H.R. REP. 103-88, H.R. Rep. No. 88, 103RD Cong., 1ST Sess. 1993, 1993 WL 158058 (Leg.Hist.)
P.L. 103-141, RELIGIOUS FREEDOM RESTORATION ACT OF 1993
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May 11, 1993 (To accompany H.R. 1308)
Senate Report (Judiciary Committee) No. 103-111,
July 27, 1993 (To accompany S. 578)

HOUSE REPORT NO. 103–88

May 11, 1993
[To accompany H.R. 1308]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1308) to protect the free exercise of religion, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

SUMMARY AND PURPOSE

H.R. 1308, the Religious Freedom Restoration Act of 1993, responds to the Supreme Court's decision in Employment Division, Department of Human Resources of Oregon v. Smith [1] by creating a statutory right requiring that the compelling governmental interest test be applied in cases in which the free exercise of religion has been burdened by a law of general applicability.

HEARINGS

Hearings were held before the Subcommittee on Civil and Constitutional Rights during the 102d Congress on May 13 and 14, 1992 on H.R. 2797, a similar bill; no hearings were held during the 103d Congress.

COMMITTEE VOTE

On March 24, 1993, a reporting quorum being present, the Committee on the Judiciary ordered H.R. 1308 reported to the full House by a vote of 35–0.

DISCUSSION

BACKGROUND AND NEED

The Free Exercise Clause of the First Amendment states in relevant part that "Congress shall make no law ... prohibiting the free exercise [of religion]." However, the clarity of the Constitution has not prevented government from burdening religiously inspired action. Though laws directly targeting religious practices have become increasingly rare, facially neutral laws of general applicability have nefariously burdened the free exercise of religion in the United States throughout American history. Such laws, often upheld by the courts, undermined the exercise of religion by various groups. [2]

Not until the Supreme Court used the compelling governmental interest test in the free exercise context did decisions more protective of religious liberty evolve. In Sherbert v. Verner, [3] the Supreme Court stated the principle that a neutral law that burdens the free exercise of religion may only be upheld if the government can demonstrate that such law is justified by a compelling governmental interest and is the least restrictive means of achieving that interest. For many years and with very few exceptions, the Supreme Court employed the compelling governmental interest test. The Smith majority's abandonment of strict scrutiny represented an abrupt, unexpected rejection of longstanding Supreme Court precedent.

The Smith case began as an unemployment compensation dispute involving two Native American employees at a private drug and alcohol rehabilitation facility. The employees were fired and denied unemployment benefits after they admitted ingesting peyote–a sacrament of the Native American Church of which both were members–during a religious ceremony. The Oregon Employment Division believed that the State had a compelling interest in proscribing the use of certain drugs pursuant to a controlled substance law.

The employees filed a case disputing the denial of unemployment benefits and questioning the constitutionality of the controlled substance law as it applied to their religious practice. The case proceeded through the State and Federal courts until, on remand from the United States Supreme Court, the Oregon Supreme Court found that the State statute did not exempt the religiously inspired use of peyote. However, the court also invalidated the prohibition on sacramental peyote use under the Free Exercise Clause of the First Amendment and reaffirmed its previous ruling that the State could not deny unemployment benefits. The United States Supreme Court granted certiorari, again.

In its second review of the case, the United States Supreme Court was required to determine whether the Free Exercise Clause of the First Amendment permitted the State of Oregon to prohibit sacramental peyote use through its general criminal prohibition on use of that drug, and thus permitted the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.

The parties did not ask the Court to render a decision on the level of scrutiny applicable when a law of general applicability allegedly infringes upon an individual's rights under the Free Exercise Clause, nor did the Court request briefing or argument on this well settled issue. Nevertheless, the Smith opinion focused on the standard of review.

In an opinion written by Justice Scalia, the Court determined that the Free Exercise Clause of the First Amendment does not absolve any person of the duty to adhere to a law which incidentally forbids or requires the performance of an act that a person's religion requires or forbids, if that law is not specifically directed to religious practice. Citing Minersville School Dist. Bd. of Educ. v. Gobitis, [4] the Court stated that it had "never held that an individual's religious beliefs excuse[d] him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." [5] According to the Smith majority, the only decisions in which it held "that the First Amendment bar[red] application of a neutral, generally applicable law to religiously motivated action involved ... the Free Exercise Clause in conjunction with other constitutional protections." [6] The Court maintained that the case did not present such a "hybrid" situation, only a free exercise claim unconnected with any other constitutional right.

The Court then repudiated the use of the compelling governmental interest test. Justice Scalia wrote that:

> [T]he sounder approach [to challenges having to do with an across-the-board criminal prohibition on a particular form of conduct], 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 socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development,' Lyng v. Northwest Indian Cemetery Protective Assn., 485 U.S. 439, 451 (1988). To make an individual's obligation to obey such a law contingent upon the law's coincidence with his

religious beliefs, except where the State's interest is "compelling"–permitting him, by virtue of his beliefs, 'to become a law unto himself,' Reynolds v. United States 98 U.S. 145, 167 (1878)–contradicts both constitutional tradition and common sense. [7]

The majority reached this conclusion after finding that the applicability and success of the compelling governmental interest test stretched only as far as invalidating state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his or her religion. The Court found that the test was appropriate for that context because it lent itself to individualized governmental assessment of the reasons for the relevant conduct.

Conversely, according to the majority, the test would be inappropriate outside that context and would lead to a "parade of horribles" such as judicial determination of the "centrality" of religious beliefs; "anarchy" resulting from the supposed inability of many laws to meet the test; and exemption from a variety of civic duties. Justice Scalia stated:

Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," Braunfield v. Brown, 366 U.S. 599, 606 (1961), and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. [8]

Finally, the Court asserted that the free exercise of religion may be protected through the political process. According to the majority, its inability to find constitutional protection for religiously inspired action burdened by generally applicable laws does not mean statutory exemptions to such laws are not permitted or even desired. However, the majority noted:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs. [9]

To reach its decision in the Smith case, the majority had to strain its reading of the First Amendment and ignore years of precedent in which the compelling governmental interest test was applied in a variety of circumstances. In a strongly worded concurrence, [10] Justice O'Connor noted that the First Amendment of the Constitution does not distinguished between religious belief and conduct, and that conduct can be burdened both by the extreme and rare law that specifically targets religion as well as the generally applicable law:

[O]ur decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability. * * *

***A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion. [11]

Citing numerous cases, Justice O'Connor clarified that in the course of reviewing generally applicable laws, the Court had recognized that the right to engage in conduct is not absolute and had "respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the Government to justify

any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest." [12] Furthermore, use of the compelling governmental interest test had not been confined to "hybrid" or unemployment compensation cases as suggested in the majority opinion. Prior to Smith, the Court consistently relied upon the Free Exercise Clause in a variety of circumstances and even when the Court upheld the burden on religion, it did so only after employing strict scrutiny. [13]

IMPACT OF THE SMITH DECISION

The effect of the Smith decision has been to subject religious practices forbidden by laws of general applicability to the lowest level of scrutiny employed by the courts. Because the "rational relationship test" only requires that a law must be rationally related to a legitimate state interest, the Smith decision has created a climate in which the free exercise of religion is continually in jeopardy; facially neutral and generally applicable laws have and will, unless the Religious Freedom Restoration Act is passed, continue to burden religion. [14] After Smith, claimants will be forced to convince courts that an inappropriate legislative motive created statutes and regulations. However, legislative motive often cannot be determined and courts have been reluctant to impute bad motives to legislators.

It is not feasible to combat the burdens of generally applicable laws on religion by relying upon the political process for the enactment of separate religious exemptions in every Federal, State, and local statute. As the Supreme Court itself said:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. [15]

> The Committee believes that the compelling governmental interest test must be restored. As Justice O'Connor stated in Smith, "[t]he compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the Court to deem this command a 'luxury,' is to denigrate '[t]he very purpose of a Bill of Rights.'" [16]

THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993

The legislative response to the Smith decision is H.R. 1308, the Religious Freedom Restoration Act of 1993. The bill restores the compelling governmental interest test previously applicable to First Amendment Free Exercise cases by requiring proof of a compelling justification in order to burden religious exercise. In so doing, the definition of governmental activity covered by the bill is meant to be all inclusive. All governmental actions which have a substantial external impact on the practice of religion would be subject to the restrictions in this bill. In this regard, in order to violate the statute, government activity need not coerce individuals into violating their religious beliefs nor penalize religious activity by denying any person an equal share of the rights, benefits and privileges enjoyed by any citizen. Rather, the test applies whenever a law or an action taken by the government to implement a law burdens a person's exercise of religion.

It is the Committee's expectation that the courts will look to free exercise of religion cases decided prior to Smith for guidance in determining whether or not religious exercise has been burdened and the least restrictive means have been employed in furthering a compelling governmental interest. Furthermore, by enacting this legislation, the Committee neither approves nor disapproves of the result in any particular court decision involving the free exercise of religion, including those cited in this bill. This bill is not a codification of any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions. Therefore, the compelling governmental interest test should

be applied to all cases where the exercise of religion is substantially burdened; however, the test generally should not be construed more stringently or more leniently than it was prior to Smith.

In terms of the specific issue addressed in Smith, this bill would not mandate that all states permit the ceremonial use of peyote, but it would subject any such prohibition to the aforesaid balancing test. The courts would then determine whether the State had a compelling governmental interest in outlawing bona fide religious use by the Native American Church and, if so, whether the State had chosen the least restrictive alternative required to advance that interest. It is worth emphasizing that although this bill is applicable to all Americans, including Native Americans and their religions in keeping with the Congressional policy set in the American Indian Religious Freedom Act of 1978, the Committee recognizes that this bill will not necessarily address all First Amendment problems by itself. Native Americans have unique First Amendment concerns that Congress may need to address through additional legislation.

Prior to 1987, courts evaluated free exercise challenges by prisoners under the compelling governmental interest test. The courts considered the religiously inspired exercise, as well as the difficulty of the prison officials' task of maintaining order and protecting the safety of prison employees, visitors and inmates. Strict scrutiny of prison regulations did not automatically assure prisoners of success in court. However, in O'Lone v. Estate of Shabazz, [17] the Supreme Court articulated the standard currently applicable in free exercise cases involving prisoners. The test developed by the Supreme Court requires prison regulations to be reasonably related to legitimate penological interests, the existence of alternative means to exercise the constitutional right despite the regulations, and an examination of the impact of accommodation of the asserted right(s) on other inmates, prison personnel, and allocation of prison resources, generally. Under this test, burdens on prisoners' free exercise of their religion are more easily upheld.

In Goldman v. Weinberger, [18] the Supreme Court carved out an exception to the compelling governmental interest test applicable to review of military regulations burdening religious practices. When a Jewish psychologist sought to ear a yarmulke while on duty, the Court, foreshadowing its 1987 Shabazz decision, cited the differences between civilian society and the specialized military society as justification for upholding the military dress code. The Court decided that judicial review must be much more deferential to the military than review of similar laws affecting civilians.

Pursuant to the Religious Freedom Restoration Act, the courts must review the claims of prisoners and military personnel under the compelling governmental interest test. Seemingly reasonable regulations based upon speculation, exaggerated fears of thoughtless policies cannot stand. Officials must show that the relevant regulations are the least restrictive means of protecting a compelling governmental interest. However, examination of such regulations in light of a higher standard does not mean the expertise and authority of military and prison officials will be necessarily undermined. The Committee recognizes that religious liberty claims in the context of prisons and the military present far different problems for the operation of those institutions than they do in civilian settings. Ensuring the safety and orderliness of penological institutions, as well as maintaining discipline in our armed forces, have been recognized as governmental interests of the highest order.

There has been much debate about this bill's relevance to the issue of abortion. Some have suggested that if Roe v. Wade were reversed, the bill might be used to overturn restrictions on abortion. The Congressional Research Service is unpersuaded that this would be the case, [19] and the Committee is similarly unpersuaded. In short, the abortion debate will be resolved in contexts other than this legislation. Furthermore, the Supreme Court's decision in Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992), which describes how to resolve claims relating to abortion under the Constitution, renders discussions about the bill's application to abortion increasingly academic. To be absolutely clear, the bill does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with free exercise jurisprudence, including Supreme Court jurisprudence, under the compelling governmental interest test prior to Smith.

Although the purpose of this Act is to overcome the effects of the Supreme Court's decision in Smith, concerns have been raised that the bill could have unintended consequences and unsettle other areas of the law. Specifically, the courts have long adjudicated cases determining the appropriate relationship between religious organizations and government. In particular, Federal courts have repeatedly been asked to decide whether religious organizations may participate in publicly funded social welfare and educational programs or enjoy exemptions from income taxation pursuant to 26 U.S.C. S 501(c)(3) and similar laws. Such cases have been decided under the Establishment Clause and not the Free Exercise Clause. In fact, a free exercise challenge to government aid to a religiously affiliated college was rejected by the Supreme Court in Tilton v. Richardson. [20]

The bill includes several provisions which clarify that the bill does not change the law governing these cases. These include the provision providing for the application of the Article III standing requirements; a section which provides that the granting of benefits, funding, and exemptions, to the extent permissible under the Establishment Clause, does not violate the Religious Freedom Restoration Act; and, further clarification that the jurisprudence under the Establishment Clause remains unaffected by the bill.

Ordinary Article III rules are to be applied in determining whether a party has standing to bring a claim pursuant to this bill. In the past, the courts have interpreted the Constitution's Article III standing provision to preclude taxpayers from attaining standing to challenge on free exercise grounds the tax-exempt status of religious institutions. The Committee intends that these issues continue to be resolved under Article III standing rules and Establishment Clause jurisprudence. The Act would not provide a basis for standing in situations where standing to bring a free exercise claim is otherwise absent.

With respect to that part of Section 7 that provides that granting benefits, funding, or exemptions, to the extent permissible under the Establishment Clause, does not violate this legislation, the bill makes clear that the term “granting” should not be misconstrued to include “denying.” Thus, parties may challenge, under the Religious Freedom Restoration Act, the denial of benefits to themselves as in Sherbert.

Nothing in this bill shall be construed as affecting Title VII of the Civil Rights Act of 1964. Furthermore, where religious exercise involves speech, as in the case of distributing religious literature, reasonable time, place and manner restrictions are permissible consistent with First Amendment jurisprudence.

Finally, the Committee believes that Congress has the constitutional authority to enact H.R. 1308. Pursuant to Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause embodied in Article I, Section 8 of the Constitution, the legislative branch has been given the authority to provide statutory protection for a constitutional value when the Supreme Court has been unwilling to assert its authority. The Supreme Court has repeatedly upheld such congressional action after declining to find a constitutional protection itself. [21] However, limits to congressional authority do exist. Congress may not (1) create a statutory right prohibited by some other provision of the Constitution, (2) remove rights granted by the Constitution, or (3) create a right inconsistent with an objective of a constitutional provision. Because H.R. 1308 is well within these limits, the Committee believes that in passing the Religious Freedom Restoration Act, Congress appropriately creates a statutory right within the perimeter of its power.

SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

The short title of the bill is the “Religious Freedom Restoration Act of 1993.”

SECTION 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES

This section sets forth both the background and the purpose for enacting the Religious Freedom Restoration Act of 1993.

SECTION 3. FREE EXERCISE OF RELIGION PROTECTED

Pursuant to H.R. 1308, the government cannot burden a person's free exercise of religion, even if the burden results from a rule of general applicability, unless the burden is essential to further a compelling governmental interest and is the least restrictive means of furthering that interest.

A person may assert a free exercise violation as a claim or defense in a judicial proceeding. To bring a claim, a person or organization must meet the requirements for standing under article III of the Constitution.

SECTION 4. ATTORNEYS FEES

The bill provides that courts may, in their discretion, allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs. Furthermore, this section provides for costs and fees during an adversary adjudication.

SECTION 5. DEFINITIONS

The terms “government”, “State”, “demonstrates”, and “exercise of religion” are defined.

SECTION 6. APPLICABILITY

H.R. 1308 applies to all Federal, State and local law, including the implementation of that law, whether or not it was adopted before or after the enactment of the Act. However, Federal laws adopted after enactment may not be subject to the Act if the law, by reference to the Act, explicitly excludes application. Nothing in this bill shall authorize any government to burden any religious belief.

SECTION 7. ESTABLISHMENT CLAUSE UNAFFECTED

The Religious Freedom Restoration Act does not in any way affect the Establishment Clause of the First Amendment.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT OPERATIONS OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Operations were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(C)(3) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill H.R. 1308, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974.

U.S. Congress,
Congressional Budget Office,
Washington, DC, March 26, 1993.

Hon. Jack Brooks,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed H.R. 1308, the Religious Freedom Restoration Act of 1993, as ordered reported by the House Committee on the Judiciary on March 24, 1993. CBO estimates that implementation of H.R. 1308 would result in no significant cost to the federal government or to state or local governments.

Under current law, a unit of local, state, or federal government can infringe upon a person's exercise of religion if such infringement bears a rational relationship to furthering a government interest. H.R. 1308 would allow a unit of government to infringe upon a person's exercise of religion only if such infringement furthers a compelling government interest and is the least restrictive means of furthering that interest.

Enactment of H.R. 1308 may affect direct spending because private parties affected by this bill may seek judicial relief; if they successfully claim that their free exercise of religion has been burdened by the federal government, attorney's fees may be awarded and would be paid out of the Claims, Judgments and Relief Acts account. Therefore, this bill would be subject to pay-as-you-go procedures under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985. However, attorney's fees are permitted under current law, the federal government rarely loses cases of this type, and there is no reason to expect that the number of cases lost or the amount of attorney's fees awarded would change significantly under H.R. 1308.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne Mehlman, who can be reached at 226–2860.

Sincerely,

Robert D. Reischauer, Director.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 1308 will have no significant inflationary impact on prices and costs in the national economy.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 722 OF THE REVISED STATUTES OF THE UNITED STATES

Sec. 722. (a) The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this Title, and of Title "Civil Rights," and of Title "Crimes," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92–318, The Religious Freedom Restoration Act of 1993, or title VI of the Civil Rights Act of 1964, 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.

(c) In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of section 1977 or 1977A of the Revised Statutes, the court, in its discretion, may include expert fees as part of the attorney's fee.

SECTION 504 OF TITLE 5, UNITED STATES CODE

S 504. Costs and fees of parties

(a) * * *

(b)(1) For the purposes of this section–

(A) * * *

* * * * * * *

(C) "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607), [and] (iii) any hearing conducted under chapter 38 of title 31[;]; and (iv) the Religious Freedom Restoration Act of 1993

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ADDITIONAL VIEWS OF HON. HENRY J. HYDE, HON. F. JAMES SENSENBRENNER, HON. BILL MCCOLLUM, HON. HOWARD COBLE, HON. CHARLES T. CANADY, HON. BOB INGLIS, HON. ROBERT W. GOODLATTE

The purpose of H.R. 1308 is to overturn the 1990 decision of the United States Supreme Court in Oregon Employment Services Division v. Smith 494 U.S. 872. The "Religious Freedom Restoration Act" (hereinafter RFRA) seeks, by statute, to replicate the "compelling state interest test" for the adjudication of free exercise claims which was in place prior to the Supreme Court's decision in Smith.

In Smith, the Supreme Court held that neutral laws of general application that have the incidental effect of burdening religion do not violate the free exercise clause of the First Amendment to the United States Constitution. [1] The Smith case involved two drug rehabilitation workers who sued to obtain unemployment benefits after they were discharged for ingesting peyote during a service of Native American Church, of which both workers were members.

Justice Scalia, writing for the majority, rejected the "compelling state interest" test for adjudication of free exercise claims. Previously, government action which burdened religious exercise could only be upheld if it furthered a compelling governmental interest and was the least restrictive means of furthering that interest. This test was first articulated by the Supreme Court in the context of unemployment benefits in Sherbert v. Verner, 374 U.S. 398 (1963). In Sherbert, a Seventh-Day Adventist who had refused to work on her religion's Sabbath was awarded unemployment compensation which had previously been denied.

When this legislation was considered by the Subcommittee on Civil and Constitutional Rights and the full Judiciary Committee in the 102nd Congress, Congressman Henry J. Hyde (Ill.) offered several amendments. These amendments were designed to alleviate concerns that had been raised with respect to (1) abortion-related claims, (2) third-party challenges to government-funded social service programs run by religious institutions and (3) third-party challenges to the tax-exempt status of religious institutions. Since that time, each of these concerns has been resolved either through explicit statutory language or has been addressed in the Committee report.

CHANGES MADE TO H.R. 1308

A major issue of contention in the 102nd Congress was whether the bill was a true "restoration" of the law as it existed prior to Smith or whether it sought to impose a statutory standard that was more stringent than that applied prior to Smith. [2]

As introduced in the 102nd Congress, the RFRA purported to "restore the compelling state interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder." [3] The "compelling state interest" test as applied in Sherbert and Yoder, however, was far stronger than the court had been applying prior to Smith. Those two cases represent the zenith of free exercise jurisprudence, where religious plaintiffs who sought to have their individual claims balanced against government interests actually prevailed. In reality, in recent years it has been quite difficult, if not impossible, for plaintiffs bringing constitutional free exercise claims to prevail.

Several changes were made to the bill during the Judiciary Committee markup in late September of 1992 and prior to the bill's introduction in 103rd Congress. These changes resolved the ambiguity about the standard to be applied and made it clear that the bill does not reinstate the free exercise standard to the high water mark as found in Sherbert v. Verner and Wisconsin v. Yoder, but merely returns the law to the state as it existed prior to Smith.

Briefly the changes are as follows:

Section 2 of the legislation, the "Congressional Purposes" was amended to delete the specific reference to "Sherbert v. Verner and Wisconsin v. Yoder" in setting forth the statutory standard. This section now states that the purpose of the Act is to: "restore the compelling interest test as set forth in Federal court cases before Employment Division of Oregon v. Smith."

Section 3, the operative language of the bill, which sets forth the standard of the bill, was fundamentally changed. The language had required that the government must prove that any neutral regulation which burdened free exercise was "essential to" a compelling governmental interest. The bill was amended to require only that the government show that its action "furthers" a compelling governmental interest.

Section 5 added a new subsection which states: "the term 'exercise of religion' means exercise of religion under the First Amendment to the Constitution of the United States.

Section 7 was amended to add the following language:

> Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause of the First Amendment, shall not constitute a violation of this Act. As used in this section, the term 'granting government funding, benefits, or exemptions' does not include a denial of government funding, benefits, or exemptions.

The amendments to Sections 2, 3, and 5 make clear that the purpose of the statute is to "turn the clock back" to the day before Smith was decided. In interpreting the statute, courts are not to look exclusively to the compelling state interest test as applied in Sherbert and Yoder, but to all prior "Federal court cases." The government's action or regulation need not be "essential" to a compelling state interest, but merely should "further" a compelling government interest. Finally, the language added to Section 5 makes clear that the bill does not create a new statutory definition of the free exercise of religion, but incorporates the constitutional definition of the free exercise of religion.

The intended standard of the bill was of particular concern in the area of abortion rights. We have been concerned that the Religious Freedom Restoration Act would create an independent statutory basis to challenge abortion restrictions that does not exist under current law. Because the bill now clearly imposes a statutory standard that is to be interpreted as incorporating all "federal court cases" prior to Smith, and free exercise challenges to abortion restrictions were ultimately unsuccessful prior to Smith, we are confident that although such claims may be brought pursuant to the Act, they will be unsuccessful. [4]

The amendments to Section 7 are intended to resolve the concerns that have been raised regarding the application of the Act to third-party challenges to government-funded social service programs run by religious institutions and third-party challenges to the tax-exempt status of religious institutions. The new language makes clear that such claims are not the appropriate subject of litigation under the Religious Freedom Restoration Act.

The changes made to the bill as introduced in the 103rd Congress make clear that the Religious Freedom Restoration Act is not seeking to impose a new, invigorated compelling state interest standard, but is seeking to replicate, by statute, the same free exercise test that was applied prior to Smith.

WILL THE RFRA WORK?

In justification of the need for this legislation, proponents have provided the Committee with long lists of cases in which free exercise claims have failed since Smith was decided. Unfortunately, however, even prior to Smith, it is well known that the "compelling state interest" test had proven an unsatisfactory means of providing protection for individuals trying to exercise their religion in the face of government regulations. [5] Restoration of the pre-Smith standard, although politically practical, will likely prove, over time, to be an insufficient remedy. It would have been preferable, given the unique opportunity presented by this legislation, to find a solution that would give solid protection to religious claimants against unnecessary government intrusion. [6]

In reality, the Act will not guarantee that religious claimants bringing free exercise challenges will win, but only that they have a chance to fight. It will perpetuate, by statute, both the benefits and frustrations faced by religious claimants prior to the Supreme Court's decision in Smith. Although we have this remaining concern, we support enactment of the legislation.

Henry J. Hyde.
Bill McCollum.
Charles T. Canady.
Bob Goodlatte.
F. James Sensenbrenner.
Howard Coble.
Bob Inglis.

1 494 U.S. 872 (1990).

2 See written testimony of Professor Douglas Laycock, House Civil and Constitutional Rights Subcommittee, May 14, 1992, pp. 2–5.

3 374 U.S. 398 (1963).

4 310 U.S. 586 (1940). Gobitis, overruled three years later by West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), upheld the requirement that Jehovah's Witnesses salute the flag. The Gobitis decision precipitated widespread violence against Jehovah's Witnesses including the beating of Jehovah's Witness children on school grounds.

5 Smith, 494 U.S. at 878.

6 Id. at 881.

7 Id. at 885.

8 ID (at 888 italic in original).

9 Id. at 890.

10 Justice O'Connor concurred in the judgment by finding against the dismissed employees based on the Court's established free exercise jurisprudence.

11 Id. at 895 (quoting Wisconsin v. Yoder, 406 U.S. 205, 219–20).

12 Id. at 894.

13 See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972) (using strict scrutiny, Court held that the free exercise interests of the Old Order Amish outweighed the interests of the state compulsory education statute); Thomas v. Review Board, Indiana Employment Security Commission, 450 U.S. 707 (1981) (using strict scrutiny, Court held that a State could not deny unemployment benefits to a Jehovah's Witness who became unemployed because his interpretation of the Bible precluded him from working on an armaments production line).

Similarly, the Court has used the compelling governmental interest test and upheld the disputed government statute or regulation. See, e.g., United States v. Lee, 455 U.S. 252 (1981) (Amish employer not constitutionally entitled to an exemption from paying the employer's portion of Social Security taxes); Bob Jones University v. United States, 461 U.S. 574 (1983) (tax exemption denied to a religious college whose racially discriminatory practices were claimed to be mandated by religious belief); Hernandez v. Commissioner, 490 U.S. 680 (1989) (tax deduction denied to members of the Church of Scientology for payments they made for “auditing” and “training” services).

14 See, e.g., You Vang Yang v. Sturner, 750 F. Supp. 558 (D.R.I. 1990) (court reversed earlier decision upholding Hmong religious objection to autopsy, in light of Smith); Saint Bartholomew's Church v. City of New York and Landmarks Preservation Commission, 914 F.2d 348 (2d Cir. 1990) (relying heavily on Smith, court applied landmarking ordinances to church-owned buildings); Minnesota v. Hershberger, 462 N.W. 2d 393 (Minn. 1990) (after Smith, the Supreme Court of Minnesota, upon remand from the United States Supreme Court, relied on state instead of Federal constitutional grounds to the Amish's free exercise right not to display fluorescent emblems on their horse-drawn buggies); Ryan v. United States Department of Justice, 950 F.2d 458 (7th Cir. 1991) cert. denied., 112 S. Ct. 2309 (1992) (court cited Smith and upheld FBI's dismissal of an employee whose religious beliefs compelled him not to investigate two pacifist groups).

15 Barnette, 319 U.S. at 638.

16 Smith, 494 U.S. at 903 (citation omitted).

17 482 U.S. 78 (1987).

18 475 U.S. 503 (1986).

19 D. Ackerman, "CRS Report for Congress–The Religious Freedom Restoration Act and The Religious Freedom Act: A Legal Analysis," 92–366A (April 17, 1922).

20 403 U.S. 672, 689 (1971).

21 See, e.g., South Carolina v. Katzenbach, 383 U.S. 301 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970); City of Rome v. United States, 446 U.S. 156 (1980); Thornburgh v. Gingles, 478 U.S. 30 (1986).

1 "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. ..." U.S. Const. Amend. I. The Free Exercise Clause of the First Amendment was made applicable to the States by incorporation into the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

2 H.R. 2797, 102nd Cong., 1st Sess. (1991).

3 Wisconsin v. Yoder, 406 U.S. 205 (1972).
Of course, the label "restoration" in this context is inappropriate. Congress writes laws–it does not and cannot overrule the Supreme Court's interpretation of the Constitution and thus it is unable to "restore" a prior interpretation of the First Amendment.

4 The one successful district court free exercise challenge to an abortion funding restriction, was thrown out by the United States Supreme Court in Harris v. McRae, 448 U.S. 297. (1980) "The named appellees ... lack standing to challenge the Hyde Amendment on free exercise grounds because none alleged, much less proved, that she sought an abortion under compulsion of religious belief." 448 U.S. at 321.

5 In EEOC v. Townley Engineering, 859 F.2d 610 (9th Cir. 1988), for example, Judge John Noonan, in a dissenting opinion, noted that in sixty-five of the seventy-two decisions by the federal circuit courts of appeals involving free exercise challenges to federal statutes the religious claimants lost.

6 An attempt was made to cure these deficiencies through an amendment offered in the Subcommittee markup in the 102nd Congress. The amendment would have focused the attention of courts on those interests which are truly "compelling." The amendment defined the term "compelling state interest" as, "an interest in the nondiscriminatory enforcement of generally applicable and otherwise valid civil or criminal law directed to: (a) the protection of an individual from death or serious bodily harm, (b) the protection of the public health from identifiable risks of infection or other public health hazards, (c) the protection of private or public property, (d) the protection of individuals from abuse

or neglect, or discrimination on the basis of race or national origin, or (e) the protection of national security, including the maintenance of discipline in the Armed Forces of the United States.

This amendment would have set forth statutory standards for determining whether a government's stated interest was “compelling” rather than allowing unlimited judicial discretion. The amendment was not adopted by the Subcommittee.

H.R. REP. 103-88, H.R. Rep. No. 88, 103RD Cong., 1ST Sess. 1993, 1993 WL 158058 (Leg.Hist.)