

ALASKA LEGISLATURE COMMITTEE FILES 1999-2000 8672

10017 HOUSE STATE AFFAIRS

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

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

Sincerely,

Carole Shields
People For the American Way

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

Hilary Shelton
*Washington Bureau
NAACP*

Russell Siler
*Lutheran Office for Governmental
Affairs*



THE EPISCOPAL CHURCH OFFICE OF GOVERNMENT RELATIONS

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

October 7, 1999

Dear Senator:

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

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

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

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

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

Thank you for your consideration.

Sincerely,

Thomas H. Hart
Director of Government Relations

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

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

October 8, 1989

Dear Senator:

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

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

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

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

Religious Liberty Protection Act

October 8, 1999

Page 2

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

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

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

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

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

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

Religious Liberty Protection Act

October 8, 1988

Page 3

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

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

Sincerely,

Rabbi David Saperstein
Director, Religious Action Center of Reform Judaism

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

/s/
Florence Kimball
Friends Committee on National Legislation

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

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



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BEHIND THE HEADLINES

Jewish groups drop out of coalition

of Religious Liberty Protection Act

By Daniel Kurtzman

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

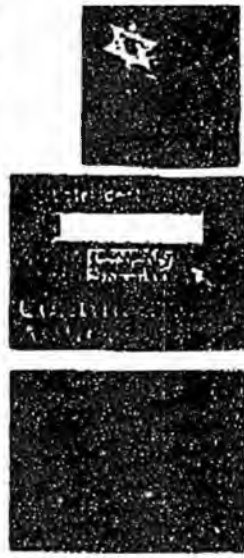
A diverse coalition of religious and civil liberties groups formed to pursue that goal following a landmark 1990 Supreme Court decision that struck down key protections for free religious practice. Congress passed legislation in 1993 to restore those protections, and President Clinton signed it.

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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**NORTHWEST
RELIGIOUS LIBERTY
ASSOCIATION**

Joseph Story

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

1507 Davidoff Street
Sitka, AK 99835

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



NRLA

NORTHWEST RELIGIOUS LIBERTY ASSOCIATION

Chairman
Jere D. Patzer

March 2, 2000

Vice Chairman
Bryce Pascoe

Alaska State Legislature
House Community and Regional Affairs Committee

President
Gregory W. Hamilton

Re: HB 387 - The Alaska Religious Freedom Protection Act

Vice President
Diana K. Justice

Honorable Chairman and Committee Members,

Government Relations

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

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

★ LEGAL RATIONALE

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

The essence of a free exercise claim is relief from a burden imposed by government on religious practice or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community (494 U.S. 872 at 897).

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

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

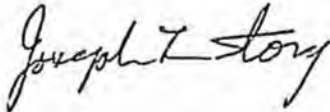
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★ HISTORICAL RATIONAL

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

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

Sincerely,

A handwritten signature in cursive script that reads "Joseph L. Story". The signature is written in dark ink and is positioned above the typed name.

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



NORTHWEST RELIGIOUS LIBERTY ASSOCIATION

Chairman
Jere D. Patzer

March 30, 2000

Vice Chairman
Bryce Pascoe

Alaska State Legislature
Alaska State Affairs Committee

President
Gregory W. Hamilton

Re: HB 387 - The Alaska Religious Freedom Protection Act

Vice President
Diana K. Justice

Honorable Chair and Committee Members,

Government Relations

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

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

★ LEGAL RATIONALE

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

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

Telephone: (503) 255-7300
Fax: (503) 253-2455
www.libertyexpress.org

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

Sincerely,

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



Alaska State Legislature

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

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

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

Signed: *Steven Paul*
Testifier

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



Alaska State Legislature

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

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

Sincerely

Signed: Keith Fredrickson
 Testifier

Self

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

907-747-3389
 Phone No.

David Levy
Anc Equal Rights Comm.

343-4340

Barbara Jones

343-4339

Noting When
Schedule HB387

LM
3/28/50

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



Center for Law and Religious Freedom

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

Carl H. Esbeck
Director

Gregory S. Baylor
Associate Director

Kimberlee W. Colby
Senior Legal Counsel

Betty L. Dunkum
Legal Counsel

Virginia E. Hartman
Executive Assistant

MEMORANDUM

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

From: Betty L. Dunkum, Esq.

Date: February 29, 2000

Re: Religious Freedom Statute For Alaska

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

1. Why Alaska Needs Its Own Religious Freedom Restoration Act

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

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

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

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

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

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

2. What Alaska Can Do To Restore Religious Liberty Protection

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

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

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

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

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

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

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

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

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

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

ACLU wants amendment
making exception for
gay people -

mainly for housing purposes.

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

Mary Pagenkopf

HCRA 3/2/00 8:10 am

REPRESENTATIVE ERIC CROFT

Memorandum

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

FROM: Rep. Eric Croft



DATE: 3/7/00

RE: HB 378, Alaska Religious Freedom Protection Act

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

For your information I have enclosed:

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



Subject: HB 387

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

From: Sam Shepard <Sam_Shepard@legis.state.ak.us>

Organization: Alaska State Legislature

To: Barbara Cotting <Barbara_Cotting@legis.state.ak.us>

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

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

Sam

HOME SCHOOL LEGAL DEFENSE ASSOCIATION

Advocates for Family & Freedom

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

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

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

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

SCOTT W. SOMERVILLE, ESQ.
ATTORNEY (VA)

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

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

BRADLEY P. JACOB, ESQ.
ATTORNEY (PA, MD, DC)

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

From: Chris Klicka

Date: February 29, 2000

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

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

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

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

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

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

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

Why does Alaska need a RFRA?

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

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

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

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

- a) the long-standing practice of pastor-laity confidentiality has been repeatedly violated;
- b) a Catholic hospital was denied accreditation for refusing to teach abortion techniques;
- c) among other zoning ordinance conflicts, a church ministry to the homeless was shut down because it was located on the second floor of a building with no elevator;
- d) a church was prohibited by a local city ordinance from feeding more than 50 people per day; and
- e) Justice Fellowship reports that a Jewish minimum-security prisoner (CPA in jail for fraud, in 6th year of 8-year term) was denied the right to attend high holy day celebrations.

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

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

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

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

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

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

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

Will HB 387 create an increase in litigation?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- Prisoner RFRA cases for the years 1995–1996 accounted for about one-tenth of one percent (0.01%) of cases in U.S. courts.
- The National Federal Court statistics show that in 1995, out of 43,158 total U.S. civil cases nationwide (1110 prisoner cases), only 50 of the cases invoking the federal RFRA were filed by prisoners.
- In 1996, out of 48,755 U.S. civil cases, only 51 RFRA cases were filed by prisoners.

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

- In New Mexico, out of 407 U.S. civil cases filed in 1995, 0 were filed by prisoners invoking the federal RFRA. In 1996, out of 492 U.S. civil cases filed, 0 were filed by prisoners invoking the federal RFRA.
- According to the Virginia Attorney General's office, out of 1,099 prisoner lawsuits filed against sheriff departments between 1993 and 1997 only 7 were "religious-styled" cases.
- In Florida, only 5 prisoner religious freedom cases invoked the federal RFRA during 1993–1997.

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

What is HB 387 based on?

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

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

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

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

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

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

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

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

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

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

Secondly, a response to the school hypothetical:

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

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

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

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

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

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

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

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

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

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

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

the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."⁵

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

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

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

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

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

By
LEE BOOTHBY

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

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

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

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

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

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

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

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

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

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

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

dent, not RFRA, which must control."¹⁴

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

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

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

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

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

shelter when of religion.

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

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

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

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

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

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

FOOTNOTES

¹117 S. Ct. 2157 (1997).

²494 U.S. 872 (1990).

³374 U.S. 398 (1963).

⁴406 U.S. 205 (1972).

⁵*Smith*, 494 U.S. 879.

⁶*Ibid.*, p. 881.

⁷*Ibid.*, p. 884.

⁸*Ibid.*, p. 890.

⁹*Flores*, 117 S. Ct. 2163.

¹⁰*Ibid.*, p. 2164.

¹¹*Ibid.*, p. 2171.

¹²*Ibid.*

¹³*Ibid.*, p. 2172.

¹⁴*Ibid.*

¹⁵ __ F.3d __, No. 93-2267 (8th Cir. 1998).

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

¹⁷*Ibid.*

¹⁸*Ibid.*, p. 2177.

¹⁹*Ibid.*, 2186 (Souter, J., dissenting).

²⁰*Ibid.*

²¹*Ibid.*

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

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

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

Mrs Campbell's

**FREE
COUP**



Special **EXIB**

A Compelling Case AGAINST

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

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

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

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

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

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

Under RFRA some churches were able to duck zoning laws and operate soup kitchens in residential neighborhoods when everyone else was prohibited from the same.² Some bankrupt religious debtors were able to circumvent bankruptcy laws and make charitable contributions when all other debtors were prevented from doing so.³ Some religious landlords claimed that they should be able to defy civil rights laws that prohibited everyone else from discriminating against unwed couples.⁴ 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*,⁵ 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*,⁷ some schoolchildren refused to comply with a state law requiring them to salute the flag. They had religious grounds for their choice: they were Jehovah's Witnesses, and their faith forbade them from honoring any graven image. The Supreme Court upheld the children's right to opt out of the flag salute ceremony, but it did so without creating any special privilege for religious believers. The Court declared that the state simply had no power to compel anybody to salute the flag.

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

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

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

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

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*,⁹ 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)."¹⁰

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

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

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

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

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

FOOTNOTES

¹²42 U.S.C. §§ 2000bb (1994).

¹*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).

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

³*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.

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

⁵117 S. Ct. 2157 (1997).

⁶319 U.S. 624 (1943).

⁷*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).

⁸494 U.S. 872 (1990).

⁹494 U.S. 879 (internal quotation marks omitted).

¹⁰Michael 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.

PROTECTORING

Are We
EXERCISE

A Compelling Case
State Interest?

ING CISE

By
MICHAEL W. MCCONNELL

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 constitutional to recognize a priest-penitent privilege without also recognizing privileges for new

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

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

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

Absent exceptions, churches that limit

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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


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

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

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

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

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

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

Thanks very much, Shari.

Barbara

Shari Kochman wrote:

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

Barbara Cotting wrote:

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

Re: fiscal note

Subject: Re: fiscal note
Date: Thu, 23 Mar 2000 15:04:22 -0900
From: Shari Kochman <shari_kochman@gov.state.ak.us>
Organization: Alaska Office of the Governor
To: Barbara Cotting <Barbara_Cotting@legis.state.ak.us>
CC: Joan M Kasson <joan_kasson@law.state.ak.us>

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

Barbara Cotting wrote:

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

Questions and Answers about

State Religious Freedom Acts



Council on Religious Freedom
Nicholas P. Miller, Esq.

TABLE OF CONTENTS

1.	What are State Religious Freedom Acts?	3
2.	Doesn't the U.S. Constitution Already Protect our Religious Liberty?	3
3.	Wasn't There A Federal Religious Freedom Restoration Act?	4
4.	But as a Practical Matter, Do We Really Need State RFRA's?	5
5.	Who Opposes State RFRA's and Why?	6
6.	Will State RFRA's Cause an Explosion of Prison Litigation?	7
7.	Will State RFRA's Allow Churches to Ignore Land Use and Zoning Regulations?	8
8.	Will State RFRA's Cancel Other Civil Rights Laws?	9
9.	Will State RFRA's Disrupt the School System?	11
10.	Are State RFRA's Constitutional?	11
11.	Should Churches, Synagogues, Mosques and Other Religious Groups Become Involved in Supporting State RFRA's?	13
	Endnotes	14

What Are State Religious Freedom Acts?

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

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

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

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

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

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

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

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

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

Wasn't There A Federal Religious Freedom Restoration Act?

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

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

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

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

But as a Practical Matter, Do We Really Need State RFRAs?

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

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

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

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

Who Opposes State RFRA's and Why?

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

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

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

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

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

Will State RFRA's Cause An Explosion Of Prison Litigation?¹⁰

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

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

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

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

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

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

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

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

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

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

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

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

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

Will State RFRAs Cancel Other Civil Rights Laws?¹⁴

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

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

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

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

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

Will State RFRA's Disrupt the School System?¹⁹

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

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

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

Are State RFRA's Constitutional?²⁰

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

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

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

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

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

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

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

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

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

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

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

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

ENDNOTES

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

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

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

⁴ 494 U.S. 872 (1990).

⁵ 104 *Harr. L. Rev.* 204 (1990).

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

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

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

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

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

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

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

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

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

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

¹⁵ 461 U.S. 574 (1983).

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

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

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

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

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

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

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

Council on Religious Freedom

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

Do you have religious liberty protection in your state?

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

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

REVIEWERS' COMMENTS

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

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

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

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

COUNCIL ON RELIGIOUS

Freedom

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

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

FISCAL NOTE

STATE OF ALASKA
2000 LEGISLATIVE SESSION

BILL NO. CSHB 387 (HES)

Revision Date/Time (Note if correction) _____ Dept. Affected All
 Title "An Act requiring governmental entities, before BRU
placing a substantial burden on a person's free exercise of religion Component _____
 Sponsor Representative Croft
 Requester House State Affairs Committee Component No. _____

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*****	*****	*****	*****	*****	*****

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2000) cost: _____

POSITIONS

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

ANALYSIS: (Attach a separate page if necessary)

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

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

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

STATE OF ALASKA
2000 LEGISLATIVE SESSION

BILL NO. CSHB 387 (HES)

ANALYSIS CONTINUATION

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

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

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

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

Damages: Under existing law, individuals who sue the state claiming their right to free exercise of religion has been infringed cannot seek damages from the state and have only limited ability to get damages from state officials under federal law. This bill may create a new civil action for damages, because damages are not specifically excluded from the appropriate relief the court may award. Providing for an award of damages may encourage more litigation in this area. At a minimum, it will make suits more time consuming and complicated, as the damages will have to be evaluated. The more significant fiscal impact, however, would be the damages themselves, should a plaintiff prevail.

FISCAL NOTE

Bill Version: HB 387

(H) Publish Date: 3/3/00

**STATE OF ALASKA
2000 LEGISLATIVE SESSION**

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

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*****	*****	*****	*****	*****	*****

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2000) cost: _____

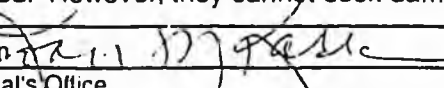
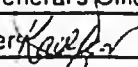
POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

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

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

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

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FISCAL NOTE

STATE OF ALASKA
2000 LEGISLATIVE SESSION

BILL NO. HB 387

ANALYSIS CONTINUATION

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

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

HB

411

Alaska State Legislature



Representative Bill Hudson

State Capitol
Juneau, Alaska
99801-1182
Phone: (907) 465-3744
Fax: (907) 465-2273

Committees
Co-Chair
House Resources
Chair
Utility Restructuring
Member
State Affairs
Transportation
Fisheries

SPONSOR STATEMENT

HB 411, Distribution of Permanent Fund Income

HB 411 was introduced to give the Permanent Fund strength, security and stability far into the future. This legislation allows for distributing income from the Permanent Fund as a percent of market value, rather than the current realized return formula.

Arguments in support of distributing Fund income as a percent of market value were first suggested by then PF Trustee Hugh Malone in the late 1980's. The Commission on the Future of the PF advised further study of this concept in 1990. In 1995, the Long-Range Financial Planning Commission recommended the market value approach for a long-term investment strategy. This year, Commonwealth North also recommended this blueprint for strengthening the Fund. This legislation fits in with the PF's long-term investment horizon. While not necessarily endorsing HB 411, The Permanent Fund Board supports a Percent of Market Value approach, recognizing that continuing the present realized return formula could lead to distortions in distributions due to gain taking and asset allocation decisions made as part of good investment policy. Passage of HB 411 would allow the PF to hold investments that historically need more time to mature. Another unique feature of the market value approach is that it produces a distribution program that is inherently more level. This is consistent with accepted methods of measuring PF performance and with the market value accounting requirement now mandated by the Governmental Accounting Standards Board.

First and foremost, House Bill 411 protects the principal of the Permanent Fund. Additionally, this approach maximizes the predictability and stability of annual distributions. This proposal is but one possible element of a long-range fiscal plan. It is however, an essential element if we are to close the troublesome fiscal gap, by most accounts, approximately \$800 million short annually.

HB 411 preserves and grows the permanent fund through statutorily required inflation proofing and **actually maintains the PF Dividend at the status quo over the next 10 years of projected growth.**

After inflation proofing the fund, the total amount of money available for distribution would be calculated. Out of this amount, HB 411 allocates 80% to the dividend and 20% to the General Fund. It produces stability in the fund management and clearly affords a first ever contribution for payment of essential services provided to the people of Alaska, **while at the same time holding the dividend harmless.**

It may be politically convenient to simply eat the public's savings as we have done since 1992, but that practice could easily lead to a full collapse of Alaska's economy.

(7)

HOUSE COMMITTEE REPORT

Date Referred to Committee: February 16, 2000

FURTHER REFERRALS:

Finance

Date of Committee Action: 3/28/00

The STATE AFFAIRS Committee considered:

HB 411

HOUSE BILL NO. 411

DISTRIBUTION OF PERMANENT FUND INCOME

"An Act relating to the market value of the permanent fund and to distribution of income of the permanent fund; and providing for an effective date."

recommends it be replaced with the following committee substitute CS HB 411 (STA)

the same title
 a new title

additional referral to _____ Committee
 attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(S): _____ (Dept)

APPROVES PREVIOUS: _____ (Dept/Date)

fiscal note(s) _____

fiscal note(s) _____

zero fiscal note(s) REV

zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
<i>Jeanette James</i>		✓		
<i>John Sullivan</i>			✓	
<i>Bob Kattala</i>			✓	
<i>George [unclear]</i>			✓	
<i>Bill Hudson</i>	✓			
<i>[unclear]</i>			✓	
<i>Scott [unclear]</i>		✓		

CHAIR'S SIGNATURE Jeanette James

I-LS1443M
Cook
3/23/00

CS FOR HOUSE BILL NO. 411()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES HUDSON, Austerman, Phillips, Murkowski, Davies

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the market value of the permanent fund and to distribution
2 of income of the permanent fund; and providing for an effective date."

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

4 * Section 1. AS 37.13.140 is amended to read:

5 Sec. 37.13.140. Income available for distribution. The market value [NET
6 INCOME] of the fund includes the market value [INCOME] of the earnings reserve
7 account established under AS 37.13.145. The market value [NET INCOME] of the
8 fund shall be computed annually as of the last day of the fiscal year in accordance
9 with generally accepted accounting principles [, EXCLUDING ANY UNREALIZED
10 GAINS OR LOSSES]. Income available for distribution equals 5.3 [21] percent of the
11 average year-end market value [NET INCOME] of the fund for the last three
12 [FIVE] fiscal years, including the fiscal year just ended, but may not exceed [NET
13 INCOME OF THE FUND FOR THE FISCAL YEAR JUST ENDED PLUS] the
14 balance in the earnings reserve account described in AS 37.13.145.

1 * **Sec. 2.** AS 37.13.145(b) is amended to read:

2 (b) By October 1 [AT THE END OF] each [FISCAL] year, the corporation
3 shall transfer from the earnings reserve account to the dividend fund established under
4 AS 43.23.045, 75 [50] percent of the income available for distribution under
5 AS 37.13.140, or the balance in the account, whichever is less.

6 * **Sec. 3.** AS 37.13.145 is amended by adding a new subsection to read:

7 (e) By October 1 each year after the transfer under (b) of this section, the
8 corporation shall transfer from the earnings reserve account to the general fund 25
9 percent of the income available for distribution under AS 37.13.140, or the balance in
10 the account, whichever is less.

11 * **Sec. 4.** AS 37.13.300(c) is amended to read:

12 (c) Income or other money [NET INCOME] from the mental health trust
13 fund may not be included in the computation of [NET] income available for
14 distribution under AS 37.13.140.

15 * **Sec. 5.** AS 37.14.03!(c) is amended to read:

16 (c) The net income of the fund shall be determined by the Alaska Permanent
17 Fund Corporation annually as of the last day of the fiscal year in accordance with
18 generally accepted accounting principles, excluding any unrealized gains or losses
19 [IN THE SAME MANNER THE CORPORATION DETERMINES THE NET
20 INCOME OF THE ALASKA PERMANENT FUND UNDER AS 37.13.140].

21 * **Sec. 6.** AS 37.17.020(b) is amended to read:

22 (b) The endowment shall be held and invested by the Alaska Permanent Fund
23 Corporation subject to AS 37.13.120; however, net income from the endowment shall
24 be distributed under AS 37.17.010 - 37.17.110 and 37.17.225. Income or other
25 money [NET INCOME] from the endowment may not be included in the computation
26 of [NET] income available for distribution under AS 37.13.140.

27 * **Sec. 7.** AS 37.17.440(b) is amended to read:

28 (b) The principal and income of the endowment shall be held and invested by
29 the Alaska Permanent Fund Corporation subject to AS 37.13.120; however, net income
30 from the endowment and subsequent income earned on net income from the
31 endowment shall be held in a separate account until appropriated by the legislature.

1 Income or other money [NET INCOME] from the endowment may not be included
2 in the computation of [NET] income available for distribution under AS 37.13.140.

3 * Sec. 8. AS 37.13.145(c) is repealed.

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

6 TRANSITION. Notwithstanding AS 37.13.140, as amended in sec. 1 of this Act,
7 income available for distribution following the end of fiscal year

8 (1) 2000 is equal to 5.3 percent of the year-end market value of the fund, but
9 may not exceed the balance in the earnings reserve account;

10 (2) 2001 is equal to 5.3 percent of the average of the year-end market value
11 of the fund for the last two fiscal years, including the fiscal year just ended, but may not
12 exceed the balance in the earnings reserve account.

13 * Sec. 10. This Act takes effect June 30, 2000.

Model Output for HB 411

SUMMARY

Expenditures and Revenues

	FY2000	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006	FY2007	FY2008	FY2009	FY2010
Anticipated Expenditures	2,294.8	2,325.1	2,355.0	2,375.3	2,389.0	2,404.6	2,409.3	2,443.2	2,460.0	2,477.0	2,494.2
Anticipated Unrestricted GF Revenue	1,949.7	1,566.2	1,473.7	1,440.1	1,422.8	1,381.9	1,376.5	1,304.6	1,239.8	1,169.5	1,093.0
Estimated Fiscal Shortfall	(345.1)	(758.9)	(881.3)	(935.2)	(966.2)	(1,022.7)	(1,032.8)	(1,138.6)	(1,220.2)	(1,303.5)	(1,401.2)
HB411 Revenue to GF	0.0	389.9	390.0	393.5	400.8	411.8	423.2	434.8	446.6	458.8	471.1
Estimated Fiscal Shortfall	(346.1)	(369.1)	(491.3)	(541.7)	(565.4)	(610.9)	(609.6)	(703.8)	(773.5)	(849.7)	(930.1)
New GF Revenue	0.0	350.0	362.3	375.0	388.2	401.9	416.0	430.6	445.7	461.4	477.6
Estimated Fiscal Shortfall	(346.1)	(19.1)	(129.0)	(166.6)	(177.2)	(209.0)	(193.6)	(273.2)	(327.8)	(388.3)	(452.5)
Constitutional Budget Reserve Draw to GF	346.1	19.1	129.0	166.6	177.2	209.0	193.6	273.2	327.8	388.3	452.5
Estimated Fiscal Shortfall	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0

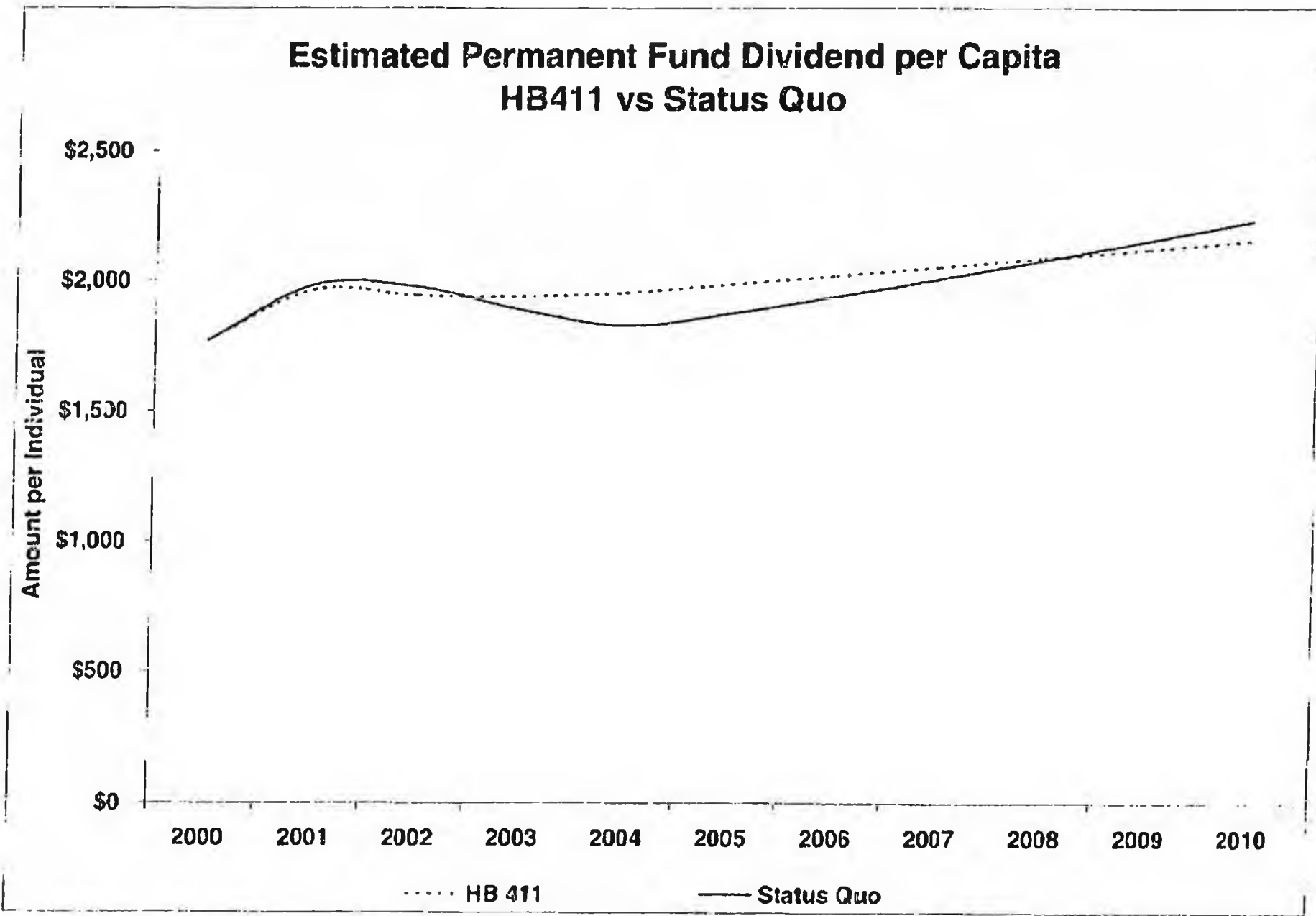
PER CAPITA DIVIDENDS

	FY2000	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006	FY2007	FY2008	FY2009	FY2010	Ten Year Total Dividends
HB411 Dividend	1,769.3	1,964.2	1,942.5	1,938.7	1,953.3	1,985.9	2,019.0	2,052.4	2,036.1	2,126.0	2,154.0	21,985.5
Per Capita Status Quo Dividend	1,769.3	1,902.5	1,976.0	1,837.1	1,827.0	1,874.2	1,938.9	2,007.1	2,078.6	2,153.0	2,229.7	21,723.4
Difference between HB411 Dividend and Status Quo Dividend	0.0	(10.3)	(33.5)	51.6	126.3	111.7	80.2	45.3	7.4	(33.0)	(75.7)	262.1

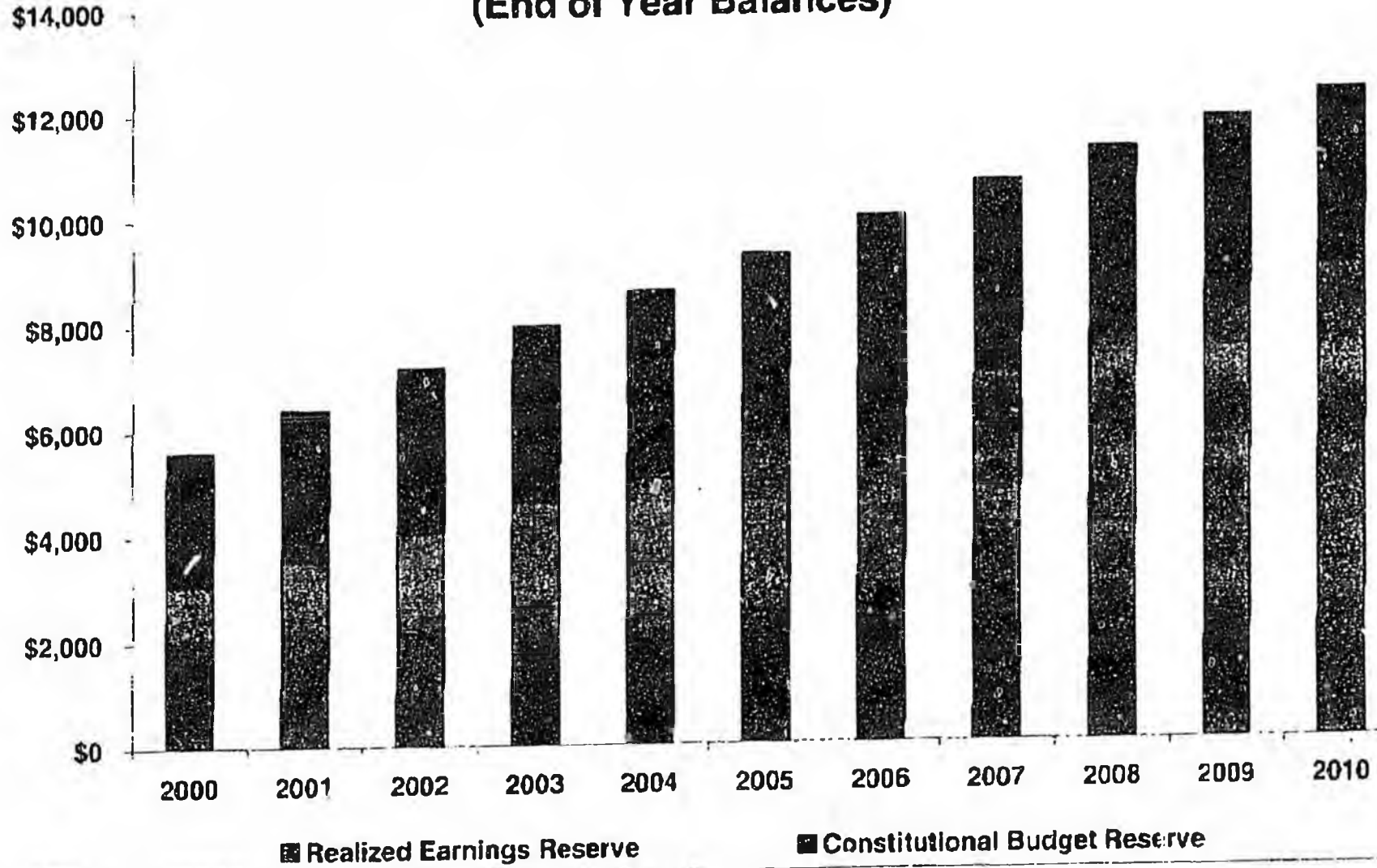
END OF YEAR BALANCES

	FY2000	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006	FY2007	FY2008	FY2009	FY2010
Permanent Fund Principal and Unrealized Earnings	23,567.1	23,843.8	24,083.7	24,314.9	24,547.4	24,773.7	24,994.9	25,235.1	25,467.5	25,691.9	25,909.0
Earnings Reserve Balance	3,069.4	3,528.5	4,038.5	4,586.6	5,156.7	5,748.7	6,354.5	6,978.6	7,617.9	8,270.8	8,936.1
Constitutional Budget Reserve Balance	2,523.7	2,862.5	3,118.5	3,357.3	3,448.8	3,515.6	3,603.2	3,618.3	3,579.9	3,478.1	3,303.9

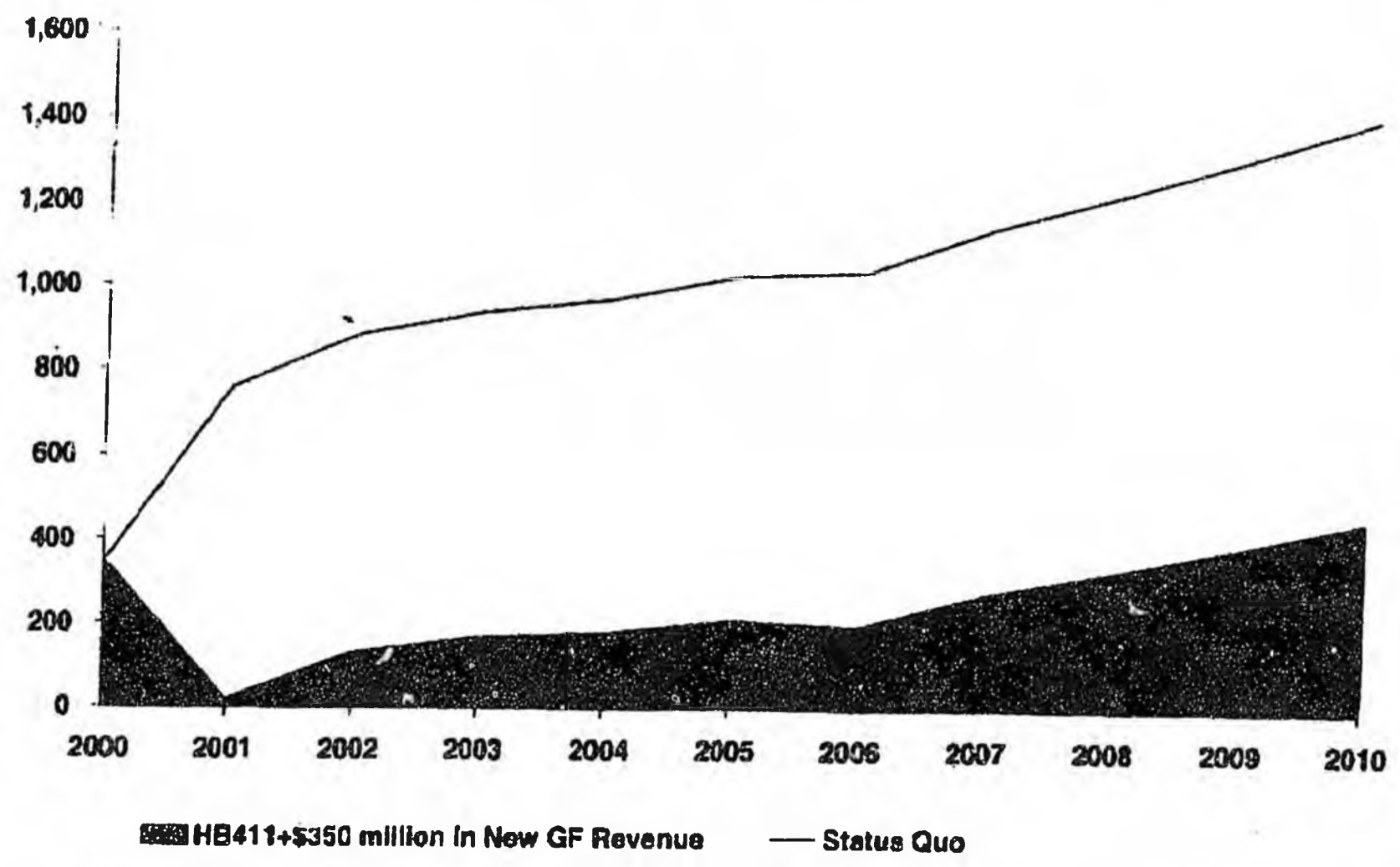
Estimated Permanent Fund Dividend per Capita HB411 vs Status Quo



House Bill 411 Alaska's Savings Accounts (End of Year Balances)



The Fiscal Gap HB411 vs. Status Quo



■ HB411+\$350 million in New GF Revenue — Status Quo



WORKING TO PROMOTE
ALASKA'S LONG-TERM
FISCAL CERTAINTY

FISCAL SENSE

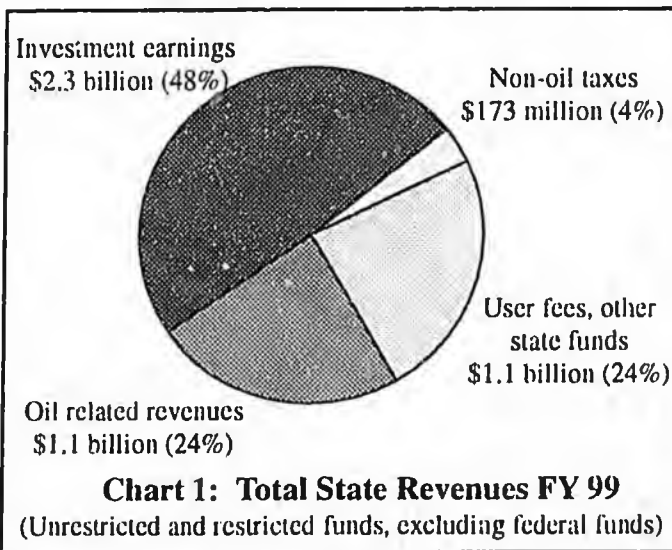
AN UPDATE ON CLOSING ALASKA'S FISCAL GAP • VOLUME 2, ISSUE #3 • WEEK OF FEBRUARY 21, 2000

Legislature urged to establish Ways and Means Committee

Financial assets key to future fiscal certainty

In FY 1980, the state's unrestricted general funds totalled \$2.5 billion. Of this amount, \$2.3 billion, or 90%, came from oil and gas taxes and royalties. In FY 99, it was a very different story. Of the \$1.4 billion in unrestricted general funds, \$913 million, or 68%, came from the oil and gas industry. (*"Unrestricted" means the funds can be spent for any public purpose.*)

The state also gets another \$3.8 billion in other types of revenues the state gets from taxes paid by non-oil businesses, financial asset earnings, and other state program activities (such as bonds, trusts, and user fees). Chart 1 illustrates a total of \$4.7 billion in



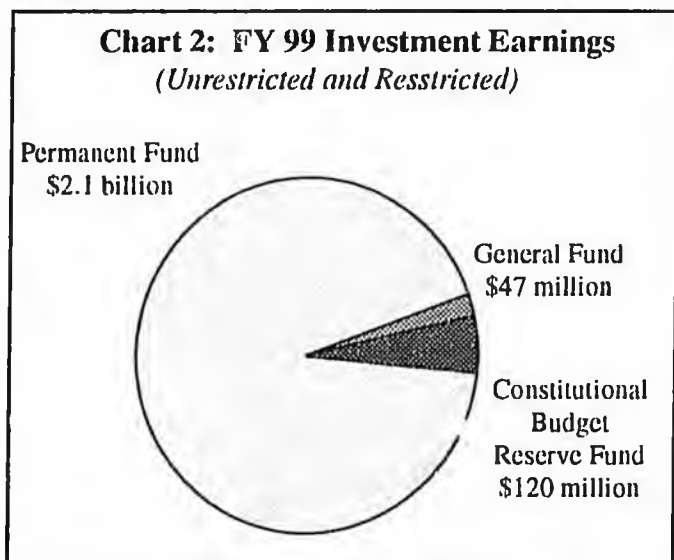
unrestricted and restricted state-generated revenues.

As chart 1 shows, nearly half of the state's revenues came from earnings from financial assets. These financial assets and their FY 99 earnings are illustrated in Chart 2.

While the Permanent Fund is the major revenue generating asset, all but \$771 million of its earnings were spent: \$1 billion for dividends and \$288 million was redeposited in the Fund for inflation-proofing. The \$771 million balance went into the Fund's Earnings Reserve Account, which had a balance of \$2.6 billion at the end of FY 99.

Financial assets require policy priority

In other states, the primary source of revenues is taxes based on in-state economic activity. As these charts illustrate, Alaska is unique. For this reason the Fiscal Policy Council believes a legislative committee with formal jurisdiction over state revenue policies should be created and has forwarded this recommendation to the Legislature. As discussed on page two, many states have a similar committee structure.



Source for charts: Alaska Department of Revenue "Fall 1999 Revenue Sources Book"

Clear policies, oversight required for maximum return

The Fiscal Policy Council has urged the Legislature to establish a Ways and Means Committee as part of its institutional structure. The purpose is to have a legislative committee with primary responsibility for policy and performance oversight of the state's financial assets.

Currently these areas are the responsibility of each body's respective Finance Committee which already has a burdensome workload that includes writing the state operating and capital budgets and reviewing all legislation that impacts state finances.

Committee jurisdiction

Given the important role that Alaska's financial assets will play in the state's financial future, it is extremely important that oversight and vigorous scrutiny be institutionalized in the Legislature instead of being conducted on an ad hoc basis. Policies that merit the attention of such a committee are:

- Clearly stated investment goals and standards for the state's financial assets;
- Systematic review and audit of returns on investment of all of the state's financial investments;

- Systematic examination of current investment practices, including inflation-proofing of the Permanent Fund;
- Evaluate the state's cash flow and determine appropriate interim alternatives;
- Identification of "value-added" opportunities to capture new revenue to the state treasury based on the state's current investments; and
- Careful and thorough examination of potential revenue-generating options, including impact on economic development and distribution policies of state revenues with local governments.

What other states do

Thirty-three state legislatures have more than one committee in each legislative body who work on state fiscal issues. It ranges from Colorado's traditional framework of an Appropriations Committee and a Finance Committee, to Maryland which also adds two joint committees: the Management of Public Funds Committee and the Spending Affordability Committee. The Connecticut Legislature only has joint committees: the Appropriations Committee and the Finance, Revenue, and Bonding Committee.

On the spending side . . .

House Finance subcommittees set to wrap up operating budget work . . . House and Senate Finance Committees do much of their state operating budget work through subcommittees, each of which is assigned a department's budget. A subcommittee develops recommended funding levels for that department's programs. **House Finance expects to wrap up its subcommittee work by March 1** (subcommittee reports will be available on the Internet (www.legfin.state.ak.us) by March 2. Subcommittee recommendations will go to the full Finance Committee, which will consider **amendments from March 6 to 9.**

House Finance will next report out the operating

budget as a bill (just like all other legislation). It will then go to the Rules Committee that will schedule it for the **full House's consideration (expected in mid-March)**. After passage, the operating budget goes over to the Senate, where the same steps are repeated. Senate Finance subcommittees, however, have been working simultaneously with the House on department budgets.

**House Finance Committee
Public Testimony on Operating Budget
Saturday, March 4 • 9 a.m.**
*Contact local Legislative Information
Office for teleconference details*

The Fiscal Policy Council of Alaska, Inc. is a nonpartisan, nonprofit, member-supported organization dedicated to promoting the state's long-term fiscal certainty through research and providing objective information about Alaska's finances. "FISCAL \$ENSE" is written by FPCA board member Cheryl Frasca, a longtime budget-watcher. The Council can be reached by calling (907)258-2331; fax 258-2332; exdir@fiscalak.org; www.fiscalak.org



MAR 21 2000

March 23, 2000

The Honorable Bill Hudson
Alaska House of Representatives
State Capitol
Juneau, AK 99801

Dear Representative Hudson:

Thank you for taking time to brief the Fiscal Policy Council about your efforts with House Bill 411. We support the efforts of you and your colleagues to advance the Legislature's discussion of ways to achieve long-term fiscal certainty. We also appreciate the opportunity to offer the following comments on the legislation and proposed amendments:

- Recasting the Permanent Fund as an "endowment" or "trust" (we suggest that "trust" may be a better term based on the negative reaction "endowment" received when broached by the Long Range Financial Planning Commission) is a significant step in the right direction. Moving to an annual draw based on the Fund's market value will enhance stability in the amount of earnings available to meet public needs. It also will allow more flexibility in the Fund's management, which will maximize investment returns over the long term.
- Moving to an annual payout rate greater than five-percent runs the risk of diminishing the Fund's value over time. As written, HB 411 would maintain the Fund's market value in real dollars if all assumptions were realized in every year. In the real world, however, the rate of return and rate of inflation are not constant and the natural volatility in these parameters raises the possibility of the value of the Fund falling. A more conservative payout rate would reduce this possibility.
- We urge using a five-year average of the market value to calculate the payout rate because it will reduce the impact of annual fluctuations on the Fund's market value. A lesser time frame would diminish the advantage of shifting to an annual payout.
- All variables used in assessing the impact of proposals should be as realistic as possible. To assess the impact of HB 411 in closing the state's fiscal gap, we are concerned that a prediction of primarily flat spending is not realistic in what it will take to foster a growing and robust economic future for Alaskans. While we recognize that future legislatures will make the actual spending decisions, we urge you to build into your analysis the recognition that adequate spending levels will be necessary in order to meet the demands of a growing state.



- Evaluation of proposals for any new or increased tax must be realistic and consider potential impact on economic activity. For example, it would be misleading to assume the same amount of oil will be produced, regardless of the state's taxation structure. It would therefore be necessary to reassess future production levels based on the specifics of any oil and gas-related tax change(s).

Again, we commend your efforts. Please advise if the Fiscal Policy Council can provide you with any other comments, suggestions, or advice during your efforts to bring certainty to Alaska's fiscal future.

Sincerely,



Marc Langland
President

cc: HB 411 co-sponsors:
Representative Alan Austerman
Representative Gail Phillips
Representative Lisa Murkowski
Representative John Davies

R - B

Wednesday, March 15, 2000

State Representative Bill Hudson
State Capitol
Juneau, AK 99801-1182

Dear Representative Hudson

I support wholeheartedly the passage of House Bill 111. I thank you and the others who support it for taking a balanced approach to our fiscal dilemma. We cannot afford to continue to destroy the infrastructure of this state any more than we can afford uncontrolled spending. We can afford some new taxes, including an income tax that taxes everyone who earns wages in Alaska. We are tired of the members of our state legislature putting their collective heads in the sand because it is politically inexpedient to advocate sound state planning. Thank you for your courage and resourcefulness.

Sincerely yours,



Robert D. Bowers

Bob Bowers, 104 Muldoon Road, Box 206, Anchorage, AK 99504
Phone & Fax: .907-337-2869. .e-mail: rdbowers@gci.net

March 23, 2000

TO: Representative Andrew Halcro
Representative Bill Hudson
Representative Gail Phillips
Representative Alan Austerman
Representative Lisa Murkowski
Representative John Davies
Representative Gary Davis

MAR 27 2000

Good Morning:

We are writing in strongest opposition to your latest tax proposal. The people of Alaska voted overwhelmingly last year against such a proposal. The people of Alaska wish to see state spending reduced, not increased or kept at the status quo. Your proposal goes against the wishes of the vast majority of the Alaskan people. Perhaps this is why Representative Hudson is against a public vote.

We find it interesting that this proposal comes so late in the legislative session. Perhaps it cannot stand the light of day and needs to be pushed as fast as possible. We suggest that it be put-off until the next legislative session as there is no pressing need for funds this year. With study the legislature will come to the same conclusion as the voters of Alaska and Representative Scott Ogan; there is no need for new taxes, we just need to reprioritize state government back to basics.

Why is it that government funding seems to be given a higher priority than private enterprise and taxpayer dollars. Why are the people of Alaska asked to pay more so government can continue to spend? Has anyone asked the people of the state of Alaska what they will be forced to give-up to pay these new taxes? Perhaps all members of the legislature should stop and ask why they were sent to Juneau and if they cannot do what the voters want done, resign.


Thank you

Michael and Rose Marie Citti
4641 Edinburgh Drive
Anchorage, Alaska 99515
(907) 243-2990