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HOUSE OF REPRESENTATIVES
COMMITTEE ON
GOVERNMENTAL OPERATIONS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT

BILL #: CS/HB 3201

RELATING TO: Religious Freedom Restoration Act

SPONSOR(S): Committee on Governmental Operations, Representative Starks and others

COMPANION BILL(S) SB 296 (i)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

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I. SUMMARY:

This bill addresses the standard by which the courts judge an individual's claim alleging state interference with free exercise of religion, and establishes a new cause of action for its infringement. CS/HB 3201 will require that any alleged interference with religious free exercise 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 effect of this Act in Florida could parallel the experience with the federal Religious Freedom Restoration Act of 1993 (RFRA). 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.

The Department of Corrections has expressed its concern 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. Supporters of the Act assert, however, that the "compelling interest" standard of scrutiny will accommodate objective penological considerations.

The fiscal impact of this bill is indeterminate. The degree of possible fiscal impact will vary according to the extent of increased litigation.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Religious Freedom Under the U.S. and Florida Constitutions

I. Florida Courts Tend to Follow Federal Rulings

Section 3, Article 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, Article I 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." [1]

II. The Sherbert "Compelling Interest" Test

A. The Test

In 1963, the United States Supreme Court ruled in Sherbert v. Verner, 374 U.S. 398 (1963), that claims under the First Amendment's religion clauses would be judged according to the "compelling interest" test. The "compelling interest" test constitutes the highest level of scrutiny[2] 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.'"[3] 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."[4]

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[1] *See 10 Fla. Jur. 2d, 595-606.*

[2] *This level of scrutiny is called "strict scrutiny" which "requires [the] state to establish that it has a compelling interest justifying the law and that distinctions created by law are necessary to further some governmental purpose." BLACKS LAW DICTIONARY, 1422 (6th ed. 1990).*

[3] *Sherbert v. Verner (quoting NAACP v. Button), 374 U.S. 398, at 403 (1963).*

[4] *Id. at 407; see also Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707, at 718(1980)("The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.")(citing Sherbert).*

For an interest to be found "compelling," the Sherbert Court stated, "no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interest, give occasion for permissible limitation.' " [5]

B. Nonapplicability of the Sherbert Test

In applying the Sherbert "compelling interest" test the United States Supreme Court gave a great degree of deference to a person's subjective assertion of religious deprivation in First Amendment "free exercise" of religion cases.[6] However, later Supreme Court rulings instituted certain exceptions to the application of the "compelling interest" test. The "compelling interest" 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 Sherbert "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.[7]

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.[8] 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."[9]

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 asserts several criteria for weighing the reasonableness of prisoners' religious rights claims against a particular prison policy:

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[5] *Sherbert v. Verner, 374 U.S. 398, at 406 (1963) (quoting Thomas v. Collins); see also Wisconsin v. Yoder, 406 U.S. 205, at 215 (1972)(Only those interests of the "highest order" are "compelling".).*

[6] *See Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707, at 715 (1981) ("We see, therefore, that [the petitioner] drew a line, and it is not for us to say that the line he drew was an unreasonable one. . . .The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion.").*

[7] *Goldman v. Weinberger, 475 U.S. 503, at 506-508 (1986).*

[8] *Turner v. Safley, 482 U.S. 78 (1987).*

[9] *Id. at 87.*

(1) Whether the policy in question serves a legitimate penological interest;[10]

(2) Whether the prisoners bringing the claim have an alternative means of religious worship;[11]

(3) Whether the costs of accommodating prisoners' religious requests are excessive;[12] and

(4) Whether there exist any "obvious, easy alternatives" to the prisoners' request.[13]

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.[14]

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."[15] 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."[16]

In Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988), the United States Supreme 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

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[10] *O'Lone v. Estate of Shabazz, 482 U.S. 342, at 350 (1987).*

[11] *Id. at 351-352.*

[12] *Id. at 352-353.*

[13] *Id. at 353.*

[14] *See Bowen v. Roy, 476 U.S. 693, 703-705 (1986); City of Boerne v. Flores, 117 S. Ct. 2157, at 2160-2161 (1997).*

[15] *Bowen v. Roy, 476 U.S. 693, at 706 (1986).*

[16] *Id. at 707-708.*

into acting contrary to their religious beliefs."[17] 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.[18]

The Goldman, Turner, O'Lone, Roy, and Lyng cases reaffirmed the Sherbert "compelling interest" test, 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 made more difficult.

III. Smith, the Religious Freedom Restoration Act of 1993, and City of Boerne

In Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), the United States Supreme Court limited the application of Sherbert's "compelling interest" test to only two circumstances:

(1) When the government regulation at issue burdened a constitutional right other than religious free exercise rights;[19] and

(2) When state unemployment-compensation rules conditioned the availability of benefits on an applicant's willingness to work under conditions forbidden by his/her religion.[20]

In Smith, the United States Supreme Court further found the "compelling interest" test inapplicable to a "generally applicable" law.[21] This ruling thus effectively removed use of the "compelling interest" test in the majority of free exercise of religion cases.[22]

In reaction to the Smith opinion, the United States Congress passed the Religious Freedom Restoration Act of 1993 (RFRA), which provided, in pertinent part:

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[17] *Lyng v. Northwest Indian Ceremony Protective Association, 485 U.S. 439, at 450 (1988).*

[18] *Id. at 449-451.*

[19] *Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, at 881 (1990).*

[20] *Id. at 883.*

[21] *Id. at 884-886("Although, as noted earlier, we have sometimes used the Sherbert test to analyze free exercise challenges to such laws . . . we have never applied the test to invalidate one. We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of generally harmful conduct, like its ability to carry on other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'"*).

[22] *See Montgomery v. County of Clinton, Michigan, 743 F. Supp. 1253, at 1259 (W.D. Mich. 1990) ("There is no contention that the laws under which the autopsy was authorized are other than generally applicable and religion neutral. Similarly, there is no contention that the authorization itself was other than religion-neutral. The religion of decedent and of his next of kin played no role in the decision and the actions of the defendants. It follows then, by implication of Employment Division [the Smith case], that defendant's actions need only have been reasonably related to a legitimate governmental objective."*).

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) IN GENERAL.- Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
(b) EXCEPTION.- Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person-
(1) is in furtherance of a compelling governmental interest; and
(2) is the least restrictive means of furthering that compelling governmental interest.
(c) JUDICIAL RELIEF.-A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

RFRA had two basic effects:

(1) It created a new cause of action against government for any person who alleged that his or her free exercise of religion was substantially burdened by government action;[23] and

(2) It re-established the use of the "compelling interest" test without the modifying exceptions of the post-Sherbert line of cases.

RFRA resulted in an increased opportunity to bring lawsuits against the state for alleged infringement upon the free exercise of religion; and, the "compelling interest" test made it more difficult for the state to win these cases. This produced an increase in the number of First Amendment religious freedom cases entertained by state and federal courts.[24]

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[23] *The meaning of "substantial burden" has been given varied interpretations. See Mack v. O'Leary, 80 F.3d 1175, at 1178-1180 (7th Cir 1996)("The Fourth, Ninth, and Eleventh Circuits define "substantial burden" as one that either compels the religious adherent to engage in conduct that his religion forbids . . .or forbids him to engage in conduct that his religion requires . . . The Eighth and Tenth Circuits use a broader definition-- action that forces religious adherents to 'refrain from religiously motivated conduct.' . . .or that 'significantly inhibit[s] or constrain[s] conduct or expression that manifests some central tenet of a [person's] individual beliefs.' . . .The Sixth Circuit seems to straddle the divide, asking whether the burdened practice is 'essential' or 'fundamental,' . . .We hold . . .that a substantial burden . . .is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs.")*

[24] *See Rust v. Clarke, 883 F. Supp. 1293 (D. Neb. 1995) (Prisoners following Asatru religion were not denied their rights under RFRA when their requests for access to location and time for ceremonies, and to ceremonial articles, were denied by correctional officials because such denials were the least restrictive means of furthering compelling state interests. Requests included stone altars, evergreen trees, cauldrons, wooden Viking swords, a sauna, special meats and foods, and the allowance for a ceremonial fire at worship services.); Campos v. Coughlin , 854 F. Supp. 194 (S.D.N.Y. 1994)(Preliminary injunction is granted allowing inmates to wear*

In 1997, the United States Supreme Court, in City of Boerne v. P.F. Flores, 117 S. Ct. 1257 (1997), declared RFRA unconstitutional on two grounds. First, the Court held that RFRA's subject matter exceeded the enumerated powers of Congress under s. 5 of the federal Fourteenth Amendment.[25] Second, the Court held that the RFRA's sweeping nature went beyond Congress' power to enact remedial legislation binding the states, and thus violated the balance between federal and state power (in short, it violates states' rights). [26]

The effect of City of Boerne was to restore the Smith ruling to effective law. Thus the "compelling interest" test is only applicable when the government regulation at issue burdens a constitutional right other than religious free exercise rights and when state unemployment compensation rules condition the availability of benefits on an applicant's willingness to work under conditions forbidden by his/her religion. Furthermore, the "compelling interest" test is inapplicable to a "generally applicable" law.

In response to this, CS/HB 3201 has been filed and it creates the "Religious Freedom Restoration Act of 1998."

B. EFFECT OF PROPOSED CHANGES:

Application of the "Compelling Interest" Test

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beads in conformity with the Santeria religion.); Prins v. Coughlin, 76 F.3d 504 (2d Cir. 1996)(Jewish inmate's allegations that transfer from one prison facility to another violated RFRA by creating difficulties in meeting dietary and ceremonial requirements of his religion are found insufficient.); Phipps v. Parker, 879 F. Supp. 734 (W.D.Ky. 1995)(Prison's requirement of short haircuts do not violate orthodox Hasidic Jewish inmate's RFRA rights.); Bessard v. California Community Colleges , 867 F. Supp. 1454 (E.D.Cal. 1994)(Requirement of loyalty oaths for state employment violates rights of Jehovah's Witnesses under RFRA.); Mack v. O'Leary, 80 F.3d 1175 (7th Cir. 1996) (Evidentiary hearing is required for determination of whether a particular religious requirement is a central tenet of prisoner's religion, the inhibition of which would constitute violation of RFRA.); Abate v. Walton, 77 F.3d 488 (9th Cir.1996) (Prisoner's suit alleging that menu offered by correctional facility does not satisfy dietary requirements of his religion fails for lack of adequate showing to that effect.); Jolly v. Coughlin , 76 F.3d 468 (2d Cir. 1996)(Prison authorities' use of confinement to compel Rastafarian prisoner to submit to tuberculosis examination, which he asserts contradicts his religious beliefs, violates RFRA.);Werner v. McCotter, 49 F.3d 1476 (10th Cir. 1995) (Prisoner alleging correctional authorities' prohibition of sweat lodge for Native American religious rituals, and possession of medicine bag, has established a prima facie case under the RFRA.); Hamilton v. Schriro, 74 F.3d 1545 (8th Cir. 1996)(Prison regulations requiring short hair length and denying sweat lodge ceremony for Native American inmates does not violate RFRA because it is narrowly tailored to meet compelling interests.); Lawson v. Duggar, 844 F. Supp. 1538 (1995)(RFRA is violated by routine prohibition of literature of Hebrew Israelite faith by correctional facility.); Cheema v. Thompson, 67 F.3d 883 (9th Cir.1995) (Preliminary injunction is granted allowing Sikh schoolchildren to carry ceremonial knives to school.); Thiry v. Carlson, 78 F.3d 1491 (10th Cir. 1996)(RFRA was not violated by the building of highway through burial area because the Native American and Christian beliefs implicated allowed for moving of gravesites when necessary.).

[25] *City of Boerne v. P.F. Flores, 117 S. Ct. 2157, at 2172 ("RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.").*

[26] *Id. at 2170 (1997)("Remedial legislation under sec. 5 'should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against.' . . . RFRA is not so confined.")(quoting Civil Rights Cases , 109 U.S., at 13); see also id. at 2172 ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").*

The Religious Freedom Restoration Act of 1998 (the Act) provides that government shall not substantially burden the free exercise of religion unless the government demonstrates that the burden

(1) Is in furtherance of a "compelling governmental interest," and
(2) Is the least restrictive means of furthering that interest.

"Government" or "state" is defined to include "any branch, department, agency, instrumentality, or official or other person acting under color of law of the state, a county, special district, municipality, or any other subdivision of the state." The Act specifically includes within its provisions "rules of general applicability," and does not provide for a alternative standard in regard to cases brought by incarcerated persons.

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.[27] 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.[28] The Act's provisions are substantially similar to those of RFRA.

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[27] *For example, see Brief of American Bar Association as Amicus Curiae in Support of Respondents at 1-2, City of Boerne v. Flores,117 S. Ct. 1257 (1997)("The ABA [American Bar Association] policy rests on the conviction that only by limiting governmental interference with the exercise of religion to those instances where government can demonstrate an urgent need to do so can we protect the principles of religious liberty and tolerance on which this country was founded and for which it is unequaled elsewhere in the world. The ABA concluded that the compelling interest test is also the most practical means for ensuring that smaller and unpopular faiths receive the same level of protection as mainstream faiths.")*

[28] *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 6-7, City of Boerne v. Flores, 117 S. Ct. 1257 (1997)("By dictating a universal strict scrutiny standard for clashes between individual religious liberty claims and collective security needs, RFRA . . .disrupts . . .core State police powers. In the area of education, for example, RFRA has generated a raft of unusual lawsuits. It has subjected such matters as the selection of songs performed by high school choirs, the enforcement of minimal educational standards and the disciplining of errant faculty to strict federal review. . . .Likewise, the RFRA mandate has made it more difficult for state and local governments to maintain public safety. The Act has generated extensive litigation over such inherently local issues as state highway improvements intended to reduce accidents, nuisance abatement actions dealing with excessive holiday lighting and the applicability of otherwise unremarkable highway and hunting safety regulations."); but see also Brief of the States of Maryland, Connecticut, Massachusetts and New York As Amici Curiae in Support of Respondent at 5, City of Boerne v. Flores, 117 S. Ct. 1257 (1997)("[T]here [is no] reason to believe that RFRA has undermined or will undermine the States' ability to manage their educational or public safety functions. For example, virtually all of the education-related cases that have been brought under RFRA have involved only ancillary issues of public education (such as sex education programs, graduations, etc.) and, even then, have been largely unsuccessful. The same is true regarding issues of public safety.").*

The Act, like RFRA, includes within its provisions cases brought by incarcerated persons.[29] The Department of Corrections has expressed its concern that the "compelling interest" standard of review will give inmates greater latitude in asserting unreasonable demands which conflict with a correctional institution's need for order and security.[30] Supporters of the Act assert, however, that the "compelling interest" level of scrutiny is sufficient to allow the courts to accommodate objective penological considerations.

Provision for Claim or Defense

This Act also provides that a person whose religious exercise has been burdened in violation of the Act may assert that violation "as a claim or defense in a judicial proceeding[31] and

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[29] *RFRA, like the Act presently, 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; depositions 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.")*

[30] *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, as applied to prison situations, 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."*)

[31] *Use of this Act as a claim or defense in a "judicial proceeding" appears to limit the forum within which such a claim or defense may be brought. "Administrative proceedings" are, for example, not mentioned (e.g. Ch. 120, F.S., proceedings conducted by "agencies" as defined therein). This apparent limitation conflicts with this Act's attorney's fee provision. The fee provision appears to entitle a non-governmental prevailing party to reasonable attorney's fees and costs in "any action or proceeding" to enforce the Act -- not just in judicial proceedings.*

obtain appropriate relief". This creates a new cause of action against government. Furthermore, what the scope of "appropriate relief" might entail is uncertain. It could mean issuing an injunction or writ to awarding compensatory damages.

Provisions Regarding Applicability of the Act

This Act also sets forth the following statements of applicability:

1. "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."

Thus this Act's provisions are retroactive and prospective in effect, and apply to laws found in the Florida Statutes as well as apparently to, for example, local ordinances and codes. Accordingly, a person could sue a governmental entity under this Act for governmental actions previously committed[32] 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 period of time allowed for a governmental entity to establish provisions and procedures (e.g., variance provisions) that would take into consideration the Act's new provisions regarding free exercise of religion.

2. "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."

Any state law[33] 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.

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.

3. "Nothing in this act shall be construed to authorize the government to burden any religious belief."

4. "Nothing in this act shall be construed to circumvent the provisions of chapter 893, Florida Statutes."

Chapter 893, F.S., deals with drug abuse prevention and control. Several of the sections in Ch. 893, F.S., make it unlawful to, for example, sell, manufacture, deliver,

[32] *There is no time limit associated with the retroactive application of this Act. Thus, conceivably an action by the state done many years ago could be brought before the courts as an alleged violation of this Act.*

[33] *"State" is defined in this Act to include counties, municipalities, and special districts. Accordingly, when referencing "state law" that includes local law as well.*

possess , or traffic in certain controlled substances. It is unclear how this Act could "circumvent" the provisions of that chapter. Possibly what is meant is that the provisions of this Act are inapplicable with regard to the enforcement of Ch. 893, F.S. If so, courts, in ruling on criminal cases brought pursuant to Ch. 893, F.S., would then have to dismiss any claim or defense brought pursuant to this Act. However, the meaning of this provision is still speculative.

5. "Nothing is 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."

This could mean that the provisions of this Act are intended to address only governmental actions that affect the free exercise of religion, not the establishment of religion. However, if the court finds the legislation to affect the establishment of religion, a statement within a general law stating the contrary is ineffectual.

6. "Nothing is this act shall create any rights by an employee against an employer if the employer is not a governmental agency."

This means that the provisions of this Act are not available against the private sector and thus cannot be used as a claim or defense in private sector litigation.

Finally, this Act also provides that "the prevailing party 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." This language is confusing. Initially, it appears that the prevailing party is awarded reasonable attorney's fees and costs. But then the sentence concludes with: "to be paid by the government." Accordingly, the government, when a prevailing party, would not be entitled to reasonable attorney's fees and costs.[34] Finally, the fee provision does not appear mandatory (e.g., the court must/shall award reasonable attorney's fees and costs to the nongovernmental prevailing party) but only "entitles" a prevailing party to reasonable attorney's fees and costs.

C. APPLICATION OF PRINCIPLES:

1. <u>Less Government:</u>

a. Does the bill create, increase or reduce, either directly or indirectly:

[34] *Under RFRA, there existed a bifurcated standard for the awarding of legal fees. For judicial proceedings, 42 U.S.C. 1988, applied, and that law provides that the court "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." For administrative proceedings, s. 504(b)(1)(C) of title 5, United States Code, applied, and that law provides that "an agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that the special circumstances make an award unjust."*

(1) any authority to make rules or adjudicate disputes?

This Act creates a cause of action under which a person may sue the government for alleged violation of his or her free exercise of religion. Its provisions may also be used as a defense.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

To the extent legal action is brought pursuant to this Act, governmental entities will have to engage personnel, including legal counsel, to defend its actions (in administrative as well as in judicial forums); and, the courts will have to hear such matters.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

An agency or program is not eliminated or reduced.

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

This bill appears to increase a person's options with regard to free exercise of religion.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

This bill does not purport to provide services to families or children.

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

This bill does not create or change a program providing services to families or children.

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Creates new sections of law.

E. SECTION-BY-SECTION RESEARCH:

Section 1: Provides a title: "Religious Freedom Restoration Act of 1998."

Section 2: Provides definitions.

Section 3: Provides that government shall not substantially burden a person's exercise of religion unless the State's action is to further a "compelling governmental interest" and is accomplished by the "least restrictive means" possible; and, provides that a person whose religious exercise has been burdened in violation of the Act may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief.

Section 4: Provides for entitlement to reasonable attorney's fees and costs by the prevailing nongovernmental party.

Section 5: Provides that this Act applies to all state law (statutory or otherwise), and the implementation of that law, whether adopted before or after the implementation of this act; provides that state law adopted after enactment of this Act is subject to this Act unless expressly otherwise stated by such laws; provides that nothing in this Act shall authorize the State to burden any religious belief; provides that nothing in this Act shall circumvent Ch. 893, F. S. ("Drug Abuse Prevention and Control"); provides that nothing in this Act shall affect the portion of s. 3, Art I of the State Constitution which prohibits laws respecting the establishment of religion; and, provides that nothing in this Act creates any rights by an employee against a non-governmental employer.

Section 6: Provides an effective date of upon becoming law.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See "Fiscal Comments"

2. Recurring Effects:

See "Fiscal Comments"

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

See "Fiscal Comments"

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

See “Fiscal Comments”

2. Recurring Effects:

See “Fiscal Comments”

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

None.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

The fiscal impact of this bill is indeterminate. To the extent increased litigation against government results from this Act, then state and local goverments will have to defend against same. Litigation entails expense, including attorneys’ 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.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to expend funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority of counties or municipalities to raise revenues.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On April 7, 1998, the Committee on Governmental Operations adopted one "remove everything after the enactment clause" amendment. That amendment provided that government shall not substantially burden a person's free exercise of religion except in cases where the government has demonstrated that the burden is in furtherance of a "compelling governmental interest," and that it is the least restrictive means of furthering that interest. This test is to be applied to all cases asserting a claim against the state for infringement upon the free exercise of religion, including those from incarcerated persons. The amended bill was made a committee substitute.

The original bill provided that in cases brought by incarcerated individuals, the government has to demonstrate that the burden is in furtherance of a "substantial penological interest," and that it is the least restrictive means of furthering that interest. The original bill also defined "Exercise of Religion," as "the exercise of religion under s. 3, Art. I of the State Constitution." The committee substitute changed that definition.

VII. SIGNATURES:

COMMITTEE ON GOVERNMENTAL OPERATIONS:

Prepared by:	Legislative Research Director:
Garci Perez	Jimmy O. Helms