SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: April 14, 1998 Revised: _____ _____ _____ _____

Subject: Religious Freedom Restoration Act

	Analyst	Staff Director	Reference	Action
1.	Geraci	Moody	JU	Favorable/CS
2.			GO	
3.				
4.				
5.				

I. Summary:

Committee Substitute for Senate Bill 296 creates the "Religious Freedom Restoration Act of 1998."

The bill provides that government may not substantially burden a person's exercise of religion, even if the burden results from a rule of facially neutral application. The CS addresses the standard by which the courts may judge an individual's claim alleging governmental interference with the free exercise of religion. Such alleged interference will be judged according to whether the state's action is in furtherance of a compelling state interest, and, if so, whether that interest is met by the least intrusive means possible.

The bill provides for an award of attorney's fees and costs paid by the government to the prevailing plaintiff in any action or proceeding to enforce a provision of this act.

The bill shall take effect upon becoming a law.

The bill creates yet unnumbered sections of the Florida Statutes.

II. Present Situation:

Section 3, Art. I of the Florida Constitution states:

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury

> directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

The application of s. 3, Art. I, Fla. Const., by Florida courts has largely paralleled the Federal law regarding the application of the federal First Amendment's clause stating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

A. The *Sherbert* Analysis

In 1963, the United States Supreme Court created a balancing test to determine whether a facially neutral state law of general applicability could place unacceptable pressure on an individual to abandon the precepts of his or her religion. *Sherbert v. Verner*, 374 U.S. 398 (1963). In this case, the appellant, a member of the Seventh-Day Adventist Church, lost her job because she refused to work on Saturday, the Sabbath Day of her religion. *Id.* at 399. She was unable to obtain other employment because of her observation of the Sabbath, but was denied unemployment benefits because her refusal to work on Saturday was not a good cause justification. *Id.* at 400.

To apply the balancing test, the Court must first determine whether the regulation imposes any burden on the free exercise of the claimant's religion. *Id.* at 402. If it does, the Court must then determine whether some compelling state interest justifies the substantial infringement of the claimant's First Amendment rights. *Id.* at 403. The compelling interest test constitutes the highest level of scrutiny, strict scrutiny, that the Supreme Court has applied in analyzing claims against state actions alleged to be unconstitutional. Under this level of scrutiny, the burden is on the state to prove that any interference with an individual's religious practice meets two criteria. First, the state must show that interference is "justified by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate." *Id.* Second, in the process of making such a showing, the state must "demonstrate that no alternative forms of regulation would [meet the state interest] without infringing First Amendment rights." *Id.* at 407.

B. Exceptions to the *Sherbert* Analysis

In applying the compelling interest test, the Supreme Court has given a great degree of deference to a person's subjective assertion of religious deprivation in First Amendment free exercise of religion cases. However, later Supreme Court rulings instituted certain exceptions to the application of the compelling interest test. The test was found inapplicable to free exercise challenges against government actions in the following three circumstances:

1. Military "Free Exercise" Cases

In *Goldman v. Weinberger*, 475 U.S. 503 (1986), the United States Supreme Court ruled that the compelling interest test was not applicable to free exercise claims in military situations. The *Goldman* Court found this exception justifiable because the military is a "specialized society separate from civilian society," whose mission necessitates fostering "instinctive obedience, unity,

commitment, and esprit de corps" through, among other things, regulations enforcing a heightened degree of uniformity. *Id.* at 506.

2. Prison "Free Exercise" Cases

In *Turner v. Safley*, 482 U.S. 78 (1987), the United States Supreme Court held that prison regulations were not subject to the compelling interest test, because, although prisoners still retain their constitutional rights, the "institutional order" necessary for a corrective environment justifies a lessened level of scrutiny. *Id.* In prison free exercise cases, a court must only inquire "whether a prison regulation that burdens fundamental rights is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns."*Id.* at 87.

In *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), the United States Supreme Court reaffirmed the *Turner* holding. In *O'Lone*, the Court asserted several criteria for weighing the reasonableness of prisoners' religious rights claims against a particular prison policy:
(1) Whether the policy in question serves a legitimate penological interest;
(2) Whether the prisoners bringing the claim have an alternative means of religious worship;
(3) Whether the costs of accommodating prisoners' religious requests are excessive; and
(4) Whether there exist any "obvious, easy alternatives" to the prisoners' request.
Id.

3. Generally Applicable Laws

A generally applicable law is a facially neutral law which is applied, in a generalized fashion and without discrimination, to a general population in a blanket manner. *See Bowen v. Roy*, 476 U.S. 693, 703-705 (1986); *City of Boerne v. Flores*, 117 S. Ct. 2157, at 2160-2161 (1997).

In *Bowen v. Roy*, 476 U.S. 693 (1986), the United States Supreme Court rejected a free exercise challenge to a state law which required that all residents utilize social security numbers in order to get governmental assistance. The Court differentiated between a "facially neutral" state law which "indirectly and incidentally" affects a particular religious practice, and a state law which "criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons." *Id.* at 706. The Court found the two to be "wholly different," and that "absent proof to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest." *Id.* at 707.

In *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), the Court, applying the reasoning in *Roy*, rejected a free exercise challenge to a road construction project planned for a tract of federally owned land. Against a claim that the construction would disrupt an area containing ritualistic value to certain Native Americans, the Court differentiated between state actions that coerce, penalize, or prohibit the exercise of religion and state actions which "may make it more difficult to practice certain religions but which have no tendency to coerce

individuals into acting contrary to their religious beliefs." *Lyng* at 450. Under the ruling in *Lyng*, only state actions that coerce, penalize, or prohibit the exercise of religion are subject to the compelling interest test. Accordingly, generalized state actions which are merely "inconvenient" but are not specifically prohibitive or coercive of religious practice are not subject to the compelling interest test. *Id.* at 449.

The *Goldman*, *Turner*, *O'Lone*, *Roy*, and *Lyng* cases reaffirmed the *Sherbert* analysis, but created exceptions to its application. In those cases where the compelling interest test does not apply, proving a case against the state for infringement of free exercise of religion is much more difficult.

C. The Religious Freedom Restoration Act of 1993

The *Sherbert* analysis continued to be controlling until 1990, when the Court decided *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872 (1990). In this case, the claimants were denied unemployment benefits because of their use of peyote for sacramental purposes in their Native American Church. *Id.* at 874. The Court chose not to use the compelling interest test, finding that the right of free exercise does not excuse an individual from complying with a law forbidding an act, that may be required by his religious beliefs, if the law is not specifically aimed at religious practice, and is otherwise constitutional as applied to others who engage in the act for nonreligious reasons. *Id.* at 878. The Court distinguished *Sherbert* on the grounds that the test was created in a context related to unemployment compensation eligibility rules that allowed individualized governmental assessment of the reasons for the relevant conduct. *Id.* at 884. Also, the Court explained that the only decisions where it has been held "that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press." *Id.* at 881.

In response to the *Smith* decision, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA). 42 U.S.C. s. 2000bb. RFRA revived the compelling interest test, but included a least restrictive means analysis not present in the original case. RFRA resulted in an increased opportunity to bring lawsuits against the state for alleged infringement upon the free exercise of religion and the standard of strict scrutiny made it more difficult for a state to win such a case. This produced an increase in the number of First Amendment religious freedom cases entertained by state and federal courts.

In June of 1997, in *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), the Court held RFRA unconstitutional because it was not a proper exercise of Congress' enforcement power . The Court stated that the "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections." *Id.* The Court found that the RFRA was an intrusion into the States' general authority to regulate for the health and welfare of their citizens, and by imposing a least restrictive means requirement, Congress created legislation broader than is appropriate. *Id.* This case upholds the ruling in *Smith*, and at this time, *Smith* is the controlling case law.

III. Effect of Proposed Changes:

The Religious Freedom Restoration Act of 1998 (the Act) provides that government shall not substantially burden the free exercise of religion, even if the burden results from a rule of general applicability, unless the government demonstrates that the burden:

- Is in furtherance of a compelling governmental interest, and
- Is the least restrictive means of furthering that interest.

RFRA had established the compelling interest test for all claims against the state for infringement upon the free exercise of religion, including claims from incarcerated individuals or groups. This had created debate as to whether the greater capacity for successful litigation by inmates had hindered the security and order of corrections facilities, and whether it produced an inordinate degree of inmate litigation. *See, e.g. Brief for Amici States of Ohio, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, The Commonwealth of Pennsylvania, and the Territories of American Samoa, Guam and The Virgin Islands in Support of Petitioner* at 3-6, *City of Boerne v. Flores*, 117 S. Ct. 1257 (1997) ("[RFRA] has spawned a remarkable wave of inmate litigation in the years since it was passed. Based on a Lexis/Nexis search conducted on November 12, 1996, no fewer than 189 inmate cases have been decided involving RFRA-based challenges. . . . The litigation wave generated by RFRA disrupts State prisons and State prison administrations in many ways. As an initial matter, RFRA cases are harder to dispose of than most due to the difficulty (if not impossibility) of determining the accommodations that are truly necessary for the proper exercise of a given religion. . . . For like reasons, RFRA lawsuits are expensive. New attorneys and experts must be hired to defend them; dispositions and other discovery must be taken to respond to them; and successful lawsuits require costly reconfigurations of corrections programs, sometimes even prison buildings. . . . Besides the difficulty of responding to this litigation and the cost of handling it, RFRA lawsuits compel corrections officials to divert extensive staff time to handling the litigation. They must investigate the 'religious' nature of each claim and the 'religious' necessity to each inmate of bringing the claim. Making matters worse is the "least restrictive means" test, which regularly compels corrections staff to develop ways to accommodate even the most unusual and isolated demands."); *but see Brief of the States of Maryland, Connecticut, Massachusetts and New York As Amici Curiae in Support of Respondent* at 3-9, *City of Boerne v. Flores*, 117 S. Ct. 1257 (1997) ("Properly interpreted, RFRA does not and will not impede the States' ability to operate their prisons effectively. . . . With respect to prison management, RFRA requires courts to provide substantial deference to the States and to those responsible for administering the state penal systems. . . . The limitations inherent in the requirement of proving a "substantial burden" preserves State authority in may instances where RFRA may be invoked. Although the lower courts, prior to *O'Lone*, disagreed among themselves as to whether the *Sherbert/Yoder* compelling interest test applies to religious freedom claims in the prison context, even those courts that had applied that test accorded a great deal of deference to the judgements of prison administrators. . . . This deference applied at two distinct levels. First, following this Court's statements in earlier decisions, the lower courts recognized that, in the prison context, order, safety, security, and discipline are paramount government interests. . . . Second, those courts

recognize that prison officials are entitled to great deference in determining whether a particular prison regulation is tailored with sufficient precision to the state interest at issue.")

The Department of Corrections has expressed concerns that the heightened standard of review will give inmates greater latitude in asserting unreasonable demands which conflict with a correctional institution's need for order and security. The Department of Corrections is concerned not only with the ability to win lawsuits under the Act, but with the possibility that the Act's compelling interest standard may give incarcerated individuals an increased capacity to go to trial on frivolous matters. In this, the Department of Corrections' assertions parallel similar criticisms by amici in the *Bourne* case. *See Brief for Amici States of Ohio, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, The Commonwealth of Pennsylvania, and the Territories of American Samoa, Guam and The Virgin Islands in Support of Petitioner* at 3, *City of Boerne v. Flores*, 117 S. Ct. 1257 (1997) (Many of the cases . . . involve recycled claims that were defeated years ago under the reasonableness test applied to inmate free exercise claims. Thus, though many of the claims now confronting State prison officials could not have met the pleading requirements of Rule 11 under prior law, [under RFRA's "compelling interest"standard] they are now being litigated anew in every corner of the country.)

This Act also sets forth the following statements of applicability:

- This act applies to all state law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this act;
- State law adopted after the date of the enactment of this act is subject to this act unless such law explicitly excludes such application by reference to this act;
- Nothing in this act shall be construed to authorize the government to burden any religious belief;
- Nothing in this act shall be construed to circumvent the provisions of chapter 893, Florida Statutes;
- Nothing in this act shall be construed to affect, interpret, or in any way address that portion of s. 3, Art. I of the State Constitution prohibiting laws respecting the establishment of religion;
- Nothing in this act shall create any rights by an employee against an employer if the employer is not a governmental agency.

This Act's provisions are retroactive and prospective in effect, and apply to laws found in the Florida Statutes, as well as to local ordinances and codes. Arguably, a person could sue a governmental entity under this Act for governmental actions previously committed that were in conformance with then existing law, and if that person prevailed, he or she would be entitled to reasonable attorneys' fees and costs. There is no time limit associated with the retroactive application of this Act. Therefore, an action by the state done many years ago could, arguably, be brought before the courts as an alleged violation of this Act. There is no period of time allowed for a governmental entity to establish provisions and procedures that would take into consideration the Act's new provisions regarding free exercise of religion. This application may be considered unconstitutional because of the retrospective nature of the Act. In *McCord v. Smith*,

43 So.2d 704 (Fla. 1949), the Florida Supreme Court held that "[a] retrospective provision of a legislative act is not necessarily invalid. It is so only in those cases wherein vested rights are adversely affected or destroyed or when a new obligation or duty is created or imposed, or an additional disability is established, on connection with transactions or considerations previously had or expiated." *Id.* at 708. The Florida Supreme Court also found that a statutory requirement for a nonprevailing party to pay attorney fees constituted "a new obligation or duty," and was therefore substantive in nature and could only be applied prospectively. *Young v. Altenhaus*, 472 So.2d 1152 (Fla. 1985). Additionally, in overturning RFRA as unconstitutional, the United States Supreme Court found that RFRA "cannot be considered remedial, preventive legislation, if those terms are to have any meaning." *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997). Since this Act is based on RFRA, it could be construed that it is substantive in nature. If the Act applies retrospectively, it could be found unconstitutional.

Any state law created after this Act takes effect can circumvent this Act's provisions by simply stating that the Act does not apply. If such a statement is provided in a new law, then a defense or claim pursuant to this Act is unavailable. Existing law cannot so circumvent this Act's applicability, unless possibly it is readopted with the appropriate statement regarding the Act's inapplicability. "State" is defined in this Act to include counties, municipalities, and special districts. Accordingly, when referencing "state law," the reference includes local law as well.

Additionally, one legislature may not bind the hands of future legislatures with regard to prohibiting changes to statutory law. *Neu v. Miami Herald Publishing, Co.*, 462 So.2d 821, at 824 (Fla. 1985). Accordingly, future legislatures could otherwise negate the effect of this Act, without expressly referencing it.

The provisions of this Act only apply to governmental actions that affect the free exercise of religion, not the establishment of religion. This means that the provisions of this Act are not available against the private sector and cannot be used as a claim or defense in private sector litigation.

This Act would re-establish the compelling interest test in cases where state actions were alleged to have violated a person's free exercise of religion. In such an instance, the State would be required to meet the requisite standard by the least intrusive means possible. The effect of this Act in Florida could parallel the experience with RFRA at the national level. RFRA produced a broadened capacity for legal action against the state for alleged infringement upon free exercise of religion. Proponents of RFRA had affirmed this effect as indicative of a greater protection for religious practice. Conversely, the greater deference to the subjective claims of individuals that RFRA provided, over even facially neutral state laws, created concerns that the basic regulatory and security functions of government could be adversely affected.

This Act also provides that "the prevailing plaintiff in any action or proceeding to enforce a provision of this act is entitled to reasonable attorney's fees and costs to be paid by the government."

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This application may be considered unconstitutional, if the Act is retrospective in nature. In *McCord v. Smith*, 43 So.2d 704 (Fla. 1949), the Florida Supreme Court held that "[a] retrospective provision of a legislative act is not necessarily invalid. It is so only in those cases wherein vested rights are adversely affected or destroyed or when a new obligation or duty is created or imposed, or an additional disability is established, on connection with transactions or considerations previously had or expiated." *Id.* at 708. The Florida Supreme Court also found that a statutory requirement for a nonprevailing party to pay attorney fees constituted "a new obligation or duty," and was therefore substantive in nature and could only be applied prospectively. *Young v. Altenhaus*, 472 So.2d 1152 (Fla. 1985). Additionally, in overturning RFRA as unconstitutional, the United States Supreme Court found that RFRA "cannot be considered remedial, preventive legislation, if those terms are to have any meaning." *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997). Since this Act is based on RFRA, it could be construed that it is substantive in nature. If the Act is retrospective in nature, it could be found unconstitutional.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The fiscal impact of this bill is indeterminate. The degree of possible fiscal impact will vary according to the extent of increased litigation. To the extent increased litigation against a governmental entity results from this Act, then state and local governments will have to defend against such litigation. Litigation involves expenses, including attorney's fees. Furthermore, any relief granted against the state may have a fiscal impact. This indeterminate amount of resulting litigation will also have a fiscal impact on the courts.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.