*

By  
MICHAEL W. McCONNELL  
**CISE**  
FOR "Compelling

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 unconstitutional to recognize a priest-penitent privilege in 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 often affects other people, the government will frequently have a legitimate right to interfere. Religious motivation doesn't justify child sacrifice, stealing, 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

Invest in

LIBERTY

WOULD YOU LIKE TO INCREASE

your income while at the same time give to a special work? Liberty magazine has a Gift Annuity Program designed to help you meet your specific financial needs as well as enable you to contribute to the important cause of religious freedom. For more information about this program or how you can include Liberty in your will, write to:

Liberty Magazine Gift Annuity Program  
General Conference Trust Services

514 Old Columbia Pike, Silver Spring, MD 20904-6600.

Call (301) 680-5003 or (301) 680-5005.

The above phone numbers are solely for the gift annuity program.  
For more information or address change, please see page 5.

missions." Specifically rejecting the constitutional argument now made against 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. 

# Why We Need State RFRA Bills: A Panel Discussion

Alan Reinach\*

## TABLE OF CONTENTS

INTRODUCTION.....	823
I. A GOOD METAPHOR IS WORTH A THOUSAND PICTURES.....	825
A. <i>The Property Rights Metaphor — No Balance</i> .....	826
B. <i>The Road Runner Metaphor</i> .....	827
C. <i>Free Exercise as a Cripple</i> .....	828
D. <i>Gimme Shelter!</i> .....	829
E. <i>A Peggare</i> .....	829
F. <i>The California Experience</i> .....	831
II. PANEL DISCUSSION.....	832
A. <i>Pat Nolan</i> .....	832
B. <i>Nick Miller</i> .....	835
C. <i>Alan Reinach</i> .....	837
D. <i>Professor Douglas Laycock</i> .....	843
E. <i>Richard Foltin</i> .....	848

## INTRODUCTION

The most pressing issue facing proponents of Religious Freedom Restoration Acts ("RFRA's") when confronting legislators is their importance and necessity. Legislators want to know the problems RFRA's are designed to remedy; they want to know of particular horror stories they can claim to fix. However, one practical problem for advocates is that neither legislators nor the general public are overly sympathetic to the worst violations of religious liberty, which tend to involve either minority faiths or religious practices

---

\* President of the Seventh-day Adventist Church State Council, the religious liberty educational and advocacy arm of the church for a five-state western region, including California, Arizona, Nevada, Utah, and Hawaii. Mr. Reinach chaired the drafting committee of the California Coalition for the Free Exercise of Religion, sponsors of AB 1617, The Religious Freedom Protection Act; and has also been active in forming state RFRA coalitions in Arizona and Hawaii, and in advocacy efforts in Nevada.

V.C. DAVIS LAW REVIEW  
SPRING 1994, VOL. 32, NO. 3

that are feared, hated, or both.

For instance, just before scheduled hearings in the Arizona Senate Judiciary Committee, the Arizona Republic ran a column concerning an inmate's fifteen year battle to obtain kosher meals.<sup>1</sup> The article derided the inmate's religious freedom claim, and doubted that it was "kosher" for a rapist to demand kosher food. It did not matter that the Arizona prisons routinely serve kosher food to those who require it. No one asked why the prison establishment was willing to fight for fifteen years to deny this prisoner kosher meals when it provides them routinely to others. The damage was done. When it comes to a convicted rapist, the media knows no possibility of redemption or forgiveness.

Conscious of this rapist story, while preparing to testify before the Arizona Senate Judiciary Committee, I tried to find the most appealing free exercise example to cite. I decided to showcase the problem that many Seventh-day Adventist public school students encounter when they try to enroll in a band class. They are typically told that if they cannot participate in concerts on Friday nights for religious reasons, they might as well not enroll, for they will receive a failing grade. I argued that schools should be more accommodating, permit religious students to participate in band, and excuse them from the occasional concert that might conflict with religious obligations. Surely the Senators would be solicitous of our youth, and realize the need to avoid creating a situation in public schools that would make some students feel like second class citizens because of their faith. Alas, this example failed to heighten interest and the Arizona RFRA bill met with stiff opposition.<sup>2</sup>

Another basic problem that advocates confront is that many legislators are surprisingly ignorant concerning religious freedom. They have never heard of *Employment Division v. Smith*<sup>3</sup> or *City of Boerne v. Flores*.<sup>4</sup> They labor under the common misperception that the law protecting religious freedom works well and does not require legislative action. Legislators also labor under the misconception that state supreme courts are more willing to interpret

---

<sup>1</sup> See David Leibowitz, *Is Catering to a Rapist Kosher?* ARIZ. REPUBLIC, Feb 3, 1999, at B1.

<sup>2</sup> The opposition was led by a Senator from Tucson, Arizona, who asserted that if any such problems arise in her district, she sees that they are worked out. A Jewish mother testified about the ongoing problem of schools scheduling field trips and other activities on the High Holy Days. This was met with the same response. Ironically, the Senator leading the opposition to the bill was herself, Jewish.

<sup>3</sup> 494 U.S. 872 (1990).

<sup>4</sup> 521 U.S. 507 (1997).

state constitutional provisions in a manner that provides greater religious freedom than similar provisions in the U.S. Constitution, as the Supreme Court has so interpreted.

Again, the Arizona Senate hearings offer a fitting example. The RFRA bill fell into a constitutional catch twenty-two as Senators asserted inherently contradictory reasons for objecting to the bill. Senators argued both that the Arizona Constitution already protected against facially neutral laws of general applicability, and that a state RFRA might open the door to a litigation explosion should they adopt the bill. Ultimately, the fact that there had been only six reported RFRA decisions in Arizona in five years fell on deaf ears, as the bill was voted down in committee. Assumptions about the adequacy of the Arizona Constitution were contradicted by legal analysis supplied to the committee, but to no avail.

Since legislators may have many and varied reasons for ambivalence and opposition to RFRA bills, advocates must be prepared to effectively address why we need such bills. Answers to this question fall into two general categories: those that deal with legal explanations — the erosion of constitutional protection for free exercise rights; and those that document actual cases or problems. Part I of this Article will address the legal erosion of free exercise rights. Part II of this Article is a refined version of a panel discussing why state RFRA's are needed. Panelists represent two unique faith perspectives, Jewish and Seventh-day Adventist; the views of two leading activist organizations, Justice Fellowship and the Council on Religious Freedom, and; one prominent law professor/activist, Doug Laycock. The intent of the panel was to compile the sort of practical experiences that legislators crave in order to justify legislation. Of course, this task is an ongoing one, as those advocating for state RFRA's continue to network, to exchange horror stories, and to refine advocacy techniques.

#### I. A GOOD METAPHOR IS WORTH A THOUSAND PICTURES

If a picture is worth a thousand words, a good metaphor is worth a thousand pictures. Other legal commentators have analyzed the relevant Supreme Court decisions. I would prefer to assume a basic familiarity with *Smith* and *Boerne*, and propose some metaphors that not only capture the reality of these decisions, but may have some utility for advocacy purposes.

A. *The Property Rights Metaphor — No Balance*

The Seventh-day Adventist Church is involved in litigation with Solano County, California, over the issue of whether a local congregation can locate radio broadcast facilities in office space on church premises.<sup>5</sup> The County Board of Supervisors denied the church a conditional use permit for the radio station, which required only office facilities, since actual broadcast would be from an existing tower on a nearby mountain.<sup>6</sup> At oral argument of the appeal, the assistant county attorney made a shocking statement: "no property owner has any right to the use of his land, unless that use is permitted by government."<sup>7</sup> While I am no expert on property rights, I doubt that this statement is literally true. But more to the point, I suspect that most Americans still have enough residual commitment to individual liberty that they would recoil with horror at the suggestion that they were entirely dependent on government to tell them what they can or cannot do with their land.

Yet, when it comes to the free exercise of religion, that is precisely the status of the law. We are entirely dependent on government in cases where religious exercise is in conflict with a facially neutral law of general applicability.<sup>8</sup> Religious exercise is utterly bound by whatever government determines in such cases. There is no necessity of compromise or balance.

Anyone even remotely familiar with the land use process understands that the process seeks to achieve a balance between the rights of the landowner to the use of her land, and the rights of the community to avoid the unwanted impact a particular use may cause. The process relies heavily on compromise to achieve that balance. Yet, when it comes to similar conflicts between the general goals of society as expressed in facially neutral laws of general applicability, and unique religious beliefs and practices, no such process of compromise or balance is now required.<sup>9</sup> Government wins and religion loses.<sup>10</sup> Government power to infringe on free exercise is almost unfettered by meaningful constitutional limita-

---

<sup>5</sup> See *Vacaville Seventh-day Adventist Church v. Solano County Bd. of Supervisors*, No. L01955 (Cal. Super. Ct. April 14, 1998).

<sup>6</sup> See *id.*

<sup>7</sup> *Id.*

<sup>8</sup> See *Smith*, 494 U.S. at 872.

<sup>9</sup> See *id.*

<sup>10</sup> Litigators will assert legal theories, such as hybrid rights, or a scheme of individualized exemptions, to avoid the harshness of this rule. Nevertheless, the observation above accurately describes the general rule.

tion. Contrast the current Supreme Court's disdain for religious freedom with the sentiments of George Washington, our nation's first president, as expressed in a letter of reassurance to Quakers. Washington's statement captures the essence of the strict scrutiny concept:

I assure you very explicitly, that 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 to the protection and essential interests of the nation may justify and permit."<sup>11</sup>

Washington would jealously protect free exercise as one of the "conscientious scruples of all men," as balanced against compelling community interests, or the "essential interests of the nation," in Washington's own words. His expression is consistent with the strict scrutiny standard advocated by state RFRA supporters. He would require a balancing that puts an appropriately heavy burden on government to justify an infringement upon religious freedom. Current law requires no such balancing.

#### *B. The Road Runner Metaphor*

If you've seen it once, you've seen it a thousand times. Wile E. Coyote is chasing the Road Runner. The Road Runner steps aside, just before going over the cliff. The Coyote, meanwhile, keeps going. As long as Wile E. Coyote keeps looking ahead, he zooms forward, oblivious to the fact that he is no longer on solid ground, but in thin air. As soon as he looks down – well, you know what happens.

This aptly illustrates the state of free exercise law. The constitutional foundation has crumbled, leaving free exercise hanging in thin air, waiting to crash. Although the foundation has crumbled, we have not yet experienced a flood of free exercise cases. In comparison with, for example, sexual harassment or employment discrimination claims, or some other civil rights problem, free ex-

---

<sup>11</sup> A DOCUMENTARY HISTORY OF RELIGION IN AMERICA 278 (Edwin Gaustad ed., 2d ed. 1993).

ercise cases are statistically insignificant.<sup>12</sup> We have not yet crashed.

Perhaps the reason we have yet to crash is that America has a long tradition of respect for religious freedom. To some extent, we are living on borrowed cultural and constitutional capital. Since the constitutional foundation has already been destroyed, how long can religious freedom endure?

### C. *Free Exercise as a Cripple*

A recent Ninth Circuit decision has invigorated discussion of the theory of "hybrid rights" as a basis for protecting free exercise.<sup>13</sup> The theory arises from Justice Antonin Scalia's characterization, in *Smith*, that the vast body of religious free exercise cases that appeared to adopt strict scrutiny were really hybrid cases, involving both free exercise plus another constitutional right.<sup>14</sup> The theory is that free exercise claims recover their constitutional strength only if accompanied by another, hybrid, right. The Ninth Circuit engaged in a lengthy discussion of hybrid rights, and considered just how strong a hybrid claim must be to trigger the protection of the strict scrutiny test.<sup>15</sup> No doubt, at some point the Supreme Court will consider this issue and determine whether the hybrid-rights theory is valid or not, and if so, how to apply it.

Until then, we are left with the distinct impression that free exercise has become a paraplegic, a cripple, who must be wheeled into court by a hybrid right. Free exercise claims have no legal leg to stand on, unless a hybrid right serves as the wheelchair, thus giving them a legal basis.

Some may hope that the hybrid-rights theory will adequately blunt the worst edges of the *Smith* decision. This is unlikely. Instead, the hybrid-rights theory illuminates the absurd state of the law: that religious exercise warrants the protection of strict scrutiny only when it can stand on the basis of some other right. The hy-

---

<sup>12</sup> To determine whether a state RFRA bill was needed, I searched all reported free exercise cases in California, Arizona, and Hawaii. In California, for example, I found eight reported free exercise cases, not counting RFRA cases. Additionally, I found more than 10 cases, including RFRA cases, in Arizona and Hawaii.

<sup>13</sup> See *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692 (9th Cir. 1999). This case applied the hybrid-rights theory to sustain the right of Christian landlords to refuse, on religious grounds, to rent to unmarried couples, notwithstanding a statute forbidding discrimination on the basis of marital status.

<sup>14</sup> See *Smith*, 494 U.S. at 881.

<sup>15</sup> See *Thomas*, 165 F.3d at 702-09.

ned.  
as a  
, we  
ince  
how

the  
se.<sup>15</sup>  
, in  
ap-  
ing  
y is  
only  
en-  
just  
the  
urt  
hts

ex-  
led  
leg  
hus

ely  
In-  
the  
iny  
hy-

free  
ght  
10

This  
on  
dis-

brid-rights theory demonstrates that free exercise has become a cripple.

#### D. Gimme Shelter!

Songwriters and poets have waxed eloquent about home. They sing and write about a sense of belonging, a sense of communal intimacy, seeking protection from the storms of life. Home is a particularly potent symbol for what religious freedom is now lacking in America. One of the foremost religious freedom litigators of our generation, Lee Boothby, commenting on *Boerne*, put it this way: "As a result, many religious people are like the homeless — without shelter."<sup>16</sup> Indeed, it is not only religious people, but the right of religious freedom itself, that is without shelter. Writing in dissent in *Smith*, Justice Blackmun declared: "This distorted view of our precedents leads the majority to conclude that strict scrutiny of a state law burdening the free exercise of religion is a 'luxury' that a well-ordered society cannot afford, and that the repression of minority religions is an 'unavoidable consequence of democratic government.'"<sup>17</sup>

Historically, religious freedom is a home-grown American product. We were the first country on earth to adopt the principle that everyone is truly equal in the eyes of the law, regardless of their faith. We were the first country to fully protect religious freedom as a matter, not of discretion, but of constitutional right. Religious freedom is the single most significant contribution our nation has made to the world.

Yet, religious freedom has now become a "luxury." It is a stranger in its own home. Unlike the prodigal son in the parable, who left home of his own free will, religious freedom has been cast out of the house.<sup>18</sup>

#### E. A Beggar

The plight of the beggar is another fitting metaphor for those seeking protection for religious free expression. Not only has religious freedom been quite literally cast out of its home, denied

<sup>15</sup> *Without Shelter: Life in Post-RFRA America*, LIBERTY, Nov./Dec. 1998, at 89.

<sup>16</sup> *Smith*, 494 U.S. at 908-09 (Blackmun, J. dissenting) (citations omitted).

<sup>17</sup> See *Luke* 15:11-32.

legal shelter, and treated as a stranger, and a cripple, but religious freedom has also become a beggar. Said the majority in *Smith*:

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. It may fairly be said that leaving accommodation to the political process will place at a 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 law against the centrality of all religious beliefs.<sup>19</sup>

Many arguments could be brought to bear to refute this contention. Most obvious is the language of the First Amendment itself: "Congress shall make no law . . . ."<sup>20</sup> By its terms, the very purpose of the Amendment was to remove the rights protected therein from the sphere of legislative activity.

In the midst of World War II, when America was battling for the life and soul of the free world, the Supreme Court declared that freedom was more important than patriotism, ruling that Jehovah's Witnesses students with religious objections to saluting the flag could not be required to violate their faith.<sup>21</sup> That courageous Court recognized what the current Court has forgotten:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.<sup>22</sup>

Religious freedom has become a beggar, because it must now beg for protection at the mercy of legislatures. Contrary to the implied contention of the Supreme Court, religious freedom values rarely, if ever, really do command the majority. It is not just that minority

---

<sup>19</sup> *Smith*, 494 U.S. at 890.

<sup>20</sup> U.S. CONST. amend. I.

<sup>21</sup> See *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

<sup>22</sup> *Id.*

religious practices are at the mercy of the legislature. Instead, all religious practices that are taken seriously enough to require some form of exemption or accommodation are likely to be minority practices. Hence, the image of a beggar seeking alms is all too apt.

#### *F. The California Experience*

Today's Court has forgotten the meaning of America. It has forgotten that our love of freedom means that fundamental freedoms are constitutionally secured from the tyranny of the majority. Today, religious freedom has been reduced to the status of a beggar. No longer constitutionally protected, it must go, hat in hand, asking the majoritarian legislative bodies to provide some form of relief. This is what RFRA is all about: welfare for a once proud and noble constitutional right that has been reduced in circumstances, lost its estate, and is now out on the street.

Our experience in advocating a RFRA bill in California demonstrates just how difficult it is to protect a fundamental right by statute. The majoritarian body, the legislature, is a place of compromise. Various interests are balanced against each other in an effort to soften the harshest impact a given bill may have for some interest. This is proper.

When religious freedom advocates went to the California legislature in 1998, seeking statutory protection, they encountered a wide variety of opposition. The most serious issue was the perceived conflict between religious freedom and other civil rights. Other interests were asserted on behalf of prisons, land use, the environment, and child welfare. The legislature responded with specific amendments to clarify that religious freedom would not undermine other specified commitments. With great difficulty, the California bill endured the legislative process, faithful to its initial objective of reestablishing religious freedom as a fundamental right.<sup>23</sup>

In retrospect, many who supported the RFRA bill, AB 1617,<sup>24</sup> now admit that the final draft that cleared the legislature was overly

<sup>23</sup> AB 1617, The Religious Freedom Protection Act, introduced by Joe Baca (D-San Bernardino), passed both the Assembly and the Senate but was vetoed by Governor Pete Wilson.

<sup>24</sup> AB 1617 was supported by the California Coalition for Free Exercise, uniting a wide range of Christian, Jewish, Muslim, Sikh, and other faith groups, as well as civil rights groups like the American Civil Liberties Union.

complex and poorly drafted.<sup>25</sup> The political process burdened the fundamental right of free exercise with numerous explanations and qualifications, although outright exemptions were avoided. Thus, there is a good reason why fundamental rights should be constitutionally protected, rather than subjected to the political process and its compromising tendencies.

That is a moot point, for now. Whether we like it or not, religious freedom must seek protection from a legislature that may be ambivalent, or even hostile. The advocate's task is to adequately justify the need for legislation. What follows are the remarks of various advocates of state RFRA bills on this precise issue. It has now been almost a decade since the Supreme Court's decision in *Smith*. During that decade, five years have gone by without the protection of RFRA. For most casual observers, it does not look like much has changed. In other words, the post-*Smith* era to the casual observer looks very similar to the pre-*Smith* era. The question, then, that the panelists addressed is the practical significance of *Smith* and that of the protection RFRA provides.

## II. PANEL DISCUSSION

### A. Pat Nolan<sup>26</sup>

With all deference to the litigators here, I think the greatest significance that the Federal RFRA held was in bargaining. It gave a person a seat at the table with any government official whose conduct impeded one's ability to practice their faith. It gave us a chance to ask the official: "what is it you are actually trying to protect?" Then it allowed us to engage in a dialog as to whether there was a way to protect that interest in such a way as to minimize the infringement on our ability to practice a religion. The numbers of those situations that occurred while RFRA was law are legend. It happened many times a day.

With the *Smith* standard, the bureaucrat wins and says "take us to court." Most people who have had their faith infringed upon do

---

<sup>25</sup> Coalition members would be reticent to publicly declare that AB 1617 was flawed, having invested so much energy in passing it. Despite its flaws, the Coalition still hoped that it would achieve its goal. Nevertheless, some Coalition members acknowledged that fundamental principles had been battered and bruised by the legislative process, and that amendments taken out of political necessity posed a risk to the bill's integrity.

<sup>26</sup> President of the Justice Fellowship and former member of the California State Assembly for 15 years. For four of those years, Mr. Nolan served as the Assembly Republican leader.

not have the resources to file a legal claim in court. So a state RFRA will once again permit the individual to at least engage in a dialog: "Is there a way to protect your interest, Mr. Bureaucrat, while not abridging my ability to practice my faith?"

I want to address the issue of the RFRAs applying to prisons. The public has little sympathy for the religious freedom rights of prisoners. However, prisoners have absolutely no ability to practice their faith except at the sufferance of officials. Everything they do requires the permission of those that are in charge of the facilities. Not only does this mean they need permission to attend a religious service or Bible study, but their ability even to possess a Bible or any religious literature in their cells is left to the discretion of the administration. This is a political issue that must be confronted in every single state where there is an effort to pass a RFRA.

First, Professor O'Neil pointed out that we already have a track record. RFRA's legal standards were in place for many years and there was no parade of horrors. No court in the country required a prison official to allow any practice that endangered the safety of any prison personnel or of the inmates. Those seeking prison exemptions try to find examples where prisoners with access to law libraries bring esoteric claims. The prisoner who claims to belong to the Church of Filet Mignon, in which it is a religious sacrament to have steak every night, and where the denial of steak every night is a denial of religious liberty, makes a great story. Then there is the prisoner who claims that the Bible requires him to be fruitful and multiply, and that he must have conjugal visits from his wife. These make great stories in the legislature and the legislators all chuckle and say, "Yeah those darn prisoners are filing these lawsuits." The reality is that none of those lawsuits have gotten anywhere. No court has ever ordered a prison official to give conjugal visits in order to respect a prisoner's religious freedom, nor has a court recognized the Church of Filet Mignon or compelled officials to serve its adherents steak.

The reality is that, during RFRA's existence, Jewish prisoners used the law to obtain permission to wear yarmulkes in prison when a warden said it was evidence of gang attire. RFRA was used to allow a Catholic to wear a crucifix when the prison official argued that it was a weapon. In that case, prison officials provided inmates with four inch long plastic toothbrushes, but claimed that a one inch long plastic crucifix was more dangerous.

RFRA was very useful as a tool when prison officials canceled

evening bible study. We could ask whether there was a way to accommodate the Bible study while still protecting the officers and inmates involved. The fact is we have a track record of years where allegedly frivolous prisoner claims were neither numerous, successful, nor burdensome.

Those advocating prison exemptions also claim there will be a flood of lawsuits, or that there have been a flood of lawsuits. We have gathered the statistics on the number of lawsuits filed under RFRA, and the numbers are unspectacular.<sup>27</sup> For example, in Virginia, there have been seven cases.<sup>28</sup> Mark Early, the Virginia Attorney General, said it is difficult to argue that these seven prisoner RFRA lawsuits constitute a great burden on the state of Virginia.<sup>29</sup> But our opponents consistently make that argument. Presenting the statistics can destroy their arguments.

I would like to emphasize, though, that as we have dealt with the effort to pass state RFRAs, what is most lacking is that those with the most at stake — those who belong to religious congregations — have no sense of urgency. They do not feel that their religious liberty is threatened. That is the biggest hurdle we have. If they did, they would rise up and the legislators would respond.

Instead, legislators are faced with Deputy Attorneys General claiming to be overwhelmed by an increasing caseload. Zoning officials warn of the repercussions, maintaining that RFRA soon will require permitting the building of slaughter houses next to residential facilities. The historic preservationists argue that RFRA will neutralize legal protections that exist for historic buildings. Professor Douglas Laycock has said that every interest group in society comes forward to protect their interests, which stand in opposition to the goals of RFRA. Legislators tend to respond in their favor, given the absence of vocal support from religion. It is important we get the word to the members of our congregations. We need to present compelling examples that will convince not only legislators, but the very people who need RFRA's protection the most. Until we do, it will be very difficult to pass State RFRA bills.

Everett Dirkson once described the legislator's mentality by saying: "When I feel the heat, I see the light." Right now there is no heat. Instead, we have relied on the good will and understanding

---

<sup>27</sup> Justice Fellowship maintains records of RFRA decisions on a state-by-state basis.

<sup>28</sup> See Letter from Virginia Attorney General (May 11, 1998) (on file with author).

<sup>29</sup> *Id.*

of legislators. We have been able to pass some bills on this basis. But if we are to build on these early successes, we will have to garner significant support from our own constituents, and through them, their legislators.

*B. Nick Miller<sup>30</sup>*

I would like to share a compelling story. I spoke on the telephone last week with a Baptist minister in Southern California, Wiley Drake. This story puts a human face on the land use and zoning issues that Professor Laycock is going to address. I think it also shows that it is not just about money and economics or whether to build in one place or another — these issues can affect the heart of the religious mission of an organization.

Pastor Wiley Drake is a pastor of a small Southern Baptist Church in the City of Buena Park, which is right next door to Anaheim and Disneyland in Southern California. His congregation helps those less needy in his neighborhood. They have a rehabilitation program for the homeless on the streets of Buena Park, processing nearly two thousand homeless individuals a year. The congregation has three goals — two of them mandatory, one of them encouraged — for the homeless individuals it helps. First, those who are using or abusing alcohol or other drugs must get into a substance abuse program and become dry. Second, they need to enter a rehabilitation program to get back into the workforce. Finally, the congregation encourages the homeless to attend their Bible studies and prayer meetings, and to grow spiritually.

The city fathers of Buena Park took a different view of this ministry than did Pastor Drake's church. They called Pastor Drake into City Hall and met with him to discuss the impact of his ministry on their community. The mayor, the city manager, and the chief of police attended the meeting. They informed him that the city was an entertainment corridor. His church's activities with the homeless were having a negative impact on the city's image.

Pastor Drake explained to them the effectiveness of the ministry and its importance to the life of the church. It was not something tangential to their beliefs but, rather, ran to the heart of their faith.

<sup>30</sup> Executive Director, Council on Religious Freedom. Mr. Miller was instrumental in organizing this symposium.

The city fathers were not interested. They warned him to stop the homeless activities or face the consequences. When Pastor Drake and his congregation continued, the city responded by filing eleven criminal charges against the church, the pastor in his individual capacity, and the church treasurer. The case went to trial and seven of the charges were dismissed.<sup>31</sup> I think the treasurer turned state's evidence and the charges against him were ultimately dropped. Four charges against the pastor and the church were sustained and convictions were obtained. These convictions were for violations not related to health, safety or fire hazards, but with use permits. The church had obtained permits for a hall for recreational use, and were now using that same facility for storing food and clothing which was given to the needy. This was regarded as a commercial use and the church's continued insistence on such use was considered a violation of the permit. Pastor Drake was convicted on four counts. At the sentencing hearing the judge said he was eligible for two years of prison time as well as a \$2000 fine.

The judge, who must have had some sense of justice and possibly a sense of humor, sentenced the pastor to 1500 hours of community service — time already served.<sup>32</sup> The church was put on probation for three years. The police in Buena Park have permission to enter church property and monitor to assure there are no homeless people that should not be there. If so, the city can shut down the entire program.

The case is currently on appeal. The church's First Amendment claim failed because these were neutral, generally applicable laws which, in the post-RFRA era, are unactionable.<sup>33</sup> Moreover, California courts, like those in many states, do not apply constitutional standards to land use issues. In this case, land use is at the heart of what this Baptist church is all about — to the heart of its mission. The land use issue has a very human face in Pastor Wiley Drake. Clearly, this case would have come out very differently if a California RFRA had been in effect.

---

<sup>31</sup> This report is largely based on an interview with Pastor Wiley Drake.

<sup>32</sup> Pastor Drake believes that press attention moderated the judge's previously harsh view of this case. The judge had refused to charge the jury on a religious liberty defense.

<sup>33</sup> The *Smith* standard holds that facially neutral laws of general applicability are not subject to strict scrutiny, and do not give rise to First Amendment free exercise claims. Alternatively, some courts will apply a rational basis test, e.g., *Brunson v. Department of Motor Vehicles*, 72 Cal. App. 4th 1251, 85 Cal. Rptr. 2d 710 (Ct. App. 1999), which amounts to the same result — dismissal of the free exercise claim.

C. *Alan Reinach*<sup>21</sup>

It is a real privilege to be here with all of you for this historic conference. The question we are dealing with in this panel is perhaps the most crucial if we are to succeed in passing state RFRA's. We have been aggressively pursuing RFRA bills in three states so far, California, Arizona and Hawaii. The question we hear most from legislators is why this bill is needed. They do not want to hear legal jargon. They want to know who is getting hurt and what needs fixing.

I have been asked to provide some concrete examples, from the perspective of my own faith, of the kinds of free exercise problems we experience. Seventh-day Adventists adhere to historic Biblical faith, so we share many religious liberty problems with other Christians. Like other churches, we also have distinctive teachings that lead to unique challenges. First, as an example common to many believers, recently we assisted an Adventist nurse who refused, for religious reasons, to participate in providing abortion services. This case arose in a private hospital setting, thus raising only Title VII religious accommodation issues. However, had it arisen in a public hospital, it would have also raised constitutional concerns.

The largest volume of free exercise problems for Seventh-day Adventists, by a wide margin, arise from observance of the Seventh-day Sabbath, from sundown Friday to sundown Saturday. Adventist students attending public schools are routinely denied opportunity to participate in band and athletic programs, because concerts or games are scheduled on Sabbath. Only occasionally do school districts make any attempt to compromise or accommodate the Adventist students. Most frequently, parents simply accept such exclusion as a cost of their faith. However, those students who are excluded do not universally respond with a sense of pride over maintaining their faithfulness. Such painful experiences lead some students to resent and eventually abandon their faith.

In the school context, RFRA ought to protect the right of students to engage in activities, such as band, where Sabbath activities are only a part of the whole. A student can participate in band throughout the week, and perform in those concerts that are not held during Sabbath hours. The fact that the student will refrain from participating in all concerts should not exclude that student.

<sup>21</sup> See *supra* note 9.

top the  
Drake  
filing  
is indi-  
to trial  
asurer  
e uli-  
church  
ictions  
ls, but  
all for  
toring  
arded  
n such  
ce was  
e said  
inc.  
ossibly  
mmu-  
roba-  
on to  
ome-  
down

'ment  
: laws  
Cali-  
ional  
art of  
sion.  
rake.  
lifor-

harsh  
se.  
re not  
laims.  
Motor  
to the

The band has no interest sufficiently compelling to justify excluding the student entirely. After all, the band would not be better off by excluding the student altogether than by permitting the student to partially participate.

Sabbath problems arise most often in the context of employment. Government employers account for a disproportionate share of cases. This may be attributable to the fact that government employers have no economic incentive to negotiate a Sabbath accommodation. Corporations are generally myopically focused on profits and, therefore, have every fiscal incentive to avoid costly litigation. Accountability in government does not operate as it does in the private sector. Rather, government officials are much less concerned about the costs of litigation.<sup>35</sup> The last major Ninth Circuit Title VII case, in 1996, involved a government employer, the California Department of Food and Agriculture. Kwasi Opuku-Boateng had applied for a permanent position with the agency.<sup>36</sup> When he informed the agency he could not work on the Sabbath, the agency terminated the hiring process.<sup>37</sup> The Ninth Circuit found that Opuku-Boateng had established a prima facie case of religious discrimination and that the state had not demonstrated that it would suffer undue hardship if forced to accommodate.<sup>38</sup> An important Title VII case currently pending in the Ninth Circuit also involves a government employer, *Balint v. Carson City*.<sup>39</sup>

Working on the Sabbath, or otherwise violating one's religious faith, should not be a condition of government employment. Indeed, government employers should be held to a higher standard than that standard established by the Supreme Court in *Trans World Airlines, Inc. v. Hardison*.<sup>40</sup> In *Trans World Airlines*, the Court held that requiring an employer to bear more than a de minimus cost in accommodating an employee's religious practices amounted to an undue hardship.<sup>41</sup> The compelling interest test, if applied to government employment, would certainly negate the de

---

<sup>35</sup> Even in cases where we have dealt with top management of a government agency, there was no apparent sense of fiscal imperative to negotiate. In fact, government agencies are far less willing to negotiate, generally, than their corporate counterparts, although there are always those fair-minded or sincere officials who prove exceptions to the rule.

<sup>36</sup> See *Kwasi Opuku Boateng v. California*, 95 F.3d 1461, 1466 (9th Cir. 1996).

<sup>37</sup> See *id.*

<sup>38</sup> See *id.* at 1472-73.

<sup>39</sup> 180 F.3d 1047 (9th Cir. 1999).

<sup>40</sup> 432 U.S. 63 (1977).

<sup>41</sup> See *id.* at 85.

minimum rule established in *Hardison*. However, it would not require courts to disregard important governmental interests. The employer must be able to perform its necessary functions. Religious accommodation cannot undermine those functions. However, under current law any de minimus burden on an employer is enough to permit government to abridge religious liberty.<sup>42</sup> This is wholly inadequate when applied to government. A constitutional standard ought to apply, and one that adequately respects religious freedom.

Sabbath testing problems are also prevalent. Most testing agencies are reasonable, and are willing to provide for non-Sabbath testing. But some public schools, colleges, or testing agencies instead force Adventist students to choose between their religion and their educational progress.<sup>43</sup>

Aside from the Sabbath, other aspects of Adventist faith encounter problems absent RFRA. Publishing work has been an important part of the Adventist ministry since our inception as a church. For many years, we have employed a sales force to market literature directly to the public, including in-home presentations. In addition, every year many churches conduct a fund raising drive for community service and disaster relief ministry. In many places this involves door-to-door solicitation. These activities frequently lead to conflicts with local government authorities over licensing or permitting.

A very current concern involves our teaching that church members and institutions abstain from involvement with labor unions. In the small town of Ukiah, California, about two hours north of San Francisco, an Adventist hospital is involved in litigation with the California Nurses Association over their effort to unionize the nurses. The hospital objects to recognizing a labor union on religious freedom grounds. First and foremost, the very act of recognizing a labor union violates the hospital's religious convictions. In addition, such recognition could easily lead to the hospital being forced to negotiate over faith-based policies.

The hospital has raised a jurisdictional defense, arguing to the National Labor Relations Board ("NLRB") that, because of the First Amendment and RFRA, the NLRB lacks jurisdiction to im-

<sup>42</sup> See *id.*

<sup>43</sup> I am currently preparing to seek an injunction against the State of California because one of its professional graduate programs has scheduled all required coursework on Saturdays.

exclud-  
etter off  
student

employ-  
tionate  
govern-  
a Sab-  
ally fo-  
o avoid  
erate as  
e much  
Ninth  
ployer,  
puku-  
ency.<sup>36</sup>  
bbath,  
Circuit  
ase of  
trated  
date.<sup>38</sup>  
ircuit

igious  
t. In-  
rdard  
Trans  
Court  
imus  
ctices  
est, if  
ie de

gency,  
encies  
there

pose a labor organizing process against the religious scruples of the hospital. Although RFRA has of course been invalidated as to the states, several courts have held that it is still in effect with respect to the Federal government.<sup>44</sup>

Free exercise claims can and do arise because of state labor laws as well. In a pending lawsuit, two former employees are suing Loma Linda University and Medical Center, an Adventist institution, claiming in part that they were discharged in violation of state labor laws for seeking to organize a labor union.<sup>45</sup> If they really were trying to organize a labor union, this would itself have been grounds for discharge, since the Adventist faith prohibits such activity. A state court will have to decide whether Loma Linda has a right to discipline employees for violating church teachings against participating in labor unions. Clearly, Loma Linda is on uncertain constitutional ground without the benefit of RFRA.

The right to discipline employees for violating church teachings often arises in cases of sexual misconduct. Frequently, disgruntled former employees bring discrimination lawsuits, asserting claims based on age, gender, or race, regardless of the faith-based reason for the discharge. Title VII permits religious institutions to discriminate on the basis of religion. However, state law may provide an independent basis for a discrimination suit in such cases. California currently exempts religious nonprofits from its discrimination laws.<sup>46</sup> However, this exemption is under attack, and may well be repealed this year.<sup>47</sup> If so, religious institutions may be required to retain faculty, administrators, ministers, or other employees who uphold neither the doctrinal nor behavioral standards of the church. Obviously, this would devastate the church's ability to carry on its religious mission.

Another pending case involves land use in Vacaville, California, where an Adventist church is seeking to establish a Christian radio station on church property, utilizing a donated mobile home. The Board of Supervisors held that the radio station was not an accessory use to an Adventist Church, since no other church in the county operated a radio station. They also held that a radio station

---

<sup>44</sup> The hospital insists that recognizing a labor union would force it to negotiate.

<sup>45</sup> See *Shankel v. Loma Linda Univ.*, No. SCV272520 (Cal. Super. Ct. 1994).

<sup>46</sup> See CAL. GOV'T CODE § 12926(d)(1) (West Supp. 1999).

<sup>47</sup> The expected language has not yet been introduced. AB 1541, however, contains language repealing the exemption only for religious hospitals that serve the public. As introduced, there is no provision to exempt religious hospitals with respect to the right to discriminate on the basis of religion.

is not a communication facility. This latter ruling was necessitated by the fact that communication facilities are permitted in any zone.<sup>48</sup>

The county's view of this case is that it has the right to restrict the proclamation of the gospel, which is central to the church's very reason for existence, without regard for whether the radio station will adversely impact the community.<sup>49</sup> In fact, the record was silent as to any real impact on the community. Sure, there were the usual assortment of a few neighbors who complained, but their complaints lacked any substance. One neighbor even complained that the station, not yet in existence, was already interfering with his television reception.

On appeal, the church's attorney, Fred Blum, argued that determining whether a radio station is an accessory use by reference to the conduct of most churches is blatant discrimination against minority faiths. The majority's activities determine the scope of minority conduct, Blum concluded.<sup>50</sup> This is the worst sort of majoritarianism which our constitution intended to prevent. This reasoning, according to Blum, would permit the county to say to the Catholic Church: "a confessional is not an accessory use to your church, since no other church in the county has a confessional."<sup>51</sup> Using this reasoning, the county could say to a synagogue: "a mikvah<sup>52</sup> is not an accessory use since no other faith group has one."<sup>53</sup>

California has a public accommodation law, the Unruh Civil Rights Act,<sup>54</sup> that makes no exemption for religious institutions.

---

<sup>48</sup> The county interprets this as relating to unmanned facilities only. This would mean that one could locate an unmanned tower in a residential zone, but not an actual radio station, which can fit into one or two rooms of a house.

<sup>49</sup> The premise of this case is that a radio station is not an accessory use to a church. Such determination is independent of whether that use will adversely impact the community. Thus, the county argued findings by the Planning Commission such as: "it is not common or necessary for radio stations to be associated with churches," and "the establishment, maintenance and operation of the radio broadcasting station is a professional office use which is not in conformity with the County General Plan goals, policies and objectives regarding the intended land uses in rural residential areas." Respondent's Opposition to Petition at 11-12, *Vacaville Adventist Church v. Solano County Bd. of Supervisors* (Cal. Super. Ct. 1998) (No. L010995).

<sup>50</sup> See Petitioner's Memorandum at 9-10, *Vacaville Seventh-day Adventist Church* (No. L010995).

<sup>51</sup> *Id.*

<sup>52</sup> A Mikvah is a bath used for ceremonial cleansing.

<sup>53</sup> Petitioner's Memorandum at 9-10, *Vacaville Seventh-day Adventist Church* (No. L010995).

<sup>54</sup> See CAL. CIV. CODE § 51 (West Supp. 1999).

Under current law, religious institutions lack a free exercise defense to claims filed under Unruh. For example, suppose an Adventist school like Loma Linda University permits a local Girl Scout chapter, unaffiliated with the school, to meet on campus. Loma Linda could be held liable for discrimination if it failed to equally permit a Satanist group to meet.<sup>55</sup> Indeed, it could be compelled to permit the Satanists to meet on campus.

Because Unruh makes no exception for religious institutions, in the absence of a viable free exercise or RFRA defense, religious schools could be sued for discriminating in admissions on the basis of religion.<sup>56</sup> Although Adventist schools generally do admit students of all faiths, and do not discriminate, the freedom to define the student body is central to the religious mission. This freedom also extends to the ability to discipline students for violating lifestyle standards, a freedom that church schools currently lack.<sup>57</sup>

In closing, I would like to put the effort to pass State RFRA in historical context. For hundreds of years before the American Revolution, Englishmen believed that Parliament protected their rights against usurpation by the crown.<sup>58</sup> The need to protect those rights against abuse by the legislative power first became an issue in colonial America. Thomas Jefferson was seeking a solution to this problem when he drafted the Virginia Statute Establishing Religious Freedom.<sup>59</sup> Evidently, he had not yet discovered the solution, as evidenced by the text, which admonishes future legislatures not to restrict or repeal the freedoms secured thereby.<sup>60</sup> Americans have taken for granted the solution that the founders finally adopted — to protect fundamental rights in a constitution that would bind future legislatures.

Our state RFRA battles are evidence that the Supreme Court has

---

<sup>55</sup> The Unruh Civil Rights Act has been interpreted to apply to schools, which are considered "business establishments" and required to accommodate the public without discrimination. See *Nichole M. by and Through Jacqueline M. v. Marúnez Unified School Dist.*, 964 F. Supp. 1369 (N.D. Cal. 1997).

<sup>56</sup> Once the principle is established that schools are "business establishments" covered by the Unruh Civil Rights Act, the admissions and discipline policies of religious schools become legally actionable.

<sup>57</sup> Thankfully, I am unaware that the lack of de jure protection has had a chilling effect on student discipline, but it is only a matter of time before some disgruntled, disciplined student learns that his rights may have been violated.

<sup>58</sup> See JACK M. RAKOVE, *ORIGINAL MEETINGS: POLITICS & IDEALS IN THE MAKING OF THE CONSTITUTION* 35 (1996).

<sup>59</sup> See A DOCUMENTARY HISTORY OF RELIGION IN AMERICA, *supra* note 11, at 259.

<sup>60</sup> See *id.*

effectively reversed two centuries of progress, taking us back to pre-constitutional colonial America. We can no longer rely on constitutional protection, but must ask majoritarian legislative bodies to protect what has been, and should be, a fundamental right, protected against abuse by the majority. We face the difficult, but not impossible task, of convincing a deliberative body, accustomed to compromise, to accept that free exercise of religion is a fundamental right which cannot be compromised. In this effort, we join the illustrious company of Madison and Jefferson.

So perhaps we can learn a lesson from Madison's efforts to pass the Virginia Statute for Religious Freedom. Being a skilled legislative captain, Madison undertook a very successful petition drive to obtain grassroots support for the bill.<sup>61</sup> If religious liberty is to be protected by the majoritarian branch of government, the most important court in the land becomes the court of public opinion. The legislature reflects, however imperfectly, the public will. If the people do not cherish religious freedom, we have little hope of preserving its legal status.

*D. Professor Douglas Laycock<sup>62</sup>*

A key part of the political problem, in Congress and especially in the state legislatures, is this question of what difference RFRA's will make. In Congress, we have not handled that question very well, in part because everyone is busy and we have not done the kind of nitty gritty homework that it takes to uncover compelling stories. But more fundamentally, most of the good stories from my perspective as a civil libertarian turn out not to be good stories politically. What counts as an appealing example in this room does not begin to count as an appealing example in most legislatures. Steve Solarz, who sponsored the first Federal RFRA bill, said: "Religious liberty is popular in the abstract but it is controversial in its specific applications."<sup>63</sup> That is the heart of the problem. Too many examples invade the turf of some interest group on the other side who says, "Well of course they shouldn't be able to do that! Who do they think they are?"

<sup>61</sup> See WILLIAM LEE MILLER, *THE FIRST LIBERTY* (1985).

<sup>62</sup> Alice McKean Young Regents Chair in Law, The University of Texas at Austin.

<sup>63</sup> This insight was commonly quoted among RFRA supporters in the debates over that bill in 1991-93, but it does not appear to have previously been recorded in the written record.

In addition, many examples that seem central from inside a religious tradition do not seem so important to someone who is outside the tradition. Many people — legislators among them — may not take their own religious tradition very seriously and have not spent more than a few minutes thinking about these problems. Unfortunately, many compelling stories often fail to arouse the interest of legislators.

In addition, there is ambiguity about what the various standards mean. What was the pre-*Smith* standard, and how many religious liberty claims succeeded under that standard? How many would succeed under RFRA? These cases are tough to win because courts often have the same reaction as politicians. The pre-*Smith* record was bad in reported cases in the lower courts, but it was not so bad in the Supreme Court<sup>64</sup> or in settlements.

I want to reinforce what Pat Nolan said. The common understanding of the meaning of *Smith* among government lawyers is: "We don't have to talk to you anymore. All laws are neutral and generally applicable. So we win. We do not have to justify our actions. We do not have to have a reason for not making exceptions; therefore we do not have to talk about not making an exception. Simply put, we do not have to talk to you." Bargaining and negotiating prove very difficult from this perspective. Threats to sue lack force because they believe they always win.

In the pre-*Smith* era and under RFRA, government officials had to justify a burden on religious liberty with a compelling governmental interest. While the exact standard was unclear, it certainly seemed high. At the very least, it provided a basis to begin a conversation. The threat to file a lawsuit was viable. Victories were difficult, and lawsuits expensive. But they were expensive for both sides, and both sides had a legal basis for their position, which provided a basis for meaningful discussion. Often these problems can be resolved in mutually acceptable ways with good faith negotiation. But there is no basis on which to negotiate if one side holds all the bargaining power. Before *Smith*, negotiated solutions were often possible; after *Smith* and without RFRA, they usually are not.

Negotiation was becoming more difficult even with RFRA. Government officials are beginning to understand that a compelling

---

<sup>64</sup> See Douglas Laycock and Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 74 TEX. L. REV. 209, 222-28 (1994) (reviewing the Supreme Court's interpretation of the compelling interest test in free exercise cases).

interest does not mean much to many judges. Government officials are beginning to understand that they can abridge religious liberty and argue that they have not imposed a substantial burden. So it may be that, even with state RFRAs, some bureaucrats will refuse to talk and the threat to file a lawsuit will not be as effective as in the past. We not only have to get these bills passed, we must win some cases. State RFRAs provide a basis for a lawsuit and, therefore, a basis for settlement discussions, but unless religious claimants win some cases, their basis for discussion will remain weak.

I also think we have been too quick to concede that all laws are neutral and generally applicable. In fact, they often are not. A law forbidding discrimination on the basis of religion may not be a neutral and generally applicable law. It may apply to everyone, but it is a law dealing explicitly with religion — making religion a regulatory category — and I would challenge that even under the *Smith* standard. Many courts believe that zoning laws are neutral and generally applicable, but I do not think we should let that assumption stand unchallenged. Zoning laws are the antithesis of generally applicable laws. With anything as big as a church, zoning officials decide parcel by parcel. Every piece of land is regulated individually and with particularity. There is nothing generally applicable about zoning laws in most jurisdictions.

The recent Ninth Circuit case shows that it is possible to protect religious exercise with the hybrid-rights theory.<sup>65</sup> But I am not very optimistic about that; few courts have relied on this theory, and others have expressed serious doubts.<sup>66</sup>

Finally, only some of the battles over religious freedom involve legislatures and statutes. More often, such battles emerge from bureaucratic and administrative practice. They are fact specific, often not recurring patterns. The opponent of religious liberty often is not a legislator, but a career bureaucrat or a single-issue regulator.

Two early cases under the Florida RFRA provide appealing

<sup>65</sup> See *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 702-11 (9th Cir. 1999) (finding hybrid rights in landlord-tenant dispute).

<sup>66</sup> Compare *id.*, and *People v. DeJonge*, 501 N.W.2d 127, 134 (Mich. 1995) (finding hybrid right to home school), with *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 566-67 (1993) (Souter, J., concurring) (finding hybrid-rights doctrine "ultimately untenable"), *Thomas*, 165 F.3d at 722-26 (Hawkins, J., dissenting) (doubting existence of hybrid-rights doctrine), *Kissinger v. Board of Trustees*, 5 F.3d 177, 180 (6th Cir. 1993) (rejecting hybrid-rights doctrine as illogical), and *Salvation Army v. Department of Community Affairs*, 919 F.2d 183, 199-200 (3d Cir. 1990) (holding that hybrid freedom of association claim adds nothing to free exercise claim).

examples of why we need such acts. In the first, the plaintiff lost his driver's license for ten years because he is a lay communion minister in a Lutheran church.<sup>67</sup> He had prior convictions for DWI and drug abuse; his license was probated for ten years on condition that he abstain from drugs and alcohol. He has been through a detoxification clinic. He is now clean. He mentioned to his probation officer that he was serving at the Lutheran church as a lay minister. The officer pulled his license because he was handling wine and taking communion. The state prosecutor defended the revocation in state court and promised to appeal if he lost. Cooler heads eventually prevailed; the case settled, and the state has promised not to revoke licenses over communion wine.<sup>68</sup> If this example of a state RFRA's benefits does not evoke sympathy from legislators, it is hard to know what example will.

In a second Florida case, the city of Boca Raton wants to bulldoze the tombstones in the municipal cemetery and begin enforcing a clause that has been buried in city's cemetery ordinance, never before enforced, and retroactively amended from time to time.<sup>69</sup> The clause says that tombstones (1) must be flat to the ground, and (2) can have only identifying information.<sup>70</sup> The clause thus prohibits religious inscriptions, crosses, stars of David, and Bible verses, permitting only names and dates. I thought that was a good example, but it had no impact in Washington, and the trial judge ruled for the city.<sup>71</sup> An appeal is pending.<sup>72</sup>

Often, if one looks beneath the surface, there is discrimination, hostility, and uneven enforcement of statutes and regulations. For example, the Mormons are the majority in Utah and my guess is that Utah and its local governments do not often infringe on their religious activities. If Mormons cannot protect their religious

---

<sup>67</sup> See Noreen Marcus, *State: Communion During Probation a Sin; Churchgoer Fighting Driver's License Suspension*, FORT LAUDERDALE SUN-SENTINEL (Jan. 4, 1999) (available, for a fee, at <<http://sun-sentinel.com/archive.htm>>).

<sup>68</sup> See Noreen Marcus, *Communion Wine Won't Bar Minister from Driving*, FORT LAUDERDALE FLORIDA SUN-SENTINEL (Feb. 26, 1999) (available, for a fee, at <<http://sun-sentinel.com/archive.htm>>).

<sup>69</sup> See *Warner v. Hanson*, No. 98-8054-Civ Ryskamp (S.D. Fla. Mar. 31, 1999).

<sup>70</sup> See Boca Raton City Council Resolution 185-82, § 1(9), as amended by City Council Resolutions 182-88 and 119-96 (quoted and paraphrased in Verified Complaint 4-6, and in Plaintiff's Response to Defendants' Motion to Dismiss Complaint 5 n.3).

<sup>71</sup> See Ben Anderson, *Judge Mows Down Cemetery Religious Symbols*, CONSERVATIVE NEWS SERVICE (April 2, 1999) (available at <<http://www.conservativenews.org/InDepth/archive/1999904/IND19990402c.html>>).

<sup>72</sup> See ACLU Press Release, *Florida ACLU to Appeal Ruling on Religious Symbols in Cemetery* (Mar. 31, 1999) (available at <<http://www.aclu.org/news/1999/n0931991.html>>).

exercise in Utah, what church can protect itself anywhere?

In much of the rest of the country, Mormons are a small minority, poorly understood. Most Americans associate Mormons with polygamy, which they no longer practice. Another common misperception is that they are not really Christian. This also is not true; the full name of the church commonly called Mormon is the Church of Jesus Christ of Latter-day Saints. Dennis Rodman is probably not the only person who thinks they are a cult. People who call religions cults tend to use the term pejoratively. So when an administrative official with discretionary governmental authority outside Utah must make a decision to grant or deny a permit, a waiver, an exception, or license, or take some other action affecting a Mormon church or Mormon organization, it seems likely that, in his relatively unbounded discretion, these common misperceptions will affect the official's decision.

One of the cases described in the federal hearings on land use occurred in Forest Hills, Tennessee, a fairly well-to-do suburb of Nashville that historically has had four churches sitting near a big intersection — Methodist, Presbyterian, and two Churches of Christ. One of those churches closed. The Mormons bought the property and applied for a land use permit. The city denied the application, citing aesthetic reasons. A state trial judge affirmed the city's action.

The trial judge said that she could not find any actual discrimination of the sort she understood the *Smith* standard to require.<sup>75</sup> She thought this was a neutral and generally applicable rule that just happened to prohibit new churches. The city's zoning code prohibited churches on any site except where the three existing churches were already located. Such a law is neither neutral nor generally applicable. It was in fact a total ban on new churches, with a grandfather clause for three familiar denominations.

I also fear that religious liberty is losing its status as a universal human right. Instead, many now perceive it to be only one of many special interests, and other special interest groups will take stands against religious liberty. Many factors, including the secularization of society, have reinforced this view of religious liberty as special interest rather than fundamental right. That view is further reinforced by the fact that other important social and political issues now line up to some extent on religious grounds. The national ACLU, which

<sup>75</sup> See *Corporation of the Presiding Bishop v. Board of Comm'rs*, No. 95-1135 (Chancery Ct. Davidson County, Tenn. Jan. 27, 1998).

previously supported RFRA, is now outside the coalition.<sup>74</sup>

If we are to succeed, we must restore the sense that religious liberty is for everyone, that it is a fundamental right. We must help government officials, special interest groups, state legislators, and the general public to understand that religious liberty is not just for conservatives, not just for Protestants or Christians, but for believers and nonbelievers of every variety. And even should we accomplish this, we are fighting an uphill battle.

E. Richard Foltin<sup>75</sup>

I was asked to speak about the Jewish community's perspective on RFRA. In most circumstances, I would approach with great trepidation any effort to speak on behalf of the Jewish community. In fact, we are a very diverse community in terms of belief, observance, and political viewpoint. There are public policy issues that split many of the Jewish groups that are part of the coalition and which support RFRA. Yet RFRA is one issue where one can speak for the entire Jewish community. The need for comprehensive legislation that protects free exercise of religious principles has achieved unanimous support among Jewish people.

The Coalition for the Free Exercise of Religion includes some twenty Jewish organizations, which run the gamut from The Agudath Israel to the Reform Movement and to all the nonaffiliated Jewish organizations in between. This unanimity reflects a profound and long standing recognition that we are a religious minority. As a religious minority we have all prospered in this great nation because of the profound and innovative notion encapsulated in the First Amendment: that the right of religious free exercise is fundamental and it is not to be abrogated by the majority's will. A deeper value that the First Amendment reflects is that members of the religious majority and minority alike are full and equal mem-

---

<sup>74</sup> See *Religious Liberty Protection Act of 1999, Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (forthcoming) (statement of Christopher Anders) (available at <<http://www.house.gov/judiciary/ande0512.htm>>). The Florida ACLU, by contrast, lobbied hard for Florida's RFRA and is appealing the judgment in *Warner v. Hanson*. See *supra* note 72 and accompanying text.

<sup>75</sup> Legislative Director and Counsel of the American Jewish Committee's Office on Governmental and International Affairs. Mr. Foltin has been active in the passage of a number of civil rights bills, including RFRA, the Religious Violence Act, and the Hate Crimes Statistics Act. In addition, he serves as co-chair of Committee on First Amendment Rights of the American Bar Association's Section on Individual Rights and Responsibilities.

bers of society. We are not guests; we do not enjoy our religious liberty at the will of others and at the sufferance of the majority. Practicing our religion is our fundamental right as human beings in this society.

This is why *Smith* and *Boerne* were such a profound shock to our community. *Smith*, especially, suggested that the protection of the free exercise of religion can be subject to the will of the majority.<sup>76</sup> It suggested we must lobby for legislation to protect religious liberty in the same way one lobbies for a greater share of an appropriations bill or for regulatory change.

There are three broad areas of concern that have developed with respect to particular observances of the Jewish community. While the impact is greatest on the orthodox community, because of stricter practice, these are important issues for all of the Jewish community, and for members of all religious communities. Moreover, although these issues do impact the orthodox most heavily, many other segments of our community also observe some or all of these practices as well. We are all victims of laws of general application to which no exceptions can be made.

The first issue I want to discuss is land use regulation. In traditional Jewish practice, one does not drive or take transportation on the Sabbath or on holidays. At the same time, there is an obligation on the Sabbath or on holidays to participate in communal worship. This means that one must live within walking distance of a synagogue in order to be a regular attendant at services on Sabbath or on a holiday.

Zoning laws that prohibit houses of worship from building in certain areas or otherwise place unreasonable restrictions on the building of those houses of worship, can effectively exclude observant Jews from practicing their faith. This has the force of segregation for Jews within those communities comparable to the Jim Crow laws of an earlier time. The impact of these so-called laws of general applicability is that members of a particular religious community are not able to live in a particular community.

During the last couple of decades we have witnessed numerous instances where Jewish communities have battled these ostensibly neutral land use laws. Such laws substantially burden their communities' religious practices by not allowing Jews to worship within close proximity to where they live. Professor Douglas Laycock

---

<sup>76</sup> See *Employment Div. v. Smith*, 494 U.S. 872 (1990).

spoke this morning about the notion that a rule prohibiting a church from building in a certain location does not amount to a substantial burden. Courts reason that this is only a financial burden and nothing but money prevents the church from building elsewhere. However, given the religious context, a rule prohibiting the building of a church in close proximity to its members' residences should amount to a substantial burden. The clearest possible case is that of Orthodox observant Jews who are simply unable to practice as a community if those houses of worship cannot be built in reasonable proximity.

Sometimes clear evidence of animus in decisions against religious groups prompts courts to grant relief. I want to talk about a case that is relevant in the zoning context. The town of Airmont in upstate New York was carved from the larger village of Ramapo. The new town enacted a zoning law forbidding synagogues in private homes. Airmont was very close to a community where a great many Orthodox Jews lived. The impact of this new incorporation of a separate village was that orthodox Jews could not move into this adjacent community. The U.S. Attorney and affected residents filed a lawsuit challenging the village's zoning policy as discriminatory, enacted for the purpose of making it impossible for Orthodox Jews to live in Airmont.<sup>17</sup> Ultimately, a court found discrimination and steps were taken to remedy that situation. The record in that case clearly demonstrated the animus that was involved and the village's intention to prevent members of a particular faith from moving into the community.

More often, however, these zoning decisions are cloaked in neutrality. Zoning boards promulgate rules, now increasingly aware of the need to compile a record that does not betray animus. Such conduct can only be addressed by a legal framework that considers adverse impact as well as discriminatory intent.

Another similar case involved an attempt to get a zoning variance for religious prayer in a rented house in residential Los Angeles. A special use permit was sought to allow a prayer to take place in a home. The city council denied the permit. One neighbor testified against the permit, saying: "If you permit this illegal use, how do you rationally prevent Muslims from setting up their

---

<sup>17</sup> See *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2d Cir. 1995) (reinstating jury verdict finding liability); *LeBlanc-Sternberg v. Fletcher*, 1996 WL 699148 (2d Cir. 1996) (unpublished disposition) (granting injunctive relief).

things, Hindus from having their temples. Once you open the door you will ruin a beautiful asset."<sup>78</sup> So I think we have enough of these cases, enough anecdotal information and statistical evidence, to show that there is a very real problem. We must work to prevent municipalities from promulgating zoning rules, seemingly neutral, but which serve as a means of excluding houses of worship.

I would like to mention one other case in the zoning area that involves a personal experience. Before I moved to Washington, D.C., I lived on Long Island close to a synagogue in North Woodmere. The synagogue was in a house that was being used as a synagogue. Although the synagogue had never really caused any traffic problems, it did not adhere to the local zoning regulations that required minimum parking for houses of worship. When the local zoning board considered an application for a variance, it did not consider that this house of worship was an Orthodox synagogue, or even that on the High Holidays there was no tangible increase in vehicular traffic. The board, of course, denied the variance.

Thankfully, the Appellate Division found a free exercise interest that the zoning board had not adequately taken into account, and the case was remanded and ultimately resolved on terms favorable to the synagogue.<sup>79</sup> However, this is not a typical result. Such cases are difficult to win, although courts in the northeast tend to be more favorably inclined towards houses of worship.

Another area I want to discuss involves religious ritual practices. Laws of general applicability have tremendous potential to impact various aspects of Jewish ritual observance. By the very nature of general rules, they accommodate behavioral norms, not the ritual religious practices of minorities. Consider the case of *Goldman v. Weinberger*,<sup>80</sup> where an officer was disciplined for wearing a yarmulke while on duty in a military hospital.<sup>81</sup> He was told he could not do that because it was a violation of military regulations that forbade the wearing of any head coverings while indoors. Aside from the issue of great deference to the military, the subtext of this case was the rule of general applicability. The regulation applies to

<sup>78</sup> *Congregation Etz Chaim v. City of Los Angeles No. 97-5042 HLH (Ex) (C.D. Cal. 1997).*

<sup>79</sup> *See Young Israel of North Woodmere v. Town of Hempstead Board of Zoning Appeals, 634 N.Y.S.2d 199 (App. Div. 1995).*

<sup>80</sup> 475 U.S. 503 (1986).

<sup>81</sup> *See id.* at 504-05.

all military personnel, of all religions.

Alan Reinach spoke earlier about the need for Sabbath accommodation by government employers. This holds true for any government controlled facility whether one is in a school, a courtroom, in the military, or in a prison. There is a real potential for conflict between the government rules regarding administration of its facilities and how one is to behave in terms of the ability to observe Shabbat, to wear a yarmulke, or to receive kosher food.

Another area that has come into conflict — and this is one of the classic cases for those who have followed the history of RFRA — is the issue of the right of the family of those who are killed in traffic accidents or other nonsuspicious events to be free of religiously prohibited autopsies or other "routine" postmortem procedures. One famous Rhode Island case involved a member of the Hmong faith who was killed in a traffic accident.<sup>62</sup> State authorities performed an autopsy despite the fact that this was a traffic accident in which there was no suspicion of foul play, nor any compelling law enforcement need why an autopsy should have been required. Nevertheless, following the *Smith* decision, a court said there was nothing it could do — the family simply had no remedy under federal civil rights law against the state for this violation of a deeply held religious belief.<sup>63</sup>

Given these examples, one can easily anticipate other situations. A state, for example, might decide to amend its humane slaughter laws, to prohibit kosher slaughter. Observant Jews would no longer be able to obtain meat to eat in any such state, on the grounds that this is ostensibly not a form of humane slaughter. Or suppose a state decided that circumcision was a harmful and inappropriate procedure and outlawed the practice. Once again there would be no legal recourse to challenge such a ruling.

These are not really hypothetical circumstances. At one point the U.S. Department of Agriculture proposed meat and poultry processing regulations which were designed to remove harmful bacterial pathogens. There was potential that those rules could create a serious problem for the kosher preparation of meat because they were inconsistent with the processing that was required when meat is salted and soaked in order to make it kosher. Had those rules been enforced it might well have meant that observant

<sup>62</sup> See *Yoo Vang Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990).

<sup>63</sup> *See id.*

Jews could not eat meat or poultry processed in the United States. This was brought to the attention — and I have to congratulate my colleagues at the Agudath Israel for doing this — of the Department of Agriculture. The regulations were amended because the Department of Agriculture was sympathetic. They found a way to amend the regulations to address the safety issue without precluding kosher slaughter. A less sympathetic administration could easily have led to a different result.

The final issue that I want to touch upon is that of discrimination. It is crucial to understand that while the anti-discrimination laws are of great importance to all of us — and many of our organizations continue to fight for additional laws to protect against discrimination — we must be cognizant of the fact that these laws sometimes conflict with the needs and beliefs of religious institutions. Orthodox rabbinical schools ordain men only. Sexes are separated during prayer services in orthodox synagogues. Many Orthodox Jewish schools are single sex institutions. Further, for some Jews, the religion is understood to proscribe a woman from teaching a class of boys. Neutral and generally applicable sex discrimination rules would seriously hamper the ability of some to adhere to religious practice in the operation of their religious schools.

I want to conclude with two brief thoughts. First, we have talked about the lack of horror stories to evoke support in legislatures. Part of that is due to a lack of research. But I also think there are still people in government who are not instinctive bureaucrats, and who recoil at the idea of discrimination and are willing to accommodate. Nevertheless, the longer we continue with a legal regime in which religious practice is not protected, the more danger we are in that hostile and discriminatory attitudes will increase and permeate society at large. So, we really have to be vigilant. The fact that we do not have enough horror stories yet should only impress upon us the urgency of this effort, so that such horror stories do not ever occur.

Finally, there have been many reasons suggested this morning for why we are seeing an increase in the number and kinds of cases and conflicts between the religiously observant and government regulation. In my view, this is attributable both to the increased religious diversity in our society, and to the growth of the regulatory state. As government promulgates more regulations, there is a greater risk of conflict between these regulations and the needs of

those who are members of a minority faith, who march to a different drum than the majority. If we are to be a truly pluralistic and diverse society, we have to insure that religious conscience is respected and that the regulatory state does not unduly infringe on religious belief.



**NATIONAL CENTER**  
\* \* \* for \* \* \*  
**HOME EDUCATION**  
*a division of Home School Legal Defense Association*

MICHAEL P. FARRIS, ESQ.  
PRESIDENT  
J. MICHAEL SMITH, ESQ.  
VICE PRESIDENT

CHRISTOPHER J. KLICKA, ESQ.  
EXECUTIVE DIRECTOR  
DOUGLAS W. DOMENECH  
DIRECTOR OF GOVERNMENT AFFAIRS

## FAX TRANSMITTAL

DATE: 2/29/00

TO: John Harris

LOCATION: \_\_\_\_\_

FAX NUMBER: 907-465-3799

FROM: Chris Klicka

SENDER'S FAX NUMBER: (540) 338-9333

**URGENT: Please notify recipient for pickup**

No. of pages (including cover): 8

**SPECIAL INSTRUCTIONS:**


\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

For Office Use:  DL  GRL

## REPRESENTATIVE ERIC CROFT

### MEMORANDUM

TO: Rep. John Harris, Chair  
House Community and Regional Affairs Committee

FROM: Rep. Eric Croft 

DATE: 2/22/00

RE: HB 387

---

I am requesting a hearing for House Bill 387, the Alaska Religious Freedom Protection Act at your earliest convenience.

Enclosed for your information:

1. Copy of the Bill
2. Sponsor Statement
3. Article regarding the need for ARFPA





**NORTHWEST  
RELIGIOUS LIBERTY  
ASSOCIATION**

**Joseph Story**

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@ptalaska.net](mailto:story@ptalaska.net)

Joseph Story

The Alaska Religious Freedom Protection Act - HB 387 - by Rep. Croft

The Legislature finds that the First Amendment to the United States Constitution and Article I, Section 4 of the Alaska Constitution recognizes and protects the fundamental right of free exercise of religion. In 1990, the United States Supreme Court retreated from over 200 years of respect for the right to free exercise of religion. In Smith v. Emp. Div., 494 U.S. 872 (1990), an opinion written by Justice Scalia, the Court held that the government no longer had to make reasonable exceptions to general laws in order to accommodate the religious beliefs of its citizens. While the Alaska Supreme Court has not chosen to follow this retreat from protection for religion, the Legislature finds that the free exercise rights of Alaska citizens are so vital and fundamental that it is in the public interest to provide a statutory guarantee of these rights to secure against a change in judicial interpretation. While it is improper for the Legislature to tell the Judiciary how to interpret the Alaska Constitution, it is proper for the Legislature to establish different rights or to secure established rights in a different manner or to a different degree than the minimum set by the Constitution as long as such legislative action does not interfere with the rights of other persons. By protecting the individual free exercise of religion, the Legislature does not intend to create an establishment of religion or an official state religion.

**HB**

**404**

ALASKA INDEPENDENT INSURANCE AGENTS AND BROKERS, INC.  
(AIIAB)  
POSITION PAPER

HOUSE BILL 404 – JOINT INSURANCE ARRANGEMENTS  
**STRONGLY OPPOSE**

The AIIAB opposes this Special Interest legislation in its present form (Version A).

This legislation has been proposed in the past with similar format and has failed to garner support for the following reasons:

- The legislation provides no consumer protection to the extended class of participants (Sec.21.76.020).
- The verbiage may be misleading in that the bill extends eligibility to other than Municipal entities that generally do not have the sophistication, risk management, or a taxation base to pay assessments.
- Only two of the fifteen general municipal powers are required for participation (Sec. 29.35.010). Any corporation in Alaska would automatically qualify for a JIA based on two of these powers, namely (11) the ability to borrow money and issue evidence of indebtedness, and (14) the rights to sue or be sued.
- Consumers may not be aware of the absence of regulatory protections that include unfair claims practices, unfair trade practices, the State Guarantee Association Act and financial solvency requirements.
- As currently proposed the State General Fund would have no authority to collect tax from premium generated by any participant. (This may represent millions of dollars each year in lost general fund revenues.)

Under current law, there is no regulatory authority provided by the Division of Insurance or any other governmental body. The extent of financial or market conduct review is limited to providing an annual financial statement only; there are no statutory consequences or accountability.

**Our Association would support this legislation *only* with the following amendment:**

Sec. 21.76.020. Regulation by the Division of Insurance and annual report.

- (a) A joint insurance arrangement [~~may not be~~ is] considered insurance for the purpose of [~~any other law of~~] the state and is [~~not~~] subject to regulations adopted by the director.

*(Bracketed is deleted, underlined is added.)*

## Chapter 29.35. MUNICIPAL POWERS AND DUTIES

### Sec. 29.35.010. General powers.

All municipalities have the following general powers, subject to other provisions of law:

- (1) to establish and prescribe a salary for an elected or appointed municipal official or employee;
- (2) to combine two or more appointive or administrative offices;
- (3) to establish and prescribe the functions of a municipal department, office, or agency;
- (4) to require periodic and special reports from a municipal department to be submitted through the mayor;
- (5) to investigate an affair of the municipality and make inquiries into the conduct of a municipal department;
- (6) to levy a tax or special assessment, and impose a lien for its enforcement;
- (7) to enforce an ordinance and to prescribe a penalty for violation of an ordinance;
- (8) to acquire, manage, control, use, and dispose of real and personal property, whether the property is situated inside or outside the municipal boundaries; this power includes the power of a borough to expend, for any purpose authorized by law, money received from the disposal of land in a service area established under AS 29.35.450 ;
- (9) to expend money for a community purpose, facility, or service for the good of the municipality to the extent the municipality is otherwise authorized by law to exercise the power necessary to accomplish the purpose or provide the facility or service;
- (10) to regulate the operation and use of a municipal right-of-way, facility, or service;
- (11) to borrow money and issue evidences of indebtedness;
- (12) to acquire membership in an organization that promotes legislation for the good of the municipality;
- (13) to enter into an agreement, including an agreement for cooperative or joint administration of any function or power with a municipality, the state, or the United States;
- (14) to sue and be sued;
- (15) provide facilities or services for the confinement and care of prisoners and enter into agreements with the state, another municipality, or any person relating to the confinement and care of prisoners.

### Sec. 29.35.015. Investment pools.

A municipality may invest money in investment pools for public entities as authorized under AS 37.23 only if that municipality has obtained the consent of its governing body through an ordinance authorizing the

March 17, 2000

Re: HB 404, an Act relating to joint insurance arrangements and providing for an effective date.

A fiscal note is not yet available for this bill. It has been requested and hopefully will be ready by March 21.

## The AML/JIA is ~ Alaska's PREMIER Risk Management Pooling Program

[Home](#) / [Site Index](#) / [Members](#) / [Staff Board](#) / [Newsletter](#) / [Claims](#) / [Links](#)  
[Publications](#) / [Calendar](#) / [ERP Ho/line](#) / [Safety Training](#) / [Loss Control](#) / [Coverage](#)



### NEWS FLASH !! Important Topics for Program Members !

## Limits Double! Rates Guaranteed!

↳ **From \$5.25 million to \$10.25 million, at no additional cost!**

Beginning July 1, 1999, AML/JIA members will enjoy liability limits of \$10.25 million in most of their liability lines. What's more, the current rates are guaranteed for two years .

"AML/JIA is a great partner, and we trust their judgement in coverage and defense issues," said Carl Oswald, second vice-president with Genesis Underwriting Management Company. "When AML/JIA asked for increased limits, we were comfortable with providing them."

Executive Director, Eileen Terwilliger, said that rates will remain at the present level after review from the pool's actuary. "AML/JIA rates are set once every two years after an actuarial review," explains Terwilliger. "We can't and won't play with our rates to buy business like a commercial insurance company can. We simply live up to our mission statement: provide the most cost-effective risk financing and quality loss control services to meet the needs of local governments and school districts."

Limits were increased to \$10.25 million per occurrence for general liability, public officials liability, school leaders errors and omissions , and auto liability with no aggregate. Employment related practices coverage is slightly lower at \$10 million per occurrence, again with no aggregate. In all instances, defense costs are outside the stated limits, which means attorney fees won't erode the \$10.25 million limit, a real advantage in the high dollar claims bracket.

All-Risk Property coverage limits were raised to \$750,000,000 blanket limits per occurrence with automatic reinstatement of the full limit after each and every loss. "The AML/JIA's broad property coverage is a real market leader," says Terwilliger. "To be able to offer coverage of this caliber, without raising rates, is what the AML/JIA is all about." The property program has a \$5,000 deductible, with higher deductibles available upon request.

Earthquake coverage of \$100,000,000 is provided to all members and is exclusive to the AML/JIA. It has a program aggregate of \$100,000,000 that is dedicated only to AML/JIA members. Floods are covered up to \$250,000,000

annually with a program aggregate. Like the earthquake coverage these limits can only be eroded by flood losses sustained by members of the AML/JIA. In fact, there is no sharing of risk with other public entities or pooling programs in other states in any of the AML/JIA's property coverages.

Boiler and machinery coverage is offered at \$50,000,000 per occurrence if members choose to purchase it.

Workers' compensation continues to provide statutory limits and \$2,500,000 in employers' liability.

"We are excited to offer these increased limits, while at the same time keeping the rates level, or in the case of property and auto liability, considerably lower," Terwilliger says. "Better still, our financial picture looks very strong. Rates are locked in for two years."

This article is intended to aid your understanding of the AML/JIA self-insurance and pooling program. It is not intended to replace, supersede or supplement your Participant Coverage Memorandum, the association's bylaws or the Cooperative Participation Agreement. For more information on coverage issues, consult your Participant Coverage Memorandum or call Eileen Terwilliger with questions at 800-337-3682.

[@Back to Top of Page](#)

---

[Home](#) / [Site Index](#) / [Members](#) / [Staff Board](#) / [Newsletter](#) / [Claims](#) / [Links](#)  
[Publications](#) / [Calendar](#) / [ERP Hotline](#) / [Safety Training](#) / [Loss Control](#) / [Coverage](#)

Send mail to [eileent@anc.amljia.org](mailto:eileent@anc.amljia.org) with questions or comments about this web site.

Last modified: February 18, 2000

## The AML/JIA is ~ Alaska's PREMIER Risk Management Pooling Program

[Home](#) / [Site Index](#) / [Members](#) / [Staff Board](#) / [Newsletter/Claims](#) / [Links](#)  
[Publications](#) / [Calendar](#) / [ERP Hotline](#) / [Safety Training](#) / [Loss Control](#) / [Coverage](#)



## COVERAGE & SERVICES

Go to: [CORE PROGRAM](#) / [LELP PROGRAM](#) / [LARGE MUNI PROGRAM](#) / [LOSS CONTROL](#) / [SAFETY TRAINING](#) / [PUBLICATIONS](#) / [CLAIMS](#)

### The AML/JIA Mission - We're leading the way!

Since 1988, the AML/JIA has earned a reputation for its dynamic response to our member's coverage needs. To this end, we have developed several programs specifically targeted to Alaska municipalities and school districts.

*A tradition of excellence and opportunity*

### MISSION STATEMENT

The Alaska Municipal League Joint Insurance Association, Inc., is a member-driven pool dedicated to providing stable, cost-effective risk financing and quality loss control services designed to meet the needs of local governments and school districts.

### Loss Control Services To Our Members

#### LOSS CONTROL

For in-depth information on coverage and limits click here: ➤

Let us help your municipality or school district with your toughest risk management question, assist to solve your scariest loss control problem, work with you to help your employees work safer and smarter, develop programs and policies to help your administration avoid unnecessary liability or exposure to loss. Our comprehensive range of REAL services is available today. If your entity is not a member YET, look at what you're missing.

#### SAFETY TRAINING

For in-depth information on coverage and limits click here: ➤

Is training an area where we could help?  
 Beginning with our newest training program: Public Entity Risk Management Seminar or "PERMS", there are literally dozens of

training topics available to our members. If you have a training need, and don't see the topic listed here, just contact our office at: 1-800-337-3682.

### **NEWSLETTERS & PUBLICATIONS**

For in-depth information on coverage and limits click here: ➤

A list of sample waivers, reference documents, sample RFP's, contracts, safety manuals, newsletters, OSHA checklists, crisis management plans, sample legal documents, safety bulletins and more, our enormous reference libraries give you a resource for documents and current information like never before. For more detailed information and articles, go to the NEWSLETTER or PUBLICATIONS page.

### **CLAIMS SERVICES**

For in-depth information on coverage and limits click here: ➤

Bringing Claims in-house was a BIG step in increasing services to our members. The AML/JIA strives to provide the highest quality claims response and handling available to Alaska's public entities.

**For more information on:**

- How to file a claim
- Some do's and don't about claims for administrators
- How your claim is handled

## **▣ Coverage - From the Smallest School to the Largest Municipality**

### **The CORE Program**

For in-depth information on coverage and limits click here: ➤

**Local Government at its BEST:** Alaskans excel at working together to solve tough problems. So in 1988, Alaska's cities, boroughs and school districts created the AML/JIA's Core Program - the kind of affordable coverages and protection that Alaskan municipalities and school districts needed. Participants have joined together to provide our own:

- Workers' Compensation
- General Liability
- Public Officials Liability
- Employment Related Practices
- Auto Liability
- Auto Comprehensive and Collision
- All-Risk Property
- Earthquake and Flood


### **The Law Enforcement Liability Pool (LELP) Program**

For in-depth information on coverage and limits click here: ➤

**How Police Departments Find Solutions:** As any officer will tell you, police work doesn't come without risks. But those risks don't have to include bankrupting your municipality. Municipal taxpayers are asked to pay millions of dollars in claims every year in Alaska for wrongful death, excessive force, false arrest and other

claims.

### **The Large Muni Program**

For in-depth information on coverage and limits click here: 

**First Dollar Coverage? Large Self-Insured Retention?** Our Core and LELP coverages can be designed to fit with your unique requirements for coverage. The AML/JIA large muni program is as flexible as you need it to be.

[@ Back to Top of Page](#)

[Home](#) / [Site Index](#) / [Members](#) / [Staff Board](#) / [Newsletter](#) / [Claims](#) / [Links](#)  
[Publications](#) / [Calendar](#) / [ERP Hotline](#) / [Safety Training](#) / [Loss Control](#) / [Coverage](#)

Send mail to [eileent@anc.amljia.org](mailto:eileent@anc.amljia.org) with questions or comments about this web site.  
Last modified: March 16, 2000

# The AML/JIA is ~ Alaska's PREMIER Risk Management Pooling Program

[Home](#) / [Site Index](#) / [Members](#) / [Staff Board](#) / [Newsletter/Claims](#) / [Links](#)  
[Publications](#) / [Calendar](#) / [ERP Hotline](#) / [Safety Training](#) / [Loss Control](#) / [Coverage](#)

## The Core Program - the Heart of the AML/JIA

■ Established by Alaska Statute 21. 76, in July of 1988, the AML/JIA was created by 37 Alaskan cities, boroughs and school districts to stabilize insurance costs, gain needed services and obtain reliable coverage. Over the years, the program has increased in coverage and limits. Today the AML/JIA is the LEADER in Alaska's municipal insurance market, with substantial expertise to support our local governments in the years ahead.

■ The AML/JIA CORE program consists of bundled coverage for:

GENERAL LIABILITY

PUBLIC OFFICIALS' LIABILITY

SCHOOL LEADERS' E & O

EMERG. MEDICAL PROF.  
LIABILITY

EMPLOYEE DISHONESTY BOND

WORKERS' COMPENSATION

AUTO COMP. & COLLISION

FLOOD COVERAGE

AUTO LIABILITY

EMPL. RELATED PRACTICES

SEXUAL MISCONDUCT

EMPLOYEE BENEFIT  
LIABILITY

EXCESS POLICE PROF.  
LIABILITY

EMPLOYERS' LIABILITY

ALL-RISK PROPERTY

EARTHQUAKE COVERAGE

... and OTHER COVERAGES as requested!

■ **GENERAL LIABILITY - FY2000 Limits: \$10,250,000 per occurrence**  
Covers legal liability for claims of monetary damages that arise from negligence or alleged negligence from:

- Premises and Operations
- Products and Completed Operations
- Liability Assumed by Contract
- Host Liquor Liability
- Automobile Ownership
- Hired and Non-Owned Use
- Police Liability for LELP Program Members
- Wrongful Acts
- Sexual Misconduct
- Athletic Participation

Persons Insured: 1) The named insured; 2) Officials of the named insured; 3) Employees while acting on behalf of the named insured; and 4) Volunteers while acting on behalf of the named insured.

■ **PUBLIC OFFICIALS' - FY2000 Limits: \$10,250,000 per occurrence**

Coverage includes:

- School Leaders' E & O
- Employment Related Practices (see next)

---

**■ BOND - FY2000 Limits \$50,000**

A standard \$50,000 Employee Dishonesty Bond is included at no additional charge to all CORE Program members. In addition to this bond, other bonds are available (at request) in limits up to \$1,000,000.

- In-House Bond Services
- Notary Bonds
- Performance Bonds
- Crime/Employee Dishonesty Bonds
- Public Officials' Bonds

---

**■ EMPL. RELATED PRACTICES - FY2000 Limits \$10,000,000 per occurrence**

The AML/JIA provides \$5,000,000 with a \$10,000 deductible for most members, endorsed coverage:

- Provided to Members at no Additional Cost
- ERP Hotline Support Service - 30 minutes free legal consultation
- Age Discrimination - related to employment
- Racial Discrimination - related to employment
- Sexual Harassment - related to employment
- Sexual Discrimination - related to employment
- Wrongful Termination

---

**■ AUTO LIABILITY - FY2000 Limits \$10,250,000 per occurrence**

Coverage includes:

- Uninsured/Underinsured Motorists  
PD = \$50,000 / BI = \$50,000,000 / CSL = \$5,000,000

**■ AUTO COMP. & COLLISION -**

Coverage includes:

- Hired and Non-Owned Vehicles
- Replacement Costs on Public Safety Vehicles
- \$500 Member Deductible

---

**■ WORKERS' COMPENSATION - Statutory Limits**

Workers' Compensation covers:

- Work-related Accidents - for employees of the AML/JIA participants
- Occupational Diseases - for employees of the AML/JIA participants

- Statutory Limits

Includes Employer's Liability - FY2000 Sublimit: \$2,500,000

---

### **■ ALL-RISK PROPERTY**

Program A = FY2000 Limits per occurrence \$750,000,000

Scheduled buildings, contents, stock, mobile/contractor's equipment, valuable papers, fine arts, computer hardware, computer software which is owned or in which there is an obligation to insure. Includes:

- Business Interruption
  - Service Interruption
  - Extra Expense
  - Transit
  - Accounts Receivable
  - Valuable Papers
  - Animals
  - Demolition/Increased Cost of Construction
  - Ordinance or Code Deficiency
  - EARTHQUAKE - \$250,000,000 (Program A)
  - FLCOD - \$100,000,000
  - BOILER & MACHINERY (optional) - \$50,000,000
  - No Co-Insurance Clause
  - Replacement Cost
  - All-Risk Deductible - \$5,000 standard (higher available at lower rates)
  - Earthquake Deductible - 2% with a \$100,000 minimum
  - Flood Deductible - \$100,000 minimum
- 

### **■ OTHER COVERAGES**

The AML/JIA has many other coverages available (as requested) outside the CORE Program. These coverages include:

- Airport Liability
  - Marina Keepers Liability
  - Warfinger's Liability
  - Hull - P & I
  - Travel Accident Insurance
  - Above Ground and Underground Storage Tanks
- 

**⚠ NOTE:** *This summary of coverage is intended to aid your understanding of the AML/JIA self-insurance and pooling program. It is not intended to replace, supercede or supplement your Participant Coverage Memorandum, the Association's Bylaws or the Cooperative Participation Agreement.*

---

[Home](#) / [Site Index](#) / [Members](#) / [Staff Board](#) / [Newsletter](#) / [Claims](#) / [Links](#)  
[Publications](#) / [Calendar](#) / [ERP Hotline](#) / [Safety Training](#) / [Loss Control](#) / [Coverage](#)

## The AML/JIA is ~ Alaska's PREMIER Risk Management Pooling Program

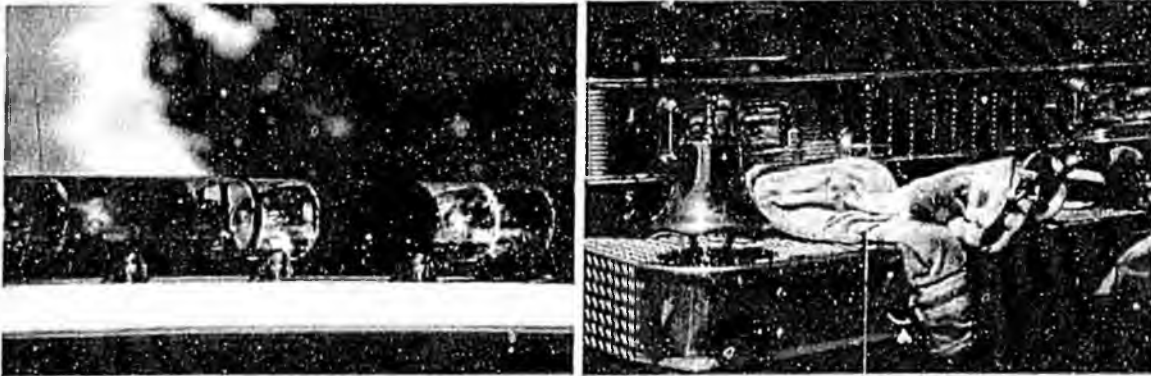
[Home](#) / [Site Index](#) / [Members](#) / [Staff Board](#) / [Newsletter](#) / [Claims](#) / [Links](#)  
[Publications](#) / [Calendar](#) / [ERP Hotline](#) / [Safety Training](#) / [Loss Control](#) / [Coverage](#)

### The Law Enforcement Liability Program Police Professional Coverage

---

#### ■ The LELP Program - How Police Departments Find Solutions

Police work doesn't come without risks. Municipal taxpayers are asked to pay millions of dollars in claims every year in Alaska for wrongful death, excessive force, false arrest and other claims. Protection from these risks is critical, and the AML/JIA Law Enforcement Liability Protection (LELP) Program



#### ■ Training and Services

The AML/JIA has earned the reputation for being the leader in training and services for the LELP Program. Each year, the LELP Program sponsors training sessions designed for Alaska's law enforcement agencies and certified by the Alaska Police Standards Council:

- Law Enforcement Management Institute
- Jail Suicide Prevention
- Skid Car Training
- Dispatch Training

AML/JIA members receive on-site safety and liability audits and are assisted with questions regarding department liability and officer safety. The AML/JIA has developed highly acclaimed model policies and procedures manuals for police, jail and dispatch operations.

#### ■ Ownership


LELP members are owners of the program. Police chiefs from member entities form the LELP Advisory Committee, which establishes its own budget, recommends training and programs, and advises the AML/JIA Board of Trustees regarding issues affecting law enforcement. As a partner in the program, your entity will work together with scores of other Alaska police departments to protect your officers and citizens.

### ■ 2000 LELP Advisory Committee Members

- Thomas Lee Clemons, Chief, City of Sand Point
- Robert Petit, City of Bethel
- Milton Haken, City of Nenana
- Gerald Meece, City of Galena
- Gregory Goodman, City of Haines

■ For more information on our Law Enforcement Liability Protection Program, or the LELP Advisory Committee, contact **Risk Manager Kevin Smith** at [kevins@jnu.amljia.org](mailto:kevins@jnu.amljia.org) or call (907) 586-3222.

---

 *the AML/JIA NOTE: This summary of coverage is intended to aid your understanding of self-insurance and pooling program. It is not intended to replace, supercede or supplement your Participant Coverage Memorandum, the Association's Bylaws or the Cooperative Participation Agreement.*

---

[Home](#) / [Site Index](#) / [Members](#) / [Staff Board](#) / [Newsletter](#) / [Claims](#) / [Links](#)  
[Publications](#) / [Calendar](#) / [ERP Hotline](#) / [Safety Training](#) / [Loss Control](#) / [Coverage](#)

Send mail to [cileent@anc.amljia.org](mailto:cileent@anc.amljia.org) with questions or comments about this web site. Last modified: February 18, 2000

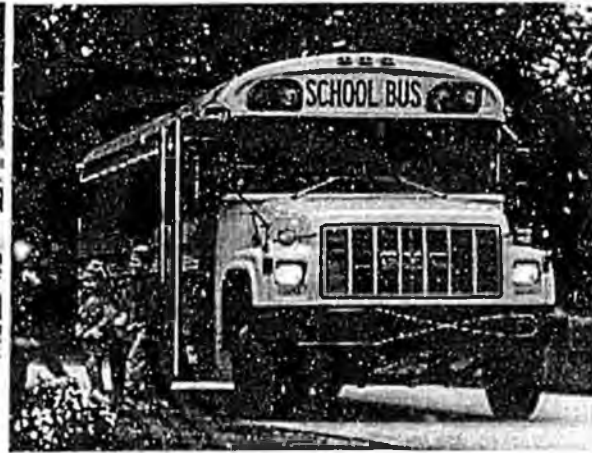
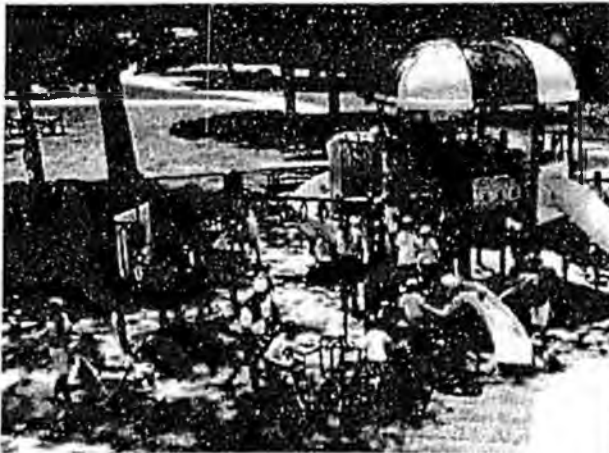
## The AML/JIA is ~ Alaska's PREMIER Risk Management Pooling Program

[Home](#) / [Site Index](#) / [Members](#) / [Staff Board](#) / [Newsletter](#) / [Claims](#) / [Links](#)  
[Publications](#) / [Calendar](#) / [ERP Hotline](#) / [Safety Training](#) / [Loss Control](#) / [Coverage](#)

### The Large Muni Program Customized Coverage for Large Entities

#### Special Programs for Our Largest Members

Some of our largest municipalities and school districts need special coverages and services. The AML/JIA's Large Muni Program is custom-made for the unique needs of Alaska's largest public entities by combining broad coverages and higher limits and levels of self-insured retention program tailored to your needs at the most, to create an economical cost.



#### Coverages Available for The Large Muni Program:

GENERAL LIABILITY  
PUBLIC OFFICIALS' LIABILITY  
SCHOOL LEADERS' E & O  
EMERG. MEDICAL PROF.  
LIABILITY

EMPLOYEE DISHONESTY BOND

WORKERS' COMPENSATION  
AUTO COMP. & COLLISION  
FLOOD COVERAGE

AUTO LIABILITY  
EMPL. RELATED PRACTICES  
SEXUAL MISCONDUCT  
EMPLOYEE BENEFIT  
LIABILITY  
EXCESS POLICE PROF.  
LIABILITY  
EMPLOYERS' LIABILITY  
ALL-RISK PROPERTY  
EARTHQUAKE COVERAGE

... and OTHER COVERAGES as requested!

#### Special Exposures

When the public entity combines municipal services, schools, police

departments and other specialized exposures like hospitals, boat harbors, and airports, savings can be realized by exploring some of the programs available for large municipalities.

### Enhanced Loss Control Services

The Large Muni Program provides options for loss control services and/or services designed to complement those your in-house risk management or broker may be offering already. Special claims handling is also available.


### Partnership

Many public entities retain the services of a broker. Working with your broker is always our pleasure. The AML/JIA works closely with our current members' brokers, creating a strong partnership that benefits the member, securing the best coverage, services and price.

### Call Us!

Or stop by our offices. We would enjoy working with you to create a highly customized proposal. A quote for coverage is always free, and in the end may save you thousands of dollars.

---

 **NOTE:** *This summary of coverage is intended to aid your understanding of the AML/JIA self-insurance and pooling program. It is not intended to replace, supersede or supplement your Participant Coverage Memorandum, the Association's Bylaws or the Cooperative Participation Agreement.*

---

[Home](#) / [Site Index](#) / [Members](#) / [Staff Board](#) / [Newsletter](#) / [Claims](#) / [Links](#)  
[Publications](#) / [Calendar](#) / [ERP Hotline](#) / [Safety Training](#) / [Loss Control](#) / [Coverage](#)

Send mail to [cileent@anc.amljia.org](mailto:cileent@anc.amljia.org) with questions or comments about this web site. Last modified:  
February 18, 2000

**CITY OF SEWARD**  
P.O. BOX 167  
SEWARD, ALASKA 99664-0167



- Main Office (907) 224-4050
- Police (907) 224-3338
- Harbor (907) 224-3138
- Fire (907) 224-3445
- Fax (907) 224-4038

March 13, 2000

Representative Gary Davis  
Room 513  
State Capitol  
Juneau, Alaska 99801-1182

Dear Representative Davis:

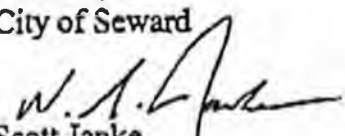
As you are aware, municipal governments and school districts are experiencing financial pressures, particularly in rural Alaska. Many of the smallest cities are on the brink of dissolution. Regardless of the size of the community, some of the services have been and are being out-sourced to local Native organizations or non-profits, such as the library, animal control, museums, senior citizen centers and even plowing roads in some communities.

As a member of the Alaska Municipal League Joint Insurance Association's pooling arrangement, the City of Seward has, as have all other pool members, been fortunate to have good insurance coverage for the services we provide at reasonable rates. Our concern is that as we transfer municipal services to non-profits or Native Village groups, that those entities be allowed to utilize the same sound and proven mechanism for securing good insurance coverage at reasonable rates so that our constituency is protected.

Adequate insurance protection at reasonable rates in rural Alaska is difficult to obtain. As more and more small cities drop the services that have been funded by the State and local Native Village governments and/or non-profit organizations take over those services, the State of Alaska shares in the liability for those functions. Having adequate insurance protection serves to protect the State's interests as well.

Therefore we are very supportive of HB404.

Sincerely,  
City of Seward

  
Scott Janke,  
City Manager

Phone: 907-224-4047  
Fax: 907-224-4038  
E-mail: [citymgr@seward.net](mailto:citymgr@seward.net)

rlg



P.O. Box 46  
Kotzebue, Alaska 99752

City Hall  
442-3401

Police Dept.  
412-3351

Fire Dept.  
442-3401

Public Works  
412-3401

February 29, 2000

Rep. Gary Davis  
Room 513  
State Capitol  
Juneau, Alaska 99801-1182

Dear Rep. Davis:

As you are well aware, municipal governments and schools are experiencing extreme financial pressures, particularly in Rural Alaska. Many of the smallest cities are on the brink of dissolution. Regardless of the size of the community, some of the services have been and are being out-sourced to local Native organizations or non-profits, such as the library, animal control, museums, senior citizen centers, and even plowing roads in some communities.

As a member of the Alaska Municipal League/Joint Insurance Association's pooling arrangement, the City of Kotzebue has, as have all other pool members, been fortunate to having good insurance coverage for the services we provide at reasonable rates. Our concern is that as we transfer municipal services to non-profits or Native Village groups, that those entities be allowed to utilize the same sound and proven mechanism for securing good insurance coverage at reasonable rates so that our constituency is protected.

Adequate insurance protection at reasonable rates in Rural Alaska is difficult to obtain. As more and more small cities drop the services that have been funded by the State and local Native village governments take over those services, the State of Alaska shares in the liability for those functions. Having adequate insurance protection serves to protect the State's interests as well.

Therefore we are very supportive of HB404. If there are any questions we can answer, please do not hesitate to call.

Sincerely,

A handwritten signature in cursive script that reads "Nancy E. Gestad". The signature is written in dark ink and is positioned above the typed name and title.

Nancy E. Gestad  
City Manager

**KOTLIK TRADITIONAL COUNCIL  
P.O. BOX 20210  
KOTLIK, ALASKA 99620  
Phone (907) 899-4326/4836 FAX (907) 899-4790**

2 March 2000

The Honorable Representative Gary Davis  
House of Representatives  
Alaska State Legislature  
State Capitol  
Juneau, Alaska 99801-1182

Re: Letter of Support Regarding HB404

Dear Mr. Davis:

This is a letter of support to the Alaska Municipal League Joint Insurance Association, Inc, (AML/JIA) regarding HB404. Our firm supports the efforts of AML/JIA's position to make it legal to add traditional council and nonprofits to the pooling statute. It will be a benefit for the 227 Federally recognized Native village governments in Alaska.

Last year I contacted AML/JIA for insurance, but was told tribal councils were not included. I have had problems finding insurance coverage since then. The passage of this bill will enable tribal governments alleviate the problems of finding coverage, therefore providing the insurance needed for their employees, buildings owned, and other assets.

If you have questions please contact me at (907) 899-4836.

Regards:.



Pius Akaran  
Tribal Administrator

UGASHIK TRADITIONAL VILLAGE  
206 E. Fireweed Lane, # 204  
Anchorage, Alaska 99503  
phone (907)338-7611  
fax (907)338-7659

March 7, 2000

Representative Gary Davis  
House of Representatives  
Alaska State Legislature  
State Capitol  
Juneau, Alaska 99801-1182

Dear Mr. Davis:

I would ask that you give your support to House Bill 404, a bill which would allow Alaska Native Village Councils, Native Associations and nonprofits to pool for worker's compensation, general liability, and property insurance just as municipalities organized under stat law and school districts presently can.

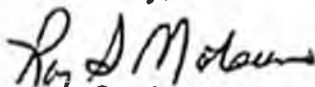
We had worker's compensation insurance and we were dropped because they said "the organization was without prior insurance history" and are in an "assigned risk" group so that they could charge us higher rates.

I feel that they insurance companies are in cahoots with each other, they cancel policies and pass you on to other insurance companies after we get "assigned risk" and "without prior insurance history" tacked onto our organization. This allows the new insurance company to charge us at a higher rate.

Also one of the companies did charge us a "broker fee" and tried to charge us again, but we challenged it and did not pay the second time.

There definitely needs to have something changed with this to help the organizations out that are in the same situation as we are. Thank you.

Sincerely,



Roy S. Matsuno  
Tribal Administrator

March 17, 2000

Re: HB 404, an Act relating to joint insurance arrangements and providing for an effective date.

A fiscal note is not yet available for this bill. It has been requested and hopefully will be ready by March 21.



# Alaska State Legislature

---

## HOUSE COMMITTEE ON COMMUNITY AND REGIONAL AFFAIRS

---

Representative John Harris, Representative Carl Morgan, Co-Chairmen  
State Capitol, Room 110, Juneau, Alaska 99801-1182  
(907) 465-3882

### AGENDA

March 21, 2000

1. Call meeting to order
  
2. Roll call      Rep. Dyson  
                     Rep. Kookesh  
                     Rep. Halero  
                     Rep. Murkowski  
                     Rep. Joule  
                     Rep. Morgan  
                     Rep. Harris
  
3. Consideration of bills on agenda  
  
                     HB 404 – Joint Insurance Arrangements
  
4. Announcements or other business  
  
                     Next meeting: Wednesday, March 22 – 5:00 pm, Room 519
  
5. Motion to adjourn



# ALASKA STATE LEGISLATURE

REPRESENTATIVE GARY DAVIS

## SPONSOR STATEMENT House Bill 404

*An Act relating to joint insurance arrangements and providing for an effective date*

House Bill 404 amends AS 21.76.010(a) to expand the types of entities allowed to enter into joint insurance arrangements for the purpose of assuming risks from losses or purchasing coverage. Native village councils, Native associations and nonprofit corporations could enter into these agreements provided that the council, association or corporation exercises at least two of the general municipal powers described under AS 29.35.010.

Unincorporated communities in which Native councils, Native associations or small nonprofit corporations exercise traditional governmental functions have great difficulty in obtaining affordable insurance coverage in the traditional market. Small, nonprofit corporations such as friends of the library, senior citizen centers and other organizations within municipalities also experience this difficulty.

House Bill 404 would allow these entities to enter into the cooperative agreements currently enjoyed by organized municipalities in Alaska. They would be able to obtain the needed insurance at a more affordable rate provided to larger insurance pools and by sharing the risk for potential losses.

In order to qualify for the ability to enter into an agreement, the nonprofit corporation, or the Native association or village council would need to exercise at least two of the general powers given to organized municipalities in the state.

Joint insurance agreements may be entered into for the following types of insurance coverage: disability, property, casualty, surety, marine, wet marine and transportation and mortgage guaranty. It may not be entered into for health, life or title insurance purposes.

This legislation was requested by the Alaska Municipal League/Joint Insurance Association and has the support of their umbrella organization, the Alaska Municipal League as well.

(A) is organized or, in the case of a United States branch or agency office of a foreign banking organization, licensed under the laws of the United States or a state of the United States, and has been granted authority to operate with fiduciary powers; and

(B) is regulated, supervised, and examined by United States federal or state authorities having regulatory authority over banks and trust companies.

(g) An insurer may receive credit for reinsurance transactions if the reinsurance agreement meets all applicable requirements established by the director.

(h) A domestic ceding insurer may not be allowed credit if the assuming insurer's accreditation has been revoked by the director.

(i) In this section, a "reinsurance transaction" means a transaction stemming from a contract by which the assuming insurer agrees to indemnify the ceding insurer in whole or in part against liability or losses that the ceding insurer might incur under a separate contract of insurance with its insured. (§ 1 ch 120 SLA 1966; am §§ 20, 21 ch 50 SLA 1990; am § 22 ch 21 SLA 1991; am §§ 19 — 22 ch 67 SLA 1992; am §§ 17, 18 ch 62 SLA 1995; am § 10 ch 81 SLA 1997)

**Revisor's notes.** — Subsection (i) was formerly AS 21.12.120. Renumbered as (g) in 1991 and as (i) in 1993, at which time former (h) and (i) were relettered as (g) and (h), respectively. In 1991, the introductory clause of (i) was rewritten to reflect the reorganization and a manifest error in an internal reference in § 21, ch. 50, SLA 1990, which enacted former AS 21.12.120, was corrected.

**Effect of amendments.** — The 1991 amendment, effective June 11, 1991, corrected a drafting error in the second and third sentences in subsection (c) as enacted by § 20, ch. 50, SLA 1990.

The 1992 amendment by §§ 19, 21, and 22, ch. 67, SLA 1992, effective July 1, 1992, rewrote paragraph (a)(2); in item (a)(4)(A)(iv), substituted "\$100,000,000" for "\$50,000,000," inserted "certified" near the end, and added the phrase beginning "or for" at the end; added item (a)(4)(A)(v); inserted "that contain an evergreen clause" and the phrase beginning "not later than" and ending "annual statement" in paragraph (c)(3); and added subsections (h) and (i). The 1992 amendment by § 20, ch. 67, SLA 1992, effective January 1, 1994, rewrote subsection (a) to incorporate

references to accreditation by the National Association of Insurance Commissioners and made related textual changes.

The 1995 amendment, effective July 1, 1995, in subsection (a), rewrote paragraph (2) and, in subparagraph (4)(A), added "or an accountant holding a substantially equivalent designation as determined by the director" at the end of items (iii)-(v), in item (iii), inserted "certified" near the end, and rewrote item (iv); and substituted "An insurer" for "A life insurer" at the beginning of subsection (g).

The 1997 amendment, effective July 1, 1997, deleted "by the insurer's domiciliary regulator and" following "certification of the insurer's solvency" in subdivision (a)(4)(A)(iii).

**Editor's notes.** — Section 83, ch. 50, SLA 1990 provides that this section as amended by § 20, ch. 50, SLA 1990, "applies to all reinsurance transactions having an inception, anniversary, or renewal date on or after July 1, 1991."

**Collateral references.** — 43 Am. Jur. 2d, Insurance, §§ 1831 to 1841.

46 C.J.S., Insurance, §§ 1220 to 1242.

**Sec. 21.12.030. Definitions not mutually exclusive.** It is intended that certain insurance coverages may come within the definitions of two or more kinds of insurance as defined in this chapter, and the inclusion of coverage within one definition does not exclude it from the definition of another kind of insurance coverage if the coverage may be reasonably included. (§ 1 ch 120 SLA 1966)

**Sec. 21.12.040 Life insurance defined.** Life insurance is insurance on human lives. The transaction of life insurance includes also the granting of endowment benefits, additional benefits for death or dismemberment by accident or accidental means, additional benefits for the insured's disability, and optional modes of settlement of proceeds of life insurance. Transaction of life insurance does not include workers' compensation insurance. (§ 1 ch 120 SLA 1966)

**Collateral references.** — 43 Am. Jur. 2d, Insurance, §§ 2, 3.

44 C.J.S., insurance, §§ 1, 25 to 27.

**Sec. 21.12.050. Health and health care insurance defined.** (a) Health insurance is insurance of human beings (1) against bodily injury, disablement, or death by accident or accidental means; (2) against the resulting expenses of the injury, disablement, or death; (3) against disablement or expense resulting from sickness or childbirth; (4)

against expense incurred in prevention of sickness; (5) for dental care; and (6) including every insurance that applies to injury, disablement, or death. Transaction of health insurance includes disability insurance and stop-loss insurance but does not include workers' compensation insurance. Health care insurance described in (b) of this section is a type of health insurance under this subsection.

(b) Health care insurance means that part of health insurance that provides benefits for medical care whether provided directly, through reimbursement, or other method.

(c) In this section, "stop-loss insurance" means insurance purchased by a self-insured employer to cover benefits the employer incurs in excess of a preset limit. (§ 1 ch 120 SLA 1966; am § 7 ch 56 SLA 1996; am §§ 11, 12 ch 81 SLA 1997)

**Cross references.** — For statement that the purpose of the amendments to this section made by ch. 81, SLA 1997 was to implement minimum federal standards, see § 1, ch. 81, SLA 1997 in the 1997 Temporary and Special Acts.

**Effect of amendments.** — The 1996 amendment,

effective September 9, 1996, rewrote this section.

The 1997 amendment, effective July 1, 1997, rewrote subsection (a) and added subsections (b) and (c).

**Collateral references.** — 43 Am. Jur. 2d, Insurance, §§ 2, 3.

44 C.J.S., Insurance, §§ 1 to 3, 18.

**Sec. 21.12.052. Disability insurance defined.** Disability insurance is insurance that provides periodic income payments when income is interrupted or terminated because of disability resulting from sickness, injury, or dismemberment, or a combination of sickness, injury, or dismemberment. (§ 8 ch 56 SLA 1996)

**Effective dates.** — Section 8, ch. 56, § 8, which enacted this section, took effect on September 9, 1996.

**Sec. 21.12.055. Annuities and annuity contract defined.** (a) Annuities means all agreements to make periodical payments if the making or continuance of all or some of a series of payments or the amount of a payment is dependent upon the continuance of human life, except payments made under AS 21.12.040. The business of annuities is considered to include additional benefits operating to safeguard the contract from lapse, or to provide a special surrender value, or special benefit, or annuity, in the event of the total and permanent disability of the holder.

(b) Annuity contract means a contract providing for an annuity as defined in (a) of this section. (§ 1 ch 120 SLA 1966)

**Sec. 21.12.060. Property insurance defined.** Property insurance is insurance on real or personal property of every kind and of every interest therein, whether on land, water, or in the air, against loss or damage from any and all hazard or cause, and against loss consequential upon the loss or damage, other than noncontractual legal liability for loss or damage. Property insurance does not include title insurance as defined in AS 21.66.480. (§ 1 ch 120 SLA 1966)

**Revisor's notes.** — In 1991, "AS 21.66.480" was substituted for "AS 21.12.100" to correct a manifest error in ch. 120, SLA 1974.

#### NOTES TO DECISIONS

**Contamination of groundwaters.** — Contamination of groundwater qualifies as property damage.

*Mapco Alaska Petro., Inc. v. Central Nat'l Ins. Co.*, 784 F. Supp. 1454 (D. Alaska 1991).

**Collateral references.** — 43 Am. Jur. 2d, Insurance, § 468 et seq.

44 C.J.S., Insurance, § 14.

Damage from sonic boom as within property insurance policy. 74 ALR2d 754.

Construction of property insurance provision excluding liability for destruction caused by order of civil authority. 84 ALR2d 683.

"Contamination" within coverage, or exception or exclusion from coverage, of property damage policy. 96

ALR2d 1360; 72 ALR4th 633.

Loss by heat, smoke, or soot without external ignition as within standard fire insurance policy. 17 ALR3d 1155.

Failure to disclose prior fires affecting insured's property as ground for avoidance of fire insurance policy. 4 ALR5th 117.

**Sec. 21.12.070. Casualty insurance defined. (a) Casualty insurance includes**

(1) **vehicle insurance:** insurance against loss of or damage to a land vehicle or aircraft or a draft or riding animal or to property while contained therein or thereon or being loaded or unloaded therein or therefrom, from any hazard or cause, and against any loss, liability, or expense resulting from or incidental to ownership, maintenance, or use of the vehicle, aircraft, or animal; and provision for medical, hospital, surgical, disability benefits to injured persons and funeral and death benefits to dependents, beneficiaries, or personal representatives of persons killed, irrespective of legal liability to the insured, if issued as an incidental coverage with or supplemental to insurance on the vehicle, aircraft, or animal;

(2) **liability insurance:** insurance against legal liability for the death, injury or disability of a human being, or for damage to property; and provision of medical, hospital, surgical, disability benefits to injured persons and funeral and death benefits to dependents, beneficiaries or personal representatives of persons killed, irrespective of legal liability of the insured, if issued as an incidental coverage with or supplemental to liability insurance;

(3) **workers' compensation and employer's liability:** insurance of the obligations accepted by, imposed upon, or assumed by employers under law for death, disablement, or injury of employees;

(4) **burglary and theft:** insurance against loss or damage by burglary, theft, larceny, robbery, forgery, fraud, vandalism, malicious mischief, confiscation, or wrongful conversion, disposal, or concealment, or from an attempt at any of the foregoing; including supplemental coverage for medical, hospital, surgical, and funeral expense incurred by the named insured or any other person as a result of bodily injury during the commission of a burglary, robbery, or theft by another; also insurance against loss of or damage to money, coins, bullion, securities, notes, drafts, acceptances, or other valuable papers and documents, resulting from any cause;

(5) **personal property floater:** insurance upon personal effects against loss or damage from any cause under a personal property floater;

(6) **glass:** insurance against loss or damage to glass, including its lettering, ornamentation, and fittings;

(7) **boiler and machinery:** insurance against any liability and loss or damage to property or interest resulting from accident to or explosions of boilers, pipes, pressure containers, machinery, or apparatus, and to make inspection of and issue certificates of inspection upon boilers, machinery, and apparatus of any kind, whether or not insured;

(8) **leakage and fire extinguishing equipment:** insurance against loss or damage to any property or interest caused by the breakage or leakage of sprinklers, hoses, pumps, and other fire extinguishing equipment or apparatus, water pipes or containers, or by water entering through leaks or openings in buildings, and insurance against loss or damage to the sprinklers, hoses, pumps, and other fire extinguishing equipment or apparatus;

(9) **credit:** insurance against loss or damage resulting from failure of debtors to pay their obligations to the insured;

(10) **malpractice:** insurance against legal liability of the insured, and against loss, damage, or expense incidental to a claim of liability, and including medical, hospital, surgical, and funeral benefits to injured persons, irrespective of legal liability of the insured, arising out of the death, injury or disablement of a person, or arising out of damage to the economic interest of a person, as the result of negligence in rendering expert, fiduciary, or professional service;

(11) elevator: insurance against loss of or damage to any property of the insured, resulting from the ownership, maintenance, or use of elevators, except loss or damage by fire, and to make inspection of and issue certificates of inspection on elevators;

(12) livestock: insurance against loss or damage to livestock, and services of a veterinary for the animals;

(13) entertainments: insurance indemnifying the producer of a motion picture, television, radio, theatrical, sport, spectacle, entertainment, or similar production, event, or exhibition against loss from interruption, postponement, or cancellation due to death, accidental injury, or sickness of performers, participants, directors, or other principals;

(14) miscellaneous: insurance against any other kind of loss, damage, or liability properly a subject of insurance and not within another kind of insurance as defined in this chapter, if the insurance is not disapproved by the director as being contrary to law or public policy.

(b) The provision of medical, hospital, surgical, and funeral benefits, and of coverage against accidental death or injury, as incidental to and part of other insurance defined in (a)(1), (2), (4), and (10) of this section, shall for all purposes be considered to be the same kind of insurance to which it is incidental, and is not subject to provisions of this title applicable to life or health insurance. (§ 1 ch 120 SLA 1966; am § 9 ch 56 SLA 1996)

**Cross references.** — For appointment of casualty insurer inspectors as special boiler inspectors, see AS 18.00.240.

**Effect of amendments.** — The 1996 amendment, effective September 9, 1996, substituted "health" for "disability" in subsection (b).

**Collateral references.** — 43 Am. Jur. 2d, Insurance, §§ 497 to 529, 703 to 728.

44 C.J.S., Insurance, §§ 1 to 49.

Liability insurance coverage for violations of anti-pollution laws. 87 ALR4th 444.

Who is executive officer of insured within liability insurance policy. 1 ALR5th 132.

Homeowner's liability insurance coverage of emotional distress allegedly inflicted on third party by insured. 8 ALR5th 254.

#### **Sec. 21.12.080. Surety insurance defined. Surety insurance includes**

(1) fidelity insurance, which is insurance guaranteeing the fidelity of persons holding positions of public or private trust;

(2) insurance guaranteeing the performance of contracts, other than insurance policies, and guaranteeing and executing bonds, undertakings, and contracts of suretyship;

(3) insurance indemnifying banks, bankers, brokers, financial or moneyed corporations or associations against loss, resulting from any cause, of bills of exchange, notes, bonds, securities, evidences of debt, deeds, mortgages, warehouse receipts or other valuable papers, documents, money, precious metals and articles made therefrom, jewelry, watches, necklaces, bracelets, gems, precious and semiprecious stones, including loss while being transported in armored motor vehicles or by messenger, but not including any other risks of transportation or navigation; also insurance against loss or damage to an insured's premises or to the furnishings, fixtures, equipment, safes, and vaults on an insured's premises caused by burglary, robbery, theft, vandalism, or malicious mischief, or attempted burglary, robbery, theft, vandalism, or malicious mischief. (§ 1 ch 120 SLA 1966)

**Collateral references.** — 35 Am. Jur. 2d, Fidelity Bonds and Insurance, §§ 1 to 28.

45 C.J.S., Insurance, § 891.

#### **Sec. 21.12.090. Marine, wet marine and transportation insurance defined. (a) "Marine insurance" includes**

(1) insurance against any and all kinds of loss or damage to

(A) vessels, craft, aircraft, cars, automobiles, and vehicles of every kind, as well as all goods, freights, cargoes, merchandise, effects, disbursements, profits, money, bullion, precious stones, securities, choses in action, evidences of debt, valuable papers, bottomry and respondentia interests and all other kinds of property and interests therein, in respect to, appertaining to, or in connection with any and all risks or perils of navigation,

transit, or transportation, including war risks, on or under any seas or other waters, on land or in the air, or while being assembled, packed, crated, baled, compressed, or similarly prepared for shipment or while awaiting shipment or during delays, storage, transshipment, or reshipment incident thereto, including marine builder's risks and all personal property floater risks;

(B) a person or to property in connection with or appertaining to a marine, inland marine, transit or transportation insurance, including liability for loss of or damage to either, arising out of or in connection with the construction, repair, operation, maintenance, or use of the subject matter of the insurance (but not including life insurance or surety bonds or insurance against loss by reason of bodily injury to the person arising out of the ownership, maintenance, or use of automobiles);

(C) precious stones, jewels, jewelry, gold, silver, and other precious metals, whether used in business or trade or otherwise and whether in the course of transportation or otherwise;

(D) bridges, tunnels, and other instrumentalities of transportation and communication (excluding buildings, their furniture and furnishings, fixed contents and supplies held in storage) unless fire, tornado, sprinkler leakage, hail, explosion, earthquake, riot and/or civil commotion are the only hazards to be covered; piers, wharves, docks and slips, excluding the risks of fire, tornado, sprinkler leakage, hail, explosion, earthquake, riot and/or civil commotion; other aids to navigation and transportation, including dry docks and marine railways, against all risks;

(2) "marine protection and indemnity insurance", meaning insurance against, or against legal liability of the insured for loss, damage, or expense arising out of, or incident to, the ownership, operation, chartering, maintenance, use, repair, or construction of a vessel, craft, or instrumentality in use in ocean or inland waterways, including liability of the insured for personal injury, illness, or death or for loss of or damage to the property of another person.

(b) For the purposes of this title "wet marine and transportation" insurance is that part of marine insurance that includes only

(1) insurance upon vessels, crafts, hulls and of interests in or with relation to vessels, crafts, and hulls;

(2) insurance of marine builder's risks, marine war risks and contracts of marine protection and indemnity insurance;

(3) insurance of freights and disbursements pertaining to a subject of insurance coming within this section; and

(4) insurance of personal property and interests in personal property, in the course of exportation from or importation into any country, and in the course of transportation coastwise or on inland waters, including transportation by land, water, or air from point of origin to final destination, in respect to, appertaining to, or in connection with, any and all risks or perils of navigation, transit, or transportation, and while being prepared for and while awaiting shipment, and during delays, storage, transshipment, or reshipment incident thereto. (§ 1 ch 120 SLA 1966)

**Revisor's notes.** — In 1991, in (b)(2), "contracts of marine protection" was substituted for "contracts of marine protection" to correct a manifest error in ch. 120, SLA 1966.

**Opinions of attorney general.** — A court would probably be more likely to classify pollution liability policies for tankers and barges as "marine insurance" or "wet marine and transportation insurance" than as

"liability insurance" or "miscellaneous insurance" and, therefore they should be eligible for the lower rate of taxation specified in AS 21.09.210(d), July 25, 1989, Op. Att'y Gen.

**Collateral references.** — 43 Am. Jur. 2d, Insurance, §§ 681 to 702.

45 C.J.S., Insurance, §§ 852 to 876.

*Sec. 21.12.100. Title insurance defined. [Repealed, § 8 ch 120 SLA 1974. For current law see AS 21.66.480.]*

**Sec. 21.12.110. Mortgage guaranty insurance defined.** Mortgage guaranty insurance includes insurance against financial loss by reason of nonpayment of principal, interest, and other sums agreed to be paid under the terms of any note or bond or other evidence of indebtedness secured by a mortgage, deed of trust, or other instrument consisting of a lien or charge on real estate. (§ 5 ch 206 SLA 1976)

*Sec. 21.12.120. [Renumbered as AS 21.12.020(g).]*

## Chapter 14. Risk Based Capital for Insurers.

### Section

- 10. Risk based capital reports
- 20. Company action level event
- 30. Regulatory action level event
- 40. Authorized control level event
- 50. Mandatory control level event
- 60. Risk based capital plan

### Section

- 70. Foreign insurers
- 80. Hearings
- 90. Confidentiality; restrictions on use
- 100. Penalty for violation
- 200. Definitions

---

**Effective dates.** — Section 3, ch. 76, SLA 1994 makes this chapter effective January 1, 1995.

---

**Sec. 21.14.010. Risk based capital reports.** (a) A life and health domestic insurer, property and casualty domestic insurer, or other insurer required by the director shall, on or before March 1, submit to the director a report of its risk based capital covering the previous calendar year. The report must be in a form and contain the information required by risk based capital instructions. A domestic insurer required to submit a report under this subsection shall file the report with

(1) the National Association of Insurance Commissioners; and

(2) the insurance regulatory agency in each state in which the insurer is authorized to transact business if the insurance regulatory agency has requested the report in writing from the insurer; a report requested under this paragraph shall be delivered

(A) not later than 15 days from the receipt of a request if the report has already been filed with the director; or

(B) at the time the report is filed with the director, if the report has not yet been filed with the director.

(b) An insurer's risk based capital shall be determined under the formula contained in the risk based capital instructions.

(c) If a domestic insurer files a report that the director determines to be inaccurate, the director may adjust the report to correct the inaccuracy. The director shall notify the insurer of an adjustment and the reason for it.

(d) If a domestic insurer transacts business only in this state and the insurer's total annual written premium plus monetary consideration received on an annuity is less than \$2,000,000, the insurer may apply annually to the director for an exemption from submitting the report required under this section.

(e) The director shall establish risk based capital instructions by regulation. (§ 1 ch 76 SLA 1994; am § 13 ch 81 SLA 1997)

**Effect of amendments.** — The 1997 amendment, effective July 1, 1997, in subsection (a), deleted "if required by the director" from the end of the first

sentence; in subparagraph (a)(2)(B), inserted "yet" near the end; and made a minor stylistic change.

**Sec. 21.75.900. Definition.** In this chapter,

(1) "material transaction" means a transaction, other than a claim payment, involving more than one-half of one percent of the reciprocal insurer's admitted assets as of December 31 of the prior year;

(2) "reciprocal insurance" is that resulting from an interexchange among persons, known as "subscribers," of reciprocal agreements of indemnity, the interexchange being effectuated through an "attorney-in-fact" common to all such persons;

(3) "reciprocal insurer" means an unincorporated aggregation of subscribers operating individually and collectively through an attorney-in-fact to provide reciprocal insurance among themselves. (§ 1 ch 120 SLA 1966; § 209 ch 67 SLA 1992)

**Revisor's notes.** — Paragraph (1) enacted as AS 21.75.345 and renumbered in 1992. Paragraphs (2) and (3) were formerly AS 21.75.280 and 21.75.290.

respectively, and were renumbered in 1992, at which time minor word and punctuation changes were made to reflect the reorganization.

## Chapter 76. Joint Insurance Arrangements.

**Section**

- 10. Authority to establish joint insurance arrangements
- 20. Regulation by division of insurance and annual report
- 30. General provisions of cooperative agreements
- 40. Financial provisions of agreements
- 50. Contracting with private administrators
- 60. Delegation of power to settle claims

**Section**

- 70. Excess insurance
- 80. Joint insurance fund
- 90. Filing of agreement
- 100. Regulations
- 110. Subrogation
- 120. Debt financing
- 900. Definitions

**Sec. 21.76.010. Authority to establish joint insurance arrangements.**

(a) Municipalities and their public corporations, city and borough school districts, and regional educational attendance areas may enter into cooperative agreements with each other for the purpose of establishing, operating, or participating in joint insurance arrangements through which the participating members agree to pool contributions in order to either assume risks from losses to the participants on a group basis or purchase coverage for the participants on a group basis.

(b) A joint insurance arrangement may be for any kind of insurance defined by this title except for health insurance, life insurance, and title insurance.

(c) A joint insurance arrangement shall be considered an alternative or supplement to any other policy or contract of insurance authorized or required by law, including insurance under AS 21.75.

(d) For purposes of AS 23.30.075, a joint insurance arrangement is considered to be an association duly authorized to transact workers' compensation insurance in the state. (§ 1 ch 136 SLA 1986; am § 3 ch 97 SLA 1992; am § 81 ch 56 SLA 1996)

**Effect of amendments.** — The 1992 amendment, effective June 20, 1992, inserted "and their public corporations" in subsection (a).

The 1996 amendment, effective September 9, 1996, deleted "disability insurance," following "this title except for" in subsection (b).

**Sec. 21.76.020. Regulation by division of insurance and annual report.** (a) A joint insurance arrangement may not be considered insurance for the purpose of any other law of the state and is not subject to regulations adopted by the director.

(b) By October 1 of each year, the administrator of a joint insurance arrangement shall prepare and deliver to the Legislative Budget and Audit Committee and the director a report showing the true and correct financial condition of the joint insurance arrangement. The report must

(1) be attested to by the administrator and the board of directors;

(2) include an analysis, certified by a member of the American Academy of Actuaries, of the sufficiency of the loss reserves; and

(3) be certified by a certified public accountant. (§ 1 ch 136 SLA 1986; am § 2 ch 85 SLA 1989; am § 96 ch 81 SLA 1997)

**Cross references.** — For legislative findings and purpose in connection with the 1989 amendment of this section, see § 1, ch. 85, SLA 1989 in the Temporary and Special Acts.

**Effect of amendments.** — The 1997 amendment, effective July 1, 1997, inserted "and the director" in the first sentence of subsection (b) and made minor stylistic changes.

**Sec. 21.76.030. General provisions of cooperative agreements.** A cooperative agreement must provide for the proper operation of the joint insurance arrangement, and include provisions for

(1) administration of the arrangement by a board of directors, specifying the number of members of the board and other requirements necessary for the proper functioning of the board;

(2) appointment of an administrator and other persons as necessary for the proper functioning of the arrangement;

(3) organization of the arrangement, including a roster of participating members and the names of the members of the board of directors;

(4) procedures to establish and promote an aggressive risk management and program among the members of the arrangement, including procedures for identifying and reducing the risks that can be reduced through implementing better safety technologies and improved work techniques and procedures;

(5) enforcing the collection of contributions or payments in default from members of the arrangement;

(6) the addition of new members to the arrangement or the withdrawal of members from the arrangement;

(7) the method of apportioning costs and disposition of excess contributions;

(8) transmission of financial statements and audit reports of the arrangement to participating members;

(9) terminating the arrangement and disposing of its assets; and

(10) establishing and administering a joint insurance fund. (§ 1 ch 136 SLA 1986)

**Sec. 21.76.040. Financial provisions of agreements.** (a) A cooperative agreement must include a provision requiring an annual determination by a casualty actuary who is a member of the American Academy of Actuaries that procedures for establishing reserves for losses of the joint insurance arrangement are actuarially sound.

(b) A joint insurance arrangement shall be subject to an annual independent audit. The audit shall be conducted in accordance with generally accepted auditing standards and must include a review of the actuarial assumptions used for establishing the reserves under (a) of this section. The audit report must include certification from a casualty actuary who is a member of the American Academy of Actuaries that the actuarial assumptions continue to be sound and the level of the reserves are adequate. (§ 1 ch 136 SLA 1986)

**Sec. 21.76.050. Contracting with private administrators.** A cooperative agreement may authorize the board of directors to enter into contracts for services necessary to perform the functions of a joint insurance arrangement. The person contracting to perform the functions must be appropriately licensed under this title if this title so requires. (§ 1 ch 136 SLA 1986)

**Sec. 21.76.060. Delegation of power to settle claims.** A cooperative agreement may delegate to the board of directors, or authorize delegation by the board to another person or group, the power to compromise, arbitrate, or otherwise settle claims on behalf of the arrangement. (§ 1 ch 136 SLA 1986)

**Sec. 21.76.070. Excess insurance.** A cooperative agreement may authorize the board of directors to purchase excess or catastrophic insurance on behalf of the joint insurance arrangement. The cost of the insurance shall be apportioned in the manner specified in the joint insurance agreement. The board may purchase insurance under this section only from an insurer authorized to do business in the state, except that an arrangement formed by municipalities or school districts may purchase insurance under this section from a risk-sharing pool established by a national association of similar entities if the risk-sharing pool meets the qualifications for an unauthorized insurer under AS 21.34.040(b) and (d) and 21.34.220 and has capital and policyholders surplus in an amount at least as great as would be required if the association were a domestic multiple line insurer. An arrangement may purchase insurance under this section for property and liability risks from unauthorized insurers allowed for use by licensed Alaska surplus lines brokers. (§ 1 ch 136 SLA 1986)

**Sec. 21.76.080. Joint insurance fund.** (a) A joint insurance arrangement shall establish a joint insurance fund. The fund consists of money

(1) contributed by members of the joint insurance arrangement through budgetary appropriations or transfers from a self-insurance reserve;

(2) contributed by officers and employees of members of the joint insurance arrangement under an employee benefit plan; and

(3) collected by the joint insurance arrangement through subrogation of a claim paid from the fund to a member of the arrangement.

(b) An expenditure may be made from a joint insurance fund only to

(1) pay claims, losses, or benefits, including interest on them, and the administrative and adjustment expenses incurred in connection with them, involving the types of protection for which the fund provides coverage as specified in the joint insurance agreement;

(2) pay contractual obligations of a joint insurance fund established by a municipal joint insurance arrangement to the Alaska Municipal Bond Bank Authority or other lender; and

(3) purchase insurance coverage for members of a municipal joint insurance arrangement on a group basis.

(c) The administrator shall keep the fund separate from other funds of a member of a joint insurance arrangement.

(d) For each type of protection offered by the joint insurance arrangement, the method of accounting must show the order, source, date, and amount of each payment from the fund.

(e) Within 150 days of the end of the fiscal year, the administrator shall furnish a detailed report of the operation and condition of the fund to the board of directors and the director of the division of insurance.

(f) Money held by a fund as reserves and money not needed for daily operations may be invested by the board of directors.

(g) A fund may not be terminated unless the administrator certifies that an amount of money sufficient to pay accrued and contingent expenditures has been placed in a fully collateralized escrow account. (§ 1 ch 136 SLA 1986; am § 3 ch 85 SLA 1989; am § 97 ch 81 SLA 1997)

**Effect of amendments.** — The 1997 amendment, effective July 1, 1997, rewrote subsection (e).

**Sec. 21.76.090. Filing of agreement.** The board of directors shall file a copy of the cooperative agreement with the director of insurance at least 60 days before the effective date of the agreement. The agreement shall be available for public inspection. (§ 1 ch 136 SLA 1986)

**Sec. 21.76.100. Regulations.** A cooperative agreement may authorize the board of directors to adopt rules not inconsistent with law for the fair and equitable administration of the joint insurance arrangement and the joint insurance fund. (§ 1 ch 136 SLA 1986)

**Sec. 21.76.110. Subrogation.** A joint insurance arrangement has a right of subrogation with respect to its participants to the same extent that an insurer has a right of subrogation with respect to one of its insureds. (§ 1 ch 136 SLA 1986)

**Sec. 21.76.120. Debt financing.** (a) A municipality or a municipal joint insurance arrangement may authorize the issuance of negotiable or nonnegotiable bonds, notes, or certificates of participation to establish reserves and to self-insure against liability not covered by excess insurance or reinsurance. A bond, note, or certificate issued under this subsection by a municipal joint insurance arrangement shall be secured and payable from participating members of the municipal joint insurance arrangement as provided in the cooperative agreement.

(b) A municipality that has entered into a municipal joint insurance arrangement may enter into contracts and agreements concerning debt issued under (a) of this section and provide for matters that affect the security of the debt. Bonds, notes, and certificates of participation issued under (a) of this section may be sold at either public or private sale as provided by the participants in the municipal joint insurance arrangement in the manner and at the price the participants determine. (§ 4 ch 85 SLA 1989)

**Cross references.** — For legislative findings and purpose in connection with the enactment of this section, see § 1, ch. 85, SLA 1989 in the Temporary and Special Acts.

**Sec. 21.76.900. Definitions.** In this chapter

(1) "adjustment expenses" means expenses for investigative, processing, legal, actuarial, arbitration, and settlement services incurred in the adjustment of losses, claims, or benefits;

(2) "administrator" means a person or group appointed by the board of directors to administer a joint insurance arrangement or a joint insurance fund;

(3) "board" or "board of directors" means the board of directors provided for in a cooperative agreement;

(4) "cooperative agreement" means a written agreement entered into by two or more entities described in AS 21.76.010 for the purpose of establishing, operating, or participating in a joint insurance arrangement;

(5) "fund" or "joint insurance fund" means a fund established under AS 21.76.080;

(6) "joint insurance arrangement" means a joint insurance arrangement authorized under AS 21.76.010. (§ 1 ch 136 SLA 1986)

## Chapter 78. Rehabilitation and Liquidation.

### Section

- 10. Jurisdiction of delinquency proceedings
- 20. Commencement of delinquency proceedings
- 30. Injunctions and orders
- 40. Grounds for rehabilitation
- 50. Grounds for liquidation
- 60. Grounds for conservation, foreign insurers
- 70. Grounds for conservation, alien insurers
- 80. Grounds for ancillary liquidation
- 90. Order of rehabilitation
- 100. Order of liquidation, domestic insurers
- 110. Order of liquidation, alien insurers
- 120. Order of conservation or ancillary liquidation of foreign or alien insurers

### Section

- 130. Conduct of delinquency proceedings against domestic and alien insurers
- 140. Conduct of delinquency proceedings against foreign insurers
- 150. Claims of nonresidents against domestic insurers
- 160. Claims against foreign insurers
- 170. Form of claim
- 180. Priority of certain claims
- 190. Attachment and garnishment of assets
- 200. Uniform Insurers Liquidation Act
- 210. Deposit of money collected
- 220. Exemption from fees



907 G Street Suite 358  
Anchorage, Alaska 99501  
(907) 258-8625  
(907) 278-3615 Fax  
1-800-337-3682 toll free in Alaska

ANCHORAGE OFFICE

## POSTION PAPER

The Alaska Municipal League Joint Insurance Association (AML/JIA) supports changes to AS 21.76 adding small nonprofits, Native associations, and Native village governments to the existing pooling statute.

Each month, the AML/JIA receives phone calls from Native village governments seeking insurance coverage. They are disappointed to discover that this is permitted for municipal governments organized under state law, but not for the 227 Federally recognized Native village governments in Alaska. Apparently, they have had some trouble finding coverage in the traditional market.

It is also common to hear from our member municipalities or school districts that are seeking coverage for small-nonprofit partners such as friends of the library, senior citizen centers, the humane society (animal control) or others who perform traditional governmental functions.

It is the AML/JIA's view that as state aid to municipalities declines, more services are being dropped or shifted to other service providers. Since existing pools organized under AS21.76 are accustomed to dealing with these exposures, it makes sense to permit these entities to pool with the new service providers as well.

A number of municipalities have dissolved in the past six years, and many more are seriously questioning their future. In many of these cases, especially where municipal governments have already dissolved, Native village governments have stepped in to provide services.

Since the *Venette* decision, it seems clear that these Native village governments in Alaska do not have taxing authority over non-members in the absence of Indian Country. This lack of taxing authority is a concern for some, who feel that state-organized municipalities with taxing authority could be paying for losses in small communities without taxing authority in the unlikely event of a pool failure. This is already the case.

Page 1 of 3

Local Government at its BEST!  
Visit our website: [www.amljia.org](http://www.amljia.org)

THE  
FOLLOWING  
DOCUMENT(S)  
ARE  
POOR  
ORIGINAL  
COPIES

February 9, 2000  
AML/JIA Position Paper

Many small communities such as Platinum (52) may have the authority to tax, but without a tax base they are essentially in the same position as Native village governments. This one reason why Alaska's pools have structured themselves to use excess insurance or reinsurance to avoid the catastrophic losses that could threaten a pool's financial integrity. The assessment provisions presently in statute were placed there to provide a level of comfort to the lawmakers of the mid-80's when the pooling concept was still a new idea. As a practical matter, it would be financial suicide for a pool to assess a member (possibly requiring them to go back to the taxpayers). This has never happened and is essentially a safety valve that fourteen years after the initial law was passed seems inconceivable to use.

In fact, the tax issue would only arise if all a pool's assets were insufficient to fund a loss. The AML/JIA presently exceeds all national pooling standards by a significant margin, and has admitted assets of approximately \$16 million. Since the AML/JIA is never exposed to more than \$250,000 on any loss it would take more large losses in a single year than we have experienced in the past 12 years total to exhaust the financial resources of the organization.

The Alaska Municipal League (AML) also supports the idea of adding Native village governments to the pooling statute. The 2000 Policy Statement (Local Govt. Powers, D, 2) states:

*2. Risk-Pooling: The League supports legislation enabling tribal organizations that provide municipal services to pool for the purposes of risk sharing and insurance services. As state funds to municipalities decline, tribal entities are filling the void to provide municipal-type services to Alaska's citizens. Pooling is a cost-effective, efficient method for handling insurance needs of all entities providing these critical public services. Amending AS 21.76 to permit tribal organizations to pool with municipalities helps keep the cost of providing public services lower. (am 11/99)*

In summary, both the AML & the AML/JIA support the idea of amending AS21.76 to include groups such as nonprofits and Native village governments providing municipal services. In fact, it is important to note that in the absence of a municipal government, the State of Alaska may be