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RELIGIOUS FREEDOM RESTORATION ACT OF 1993

JULY 27 (legislative day, JUNE 30), 1993.—Ordered to be printed

Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 578]

The Committee on the Judiciary, to which was referred the bill (S. 578) to protect the free exercise of religion, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

I. CONTENTS

69–010

II. PURPOSE

S. 578, 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 prohibition against government action substantially burdening the exercise of religion, even if the burden results from a rule of general applicability, unless the Government demonstrates that the action is the least restrictive means of furthering a compelling governmental interest.

III. LEGISLATIVE HISTORY

The Religious Freedom Restoration Act (S. 578) was introduced in the 103d Congress by Senators Kennedy and Hatch on March 11, 1993. It is cosponsored by Senators Akaka, Bennett, Bond, Boxer, Bradley, Breaux, Brown, Bumpers, Campbell, Coats, Cohen, Danforth, Daschle, DeConcini, Dodd, Dorgan, Durenberger, Exon, Feingold, Feinstein, Glenn, Graham, Gregg, Harkin, Hatfield, Inouye, Jeffords, Kassebaum, Kempthorne, Kerrey, Kerry, Kohl, Lautenberg, Levin, Lieberman, Lugar, Mack, McConnell, Metzenbaum, Mikulski, Moseley-Braun, Moynihan, Murray, Nickles, Packwood, Pell, Pryor, Reid, Riegle, Rockefeller, Sarbanes, Sasser, Specter, Wellstone, and Wofford.

Substantially similar legislation was first introduced as S. 3254 in the 101st Congress, and then reintroduced as S. 2969 in the 102d Congress. A hearing on S. 2969 was held by the Committee on the Judiciary on September 18, 1992, at which testimony was presented by William Nouyi Yang of Worcester, MA; Dallin H. Oaks, quorum of the twelve apostles, Church of Jesus Christ of Latter-Day Saints; Oliver S. Thomas, general counsel, Baptist Joint Committee on Public Affairs; Douglas Laycock, professor, University of Texas School of Law; Mark E. Chopko, general counsel, U.S. Catholic Conference; Bruce Fein, Esquire; Forest D. Montgomery, counsel, office of public affairs, National Association of Evangelicals; Michael P. Farris, president, Home School Legal Defense Association; Nadine Strossen, president, American Civil Liberties Union; and James Bopp, Jr., general counsel, National Right to Life Committee, Inc.

On May 6, 1993, a reporting quorum being present, the Committee on the Judiciary ordered S. 578 reported to the full Senate by a rollcall vote of 15–1.

IV. TEXT OF S. 578

A BILL To protect the free exercise of religion

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Religious Freedom Restoration Act of 1993".

SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) FINDINGS.—The Congress finds that—

[1] 494 U.S. 872 (1990).

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not burden religious exercise without compelling justification;

(4) in *Employment Division* v. *Smith,* 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) PURPOSES.—The purposes of this Act are—

(1) to restore the compelling interest test as set forth in *Sherbert* v. *Verner,* 374 U.S. 398 (1963) and *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is burdened; and

(2) to provide a claim or defense to persons whose religious exercise is burdened by government.

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) IN GENERAL.—Government shall not 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 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.

SEC. 4. ATTORNEYS FEES.

(a) JUDICIAL PROCEEDINGS.—Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting "the Religious Freedom Restoration Act of 1993," before "or title VI of the Civil Rights Act of 1964".

(b) ADMINISTRATIVE PROCEEDINGS.—Section 504(b)(1)(C) of title 5, United States Code, is amended—

(1) by striking "and" at the end of clause (ii);

(2) by striking the semicolon at the end of clause (iii) and inserting "and"; and

(3) by inserting "(iv) the Religious Freedom Restoration Act of 1993;" after clause (iii).

SEC. 5. DEFINITIONS.

As used in this Act—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

SEC. 6. APPLICABILITY.

(a) IN GENERAL.—This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.

(b) RULE OF CONSTRUCTION.—Federal statutory 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.

(c) RELIGIOUS BELIEF UNAFFECTED.—Nothing in this Act shall be construed to authorize any government to burden any religious belief.

SEC. 7. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

V. DISCUSSION

A. BACKGROUND AND NEED

Many of the men and women who settled in this country fled tyranny abroad to practice peaceably their religion. The Nation they created was founded upon the conviction that the right to observe one's faith, free from Government interference, is among the most treasured birthrights of every American.

That right is enshrined in the free exercise clause of the first amendment, which provides that "Congress shall make no law * * * prohibiting the free exercise [of religion]." This fundamental constitutional right may be undermined not only by Government actions singling out religious activities for special burdens,[2] but by governmental rules of general applicability which operate to place

[2] See, e.g., *Church of the Lukumi Babalu Aye, Inc.* v. *Hialeah*, 61 U.S.L.W. 4587, No. 91-948 (U.S. June 11, 1993) (striking down city ordinance that prohibited killing of animals in religious rituals while permitting killing animals in other circumstances).

substantial burdens on individuals' ability to practice their faiths. Indeed, throughout much of our history, facially neutral laws that operated to burden the free exercise of religion were often upheld by the courts, and severely undermined religious observance by many Americans.[3]

Meaningful constitutional protection against these abuses began 30 years ago, with the Supreme Court's landmark decision in *Sherbert* v. *Verner*.[4] In his opinion for the Court, Justice William J. Brennan, Jr., recognized that a facially neutral rule of general applicability (in that case a State law requiring all persons seeking unemployment benefits to be available to work every day of the week except Sunday) could place unacceptable pressure on an individual (there a Sabbatarian) to abandon the precepts of her religion. Where such a burden is placed upon the free exercise of religion, the Court ruled, the Government must demonstrate that it is the least restrictive means to achieve a compelling governmental interest.

For 27 years following the *Sherbert* decision, the Supreme Court, with few exceptions, employed the compelling governmental interest test in determining the constitutionality of facially neutral laws that substantially burdened the free exercise of religion.[5] In its 1990 decision in *Employment Division* v. *Smith*, a closely divided Court abruptly abandoned the compelling interest standard and dramatically weakened the constitutional protection for freedom of religion.

The *Smith* case arose when two Native American employees at a private drug and alcohol rehabilitation facility were fired and denied unemployment benefits after they admitted ingesting peyote as a sacrament during a religious ceremony of the Native American Church of which both were members. The employees filed suit disputing the denial of unemployment benefits and questioning the constitutionality of the controlled substance law as applied to ban their use of peyote in religious observances. Following protracted litigation, the Oregon Supreme Court ruled that the prohibition on sacramental peyote use violated the free exercise clause.

The U.S. Supreme Court reversed, holding that the free exercise clause of the first amendment did not forbid the State of Oregon to ban sacramental peyote use through its general criminal prohibition on ingestion of the drug, or to deny unemployment benefits to persons dismissed from their jobs for such religiously inspired use.

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[3] See written testimony of Prof. Douglas Laycock, U.S. Senate Committee on the Judiciary, Sept. 18, 1992, pp. 2–5 (citing examples).

[4] 374 U.S. 398 (1963).

[5] See *Church of Lukumi Babalu Aye* v. *Hialeah*, supra, slip op. at 12–13 (Souter, J., concurring in part and concurring in the judgment) (collecting cases). See, e.g., *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) (applying the compelling interest standard, the Court held that the free exercise clause barred application of a State law requiring school education of adolescents to Old Order Amish); *Thomas* v. *Review Board, Indiana Employment Security Commission*, 450 U.S. 707 (1981) (applying compelling interest standard, the 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 interest test and upheld the disputed government statute or regulation. See, e.g., *United States* v. *Lee*, 455 U.S. 252 (1982) (upholding application to Amish employer of requirement that employer pay portion of Social Security taxes); *Bob Jones University* v. *United States*, 461 U.S. 574 (1983) (upholding denial of tax exemption to a religious college whose racially discriminatory practices were claimed to be mandated by religious belief); *Hernandez* v. *Commissioner*, 490 U.S. 680 (1989) (upholding denial of tax deduction to members of the Church of Scientology for payments they made to branch churches for "auditing" and "training" services).

Six Justices agreed with this result, but the Court was more closely divided on the level of scrutiny to be applied when a law of general applicability burdens religious observance.

In an opinion by Justice Scalia (joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy), the Court repudiated the use of the compelling interest test, holding that facially neutral laws of general applicability that burden the exercise of religion require no special justification to satisfy Free Exercise scrutiny. 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 [compelling interest] test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like this 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.[6]

The majority sought to distinguish *Sherbert* and its progeny by asserting that the compelling governmental interest test had been applied only where either the Government regulation at issue burdened a constitutional right in addition to the free exercise of religion or where State unemployment compensation rules had 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.[7]

The majority found that it would be inappropriate to apply the compelling interest test outside those limited contexts because doing so would lead to 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," *Braunfeld* 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]

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[6] Id. at 885.
[7] Id. at 883–84.
[8] Id. at 888 (emphasis in original).

In a strongly worded concurrence in the judgment, Justice O'Connor took sharp issue with the Court's abandonment of the compelling interest test.[9] She noted that the first amendment does not distinguish between the extreme and rare law that specifically targets religion and the generally applicable law that burdens religious practice:

> [F]ew States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment is to have any vitality, it ought not to be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice.[10]

Justice O'Connor reviewed the Court's precedents and found that they confirmed that the compelling interest standard is the appropriate means to protect the religious liberty guaranteed by the first amendment:

> To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute. Instead, *we have 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.*[11]

The reasoning of the *Smith* decision was also sharply criticized by Justice Souter in his concurrence in the judgment in *Church of Lukumi Babalu Aye* v. *Hialeah* in June 1993. Justice Souter urged the Court to reconsider the *Smith* rule, stating:

> The extent to which the Free Exercise Clause requires government to refrain from impeding religious exercise defines nothing less than the respective relationships in our constitutional democracy of the individual to government and to God. "Neutral, generally applicable" laws, drafted as they are from the perspective of the non-adherent, have the unavoidable potential of putting the believer to a choice between God and government.[12]

B. IMPACT OF THE *SMITH* DECISION

The effect of the *Smith* decision has been to hold laws of general applicability that operate to burden religious practices to the lowest level of scrutiny employed by the courts: the "rational relationship

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[9] Justice O'Connor concurred in the judgment on the ground that application of the Oregon criminal statute to the Native American respondents satisfied the *Sherbert* standard because uniform application of the criminal prohibition was "essential" to accomplish the State's "compelling interest in prohibiting the possession of peyote by its citizens". Id. at 905.

[10] Id. at 894 (citations omitted).

[11] Id. at 894 (citations omitted and emphasis added).

[12] Slip op. at 20.

test," which requires only that a law must be rationally related to a legitimate State interest. By lowering the level of constitutional protection for religious practices, the decision has created a climate in which the free exercise of religion is jeopardized.[13] At the committee's hearings, the Rev. Oliver S. Thomas, appearing on behalf of the Baptist Joint Committee on Public Affairs and the American Jewish Committee, testified:

> Since *Smith* was decided, governments throughout the U.S. have run roughshod over religious conviction. Churches have been zoned even out of commercial areas. Jews have been subjected to autopsies in violation of their families' faith. * * * In time, every religion in America will suffer.[14]

State and local legislative bodies cannot be relied upon to craft exceptions from laws of general application to protect the ability of the religious minorities to practice their faiths, an explicit fundamental constitutional right. As the Supreme Court 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]

To assure that all Americans are free to follow their faiths free from governmental interference, the committee finds that legislation is needed to restore the compelling interest test. 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 pluralistic society. For the Court to deem this comment a 'luxury,' is to denigrate '[t]he very purpose of a Bill of Rights.'"[16]

C. THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993

The Religious Freedom Restoration Act of 1993 is intended to restore the compelling interest test previously applicable to free exercise cases by requiring that government actions that substantially burden the exercise of religion be demonstrated to be the least restrictive means of furthering a compelling governmental interest. The committee expects that the courts will look to free exercise cases decided prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened and the

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[13] See, e.g., *You Vang Yang* v. *Sturner*, 750 F. Supp. 558 (D.R.I. 1990) (reversing earlier decision upholding Hmong religious objection to autopsy, in light of *Smith*); *Minnesota* v. *Hershberger*, 462 N.W. 2d 393 (Minn. 1990) (after *Smith*, the Supreme Court of Minnesota, upon remand from the U.S. Supreme Court, relied on State instead of Federal constitutional grounds to uphold the Amish's free exercise right not to display fluorescent emblems on their horse-drawn buggies).

[14] Hearing at 44.

[15] *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 638 (1943).

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

least restrictive means have been employed in furthering a compelling governmental interest.

Pre-*Smith* case law makes it clear that only governmental actions that place a substantial burden on the exercise of religion must meet the compelling interest test set forth in the act.[17] The act thus would not require such a justification for every government action that may have some incidental effect on religious institutions.[18] And, while the committee expresses neither approval nor disapproval of that case law, pre-*Smith* case law makes it clear that strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property or resources.[19]

The committee wishes to stress that the act does not express approval or disapproval of the result reached in any particular court decision involving the free exercise of religion, including those cited in the act itself. This bill is not a codification of the result reached in any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions. Therefore, the compelling interest test generally should not be construed more stringently or more leniently than it was prior to *Smith*.[20]

D. APPLICATION OF THE ACT TO PRISONERS' FREE EXERCISE CLAIMS

The Religious Freedom Restoration Act would establish one standard for testing claims of Government infringement on religious practices. This single test, however, should be interpreted with regard to the relevant circumstances in each case.

A long series of Supreme Court decisions has examined the unusual status of prisoners for first amendment purposes.[21] The Court has recognized that prisoners possess first amendment rights, including the right to freely exercise their religions.[22]

As applied in the prison and jail context, the intent of the act is to restore the traditional protection afforded to prisoners to observe their religions which was weakened by the decision in *O'Lone* v. *Estate of Shabazz*.[23] Prior to *O'Lone*, courts used a balancing test in cases where an inmate's free exercise rights were burdened by

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[17] See *Smith*, 494 U.S. at 897–98 (O'Connor, J., concurring in the judgment) (discussing prior cases).

[18] For instance, the act does not prohibit neutral and compelling land-use regulations, such as fire codes, that may apply to structures owned by religious institutions but have not substantial impact on religious practices.

[19] In *Bowen* v. *Roy*, 476 U.S. 693 (1986), and *Lyng* v. *Northwest Cemetery Protective Ass'n*, 485 U.S. 439 (1988), the Court held that the manner in which the Government manages its internal affairs and uses its own property does not constitute a cognizable "burden" on anyone's exercise of religion. Specifically, *Bowen* held that a statutory requirement that a State use a Social Security number in administering Federal food stamps and AFDC programs does not burden the free exercise rights of Native Americans who believe the use of the numbers would harm their souls. Similarly, the Court ruled in *Lyng* that the construction of mining or timber roads over public lands which were sacred to the Native American religion did not constitute a burden on the Native Americans' free exercise rights triggering the compelling interest test.

[20] For example, it would remain for the courts to determine whether or not a facially neutral statute which prohibits killing animals that is applied so as to substantially burden the ability of a religion's adherents to engage in animal sacrifice meets the compelling interest standard. *Contrast Church of Lukumi Babalu Aye* v. *Hialeah*, supra (striking down a law banning only religiously motivated killing of animals, while assuming, without deciding, that governmental interests in avoiding cruelty to animals are compelling).

[21] See, e.g., *Bell* v. *Wolfish*, 441 U.S. 520 (1979); *Cruz* v. *Beto*, 405 U.S. 319 (1972); *Price* v. *Johnston*, 334 U.S. 266 (1948).

[22] *O'Lone*, 482 U.S. at 348; *Bell* v. *Wolfish*, 441 U.S. at 545; *Cruz* v. *Beto*, 405 U.S. 321; *Cooper* v. *Pate*, 378 U.S. 546 (1964).

[23] 482 U.S. 342 (1987).

an institutional regulation; only regulations based upon penological concerns of the "highest order" could outweigh an inmate's claims. As articulated by the U.S. Court of Appeals for the Sixth Circuit:

> While recognizing that the courts may not substitute their judgments for those of prison administrators in matters of prison procedure and management, it nonetheless remains true that the "asserted justification of such restrictions on religious practices based on the State's interest in maintaining order and discipline must be shown to outweigh the inmates' First Amendment rights," and "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." We are of the opinion that the state must do more than simply offer conclusory statements that a limitation on religious freedom is required for security, health of safety in order to establish that its interest are of the "highest order."[24]

O'Lone weakened this standard, holding that prison rules that burden prisoners' religious practices satisfy the free exercise clause if they are "reasonably related to legitimate penological interests."[25] The intent of the act is to restore traditional protection afforded to prisoners' claims prior to *O'Lone,* not to impose a more rigorous standard than the one that was applied.

The committee does not intend the act to impose a standard that would exacerbate the difficult and complex challenges of operating the Nation's prisons and jails in a safe and secure manner. Accordingly, the committee expects that the courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.[26]

At the same time, however, inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements.

Whether in the context of prisons or outside it, courts have considered a myriad of claims made under the umbrella of religious rights which are, in reality, designed primarily to obtain special privileges. As the fifth circuit observed in a prison case:

> While it is difficult for the courts to establish precise standards by which the bona fides of a religion may be judged, such difficulties have proved to be no hinderance to denials of First Amendment protection to so-called religions which tend to mock established institutions and are obviously shams and absurdities and whose members are patently devoid of religions sincerity.[27]

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[24] *Weaver* v. *Jago,* 675 F.2d 116, 119 (6th Cir. 1982) (citations omitted).
[25] 482 U.S. at 349 (citing *Turner* v. *Safley,* 482 U.S. 76, 89 (1987)).
[26] See, e.g., *Procunier* v. *Martinez,* 416 U.S. 396, 404–05 (1974).
[27] *Thereiault* v. *Carlson,* 495 F.2d 390, 395 (5th Cir. 1974), cert. denied, 434 U.S. 871 (1977) (footnote omitted).

The courts have rejected religious status, under the first amendment, for a number of prisoner-devised belief systems.[28] Moreover, when a prisoner attempted to object to participation in an anti-alcoholism program as compelling a belief because it referred to "the care of God as we understand him," a court had little difficulty in finding that the Chemical Dependency Recovery Program was not a religion.[29]

Existing analytical tools are also adequate to uncover false religious claims that are actually attempts to gain special privileges or to disrupt prison life.[30] Indeed, courts have been blunt enough in their examinations to find that a claimed religion, such as the "Church of the New Song," is, in reality, "a masquerade designed to obtain First Amendment protection."[31] The act has no effect on this settled jurisprudence, thus permitting the courts to make these assessments as they have in the past.

The committee is confident that the compelling interest standard established set forth in the Act will not place undue burdens on prison authorities. Instead, it reestablishes a standard that is flexible enough to serve the unique governmental interests implicated in the prison context. Accordingly, the committee finds that application of the act to prisoner-free exercise claims will provide a workable balancing of the legitimate interests of prison administrators with the Nation's tradition of protecting the free exercise of religion.

For all these reasons, the committee concludes the first amendment doctrine is sufficiently sensitive to the demands of prison management that a special exemption for prison free exercise claims under the act is unnecessary. The act would return to a standard that was employed without hardship to the prisons in several circuits prior to the *O'Lone* decision. The standard proved workable and struck a proper balance between one of the most cherished freedoms secured by the first amendment and the compelling governmental interest in orderly and safe operation of prisons.

E. APPLICATION OF THE ACT TO THE MILITARY

In *Goldman* v. *Weinberger*,[32] the Supreme Court carved out an exception to the compelling interest test for military regulations that burden religious practices. When a Jewish Air Force officer brought suit challenging a regulation prohibiting him from wearing a yarmulke while on duty, the Court upheld the prohibition. Taking the same deferential approach it would later take in its 1987 *O'Lone* decision, the Court held that the regulation reasonably sat-

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[28] See e.g., *Johnson* v. *PA. Bureau of Corrections*, 661 F. Supp. 425, 436–37 (M.D. Pa. 1987) (rejecting "The Spiritual Order of Universal Beings"); See also *Jacques* v. *Hilton*, 569 F. Supp. 730, 736 (D.N.J. 1983), aff'd, 738 F.2d 422 (3d Cir. 1984) (rejecting "United Church of Saint Dennis").

[29] *Stafford* v. *Harrison*, 766 F. Supp. 1014, 1017 (D. Kan. 1991).

[30] For example, in *Green* v. *White*, 525 F. Supp. 81, (E.D. Mo 1981), aff'd 693 F.2d 45 (8th Cir. 1982), cert. denied, 462 U.S. 1111 (1983), the courts rejected the claim that the Human Awareness Life Church was a religion and focused on the prisoner's demands, under a religious guise, for conjugal visits, banquets, and payment as a chaplain. See also, *United States ex rel. Goings* v. *Aaron*, 350 F. Supp. 1 (D. Minn. 1972) (rejecting claim for religious rights that prisoner has never practiced before).

[31] *Theriault* v. *Silber*, 453 F. Supp. 254, 260 (W.D. Tex. 1978), appeal dismissed, 579 F.2d 302 (5th Cir. 1978), cert. denied, 440 U.S. 917 (1979).

[32] 475 U.S. 503 (1986).

isfied the military's need for uniformity and therefore satisfied the free exercise clause. In so doing, the Court made clear that a less protective standard was to be applied in free exercise cases involving persons in the armed forces than for those involving civilians. In 1986, Congress overruled the result reached in *Goldman* by statute.[33]

Under the unitary standard set forth in the act, courts will review the free exercise claims of military personnel under the compelling governmental interest test. The committee is confident that the bill will not adversely impair the ability of the U.S. military to maintain good order, discipline, and security. The courts have always recognized the compelling nature of the military's interest in these objectives in the regulations of our armed services. Likewise, the courts have always extended to military authorities significant deference in effectuating these interests. The committee intends and expects that such deference will continue under this bill.

F. NO RELEVANCE TO THE ISSUE OF ABORTION

There has been much debate about this act's relevance to the issue of abortion. Some have suggested that if *Roe* v. *Wade*[34] were reversed, the act might be used to overturn restrictions on abortion. While the committee, like the Congressional Research Service, is not persuaded that this is the case,[35] we do not seek to resolve the abortion debate through this legislation. Furthermore, the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*,[36] which describes the way under the Constitution in which claims pertaining to abortion are resolved, means that discussions about this act's application to abortion are academic. To be absolutely clear, the act does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Courts's free exercise jurisprudence under the compelling governmental interest test prior to *Smith*.

G. OTHER AREAS OF LAWS ARE UNAFFECTED

Although the purpose of this act is only to overturn the Supreme Court's decision in *Smith*, concerns have been raised that the act 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. 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*.[37] This act does not change the law governing these cases. Sev-

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[33] Public Law 100–180, section 508(a)(2), 101 Stat. 1086 (Dec. 4, 1987), 10 U.S.C. 774.
[34] 410 U.S. 113 (1973).
[35] D. Ackerman, "CRS Report for Congress—The Religious Freedom Restoration Act and The Religious Freedom Act: A Legal Analysis," 92–366A (Apr. 17, 1992).
[36] 112 S. Ct. 2791 (1992).
[37] 403 U.S. 672 (1971).

eral provision have been added to the act to clarify that this is the intent of the committee. 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 a further clarification that the jurisprudence under the establishment clause remains unaffected by the act.

Ordinary article III rules are to be applied in determining whether a party has standing to bring a claim pursuant to this act. 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 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 act 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 *Sherber*. The act does not, however, create rights beyond those recognized in *Sherbert*.

Nothing in this act shall be construed as affecting religious accommodation under title VII of the Civil Rights Act of 1964.[38] 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, it should be noted, where a facially neutral prohibition of general applicability that substantially burdens the exercise of religion satisfies the compelling interest test, the severity of the remedy or sanction imposed for violating the prohibition is not itself subject to the compelling interest requirement.[39]

H. CONSTITUTIONAL AUTHORITY TO ENACT THE ACT

Congress has the constitutional authority to enact S. 578. The 14th amendment provides that no State shall "deprive any person of * * * liberty * * * without due process of law * * *." The 14th amendment's "fundamental concept of liberty * * * encompasses the liberties guaranteed by the First Amendment," which of course,

[38] See 42 U.S.C. 200e(j).

[39] For example, a convicted criminal defendant having failed in a defense based on the act, could not then use the act to challenge the severity of the sentence impose on the grounds less severe sanctions were available. The enforcement of permissible general prohibitions could be rendered wholly ineffective if every defendant claiming religious motivation could ask the court to speculate on the efficacy of alternative remedies or less sanctions that might be less restrictive means of controlling the prohibited behavior. Of course, any remedy or sanction remains subject to the constitutional rule that government may not discriminate against religious practices. See *Church of Lukumi Babalu Aye* v. *Hialeah*, supra.

include a right to practice one's faith free of laws prohibiting the free exercise of religion.[40]

Section 5 of the 14th amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions" of the amendment. Section 5 gives Congress "the same broad powers expressed in the necessary and proper clause" with respect to State governments and their subdivisions.[41] "Whatever legislation is appropriate, that is, adapted to carry out the objects the Amendments have in view," is within the power of Congress, unless prohibited by some other provision of the Constitution.[42]

Thus, congressional power under section 5 to enforce the 14th amendment includes congressional power to enforce the free exercise clause. Because the Religious Freedom Restoration Act is clearly designed to implement the free exercise clause—to protect religious liberty and to eliminate laws "prohibiting the free exercise" of religion—it falls squarely within Congress' section 5 enforcement power.[43]

VI. Vote of the Committee

On May 6, 1993, a reporting quorum being present, the Committee on the Judiciary ordered S. 578 reported to the full Senate by a rollcall vote of 15–1. Voting in favor of reporting the bill were the chairman and Senators Kennedy, Metzenbaum, DeConcini, Leahy, Simon, Kohl, Feinstein, Moseley-Braun, Hatch, Thurmond, Grassley, Specter, Brown, and Pressler. Voting against reporting the bill was Senator Simpson.

VII. Section-by-Section Analysis

Section 1. This section provides that the title of the act is the Religious Freedom Restoration Act of 1993.

Section 2. In this section, Congress finds that the framers of the Constitution recognized that religious liberty is an inalienable right, protected by the first amendment, and that government law may burden that liberty even if they are neutral on their face. Congress also determines that the Supreme Court's decision in *Employment Division* v. *Smith* eliminated the compelling interest test for evaluating free exercise claims previously set forth in *Sherbert* v. *Verner* and *Wisconsin* v. *Yoder,* and that it is necessary to restore that test to preserve religious freedom. The section recites that the act is intended to restore the compelling interest test and to guarantee its application in all cases where the free exercise of religion is substantially burdened.

Section 3. This section codifies the compelling interest test as the Supreme Court had enunciated it and applied it prior to the *Smith* decision. The bill permits Government to place a substantial burden on the exercise of religion only if it demonstrates a compelling

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[40] *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940).

[41] *Katzenbach* v. *Morgan,* 384 U.S. 641, 650 (1966).

[42] *Ex parte Virginia,* 100 U.S. 339, 345 (1879).

[43] While the act is intended to enforce the right guaranteed by the free exercise clause of the first amendment, it does not purport to legislate the standard of review to be applied by the Federal courts in cases brought under that constitutional provision. Instead, it creates a new statutory prohibition on governmental action that substantially burdens the free exercise of religion, except where such action is the least restrictive means of furthering a compelling governmental interest.

State interest and that the burden in question is the least restrictive means of furthering the interest. It permits persons whose religious exercise has been substantially burdened in violation of the act to assert that violation as a claim or defense in a judicial proceeding and to obtain appropriate relief against a government. Standing to assert such a claim or defense is to be governed by the general rules of standing under article III of the Constitution.

Section 4. This section amends attorneys' fees statutes to permit a prevailing plaintiff to recover attorneys' fees in the same manner as prevailing plaintiffs in other kinds of civil rights or constitutional cases.

Section 5. This section defines the terms "government", "State", "demonstrates", and "exercise of religion". "Government" includes any agency, instrumentality or official of the United States, any State or any subdivision of a State. "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and every territory and possession of the United States. "Demonstrates" means to meet the burden of production and persuasion." "Exercise of religion" means the exercise of religion under the first amendment.

Section 6. This section states that the act applies to all existing State and Federal laws, and to all such laws enacted in the future. It also provides that authority it confers on the government should not be construed to permit any government to burden any religious belief.

Section 7. This section makes it clear that the legislation does not alter the law for determining claims made under the establishment clause of the first amendment. It also confirms that granting Government funding, benefits or exemptions, to the extent permissible under the establishment clause, does not violate the act; but the denial of such funding, benefits or exemptions may constitute a violation of the act, as was the case under the free exercise clause in *Sherbert* v. *Verner.*

VIII. COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 7, 1993.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 578, the Religious Freedom Restoration Act of 1993, as ordered reported by the Senate Committee on the Judiciary on March 11, 1993. CBO estimates that implementation of S. 578 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. S. 578 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 S. 578 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 S. 578.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne Mehlman.

Sincerely,

JAMES L. BLUM
(For Robert D. Reischauer, Director).

IX. REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the committee, after due consideration, concludes that the act will not have direct regulatory impact.

X. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 578 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.

UNITED STATES CODE

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TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

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CHAPTER 5—ADMINISTRATIVE PROCEDURE

Subchapter 1—General Provisions

§ 504. Costs and fees of parties

(a)(1) * * *

* * * * * * *

(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;*

* * * * * * *

XI. ADDITIONAL VIEWS OF SENATOR SIMPSON

While I basically support the Religious Freedom Restoration Act, I have one very serious concern about its application to claims brought by prison inmates. At a time when every State and Federal jurisdiction in the country is faced with overcrowded prison facilities and an unrelenting barrage of inmate lawsuits, Congress is preparing to consider the Religious Freedom Restoration Act, legislation which will allow inmates to sue prison administrators with greater frequency. I am convinced by the appeals from the majority of state Attorneys General that the Religious Freedom Restoration Act will dramatically increase the number of inmate-generated lawsuits against the State and Federal Governments.

Not only will the raw number of suits increase, the bill will make it extremely difficult to quickly dismiss frivolous or undeserving inmate challenges. Such inmate challenges will no longer be resolved by summary judgment; rather, full-blown evidentiary hearings will be required to determine whether the prisons have any other means available to accommodate the prisoners—means available regardless of the cost.

S. 578 will expand inmate litigation, make inmate litigation more successful—even in cases brought solely to obtain special privileges—and allow inmates to relitigate issues which were already determined by the State and Federal courts in past decisions, all at considerable cost of resources to the federal and state governments.

INCREASE IN INMATE LITIGATION

Inmate challenges to the State and local government are at an all-time high and the enactment of this S. 578 bill will further expand the numbers. In 1992, for example, inmates filed a total of 49,939 civil lawsuits against the government in Federal courts—an astonishing 22% of all civil suits filed in Federal court. Over the same period, a total of 48,538 criminal cases were brought in Federal court. In 1992 inmates brought 1,401 *more* cases against the federal government than the federal government brought against criminals.

In addition, S. 578 will necessarily mean that—unless we hire more prosecutors—there will be fewer criminal prosecutions in the future. As the *Statistical Report, United States Attorneys' Offices, Fiscal Year 1992* at page two States:

> While the civil caseload is numerically larger, roughly two-thirds (⅔) of the United States Attorney office personnel are dedicated to criminal cases and roughly one-third (⅓) of the personnel are dedicated to civil litigation matters and appellate practice. More than 80% of work hours

in Court are devoted to criminal prosecutions and less than 20% are devoted to civil and appellate litigation.

If Congress passes legislation which increases the raw number of inmate lawsuits, it necessarily follows that government litigators will be diverted from criminal prosecutions. As the civil caseload increases, the number of criminal prosecutions will fall.

S. 578 will expand the number of inmate cases for several reasons. First, cases determined in the state and federal court systems will be subject to relitigation since the bill lowers the standard by which all religious claims will be measured, giving all religious claims—including inmate claims—a higher likelihood of success. Second, since the bill's standard includes the requirement that the prison officials use the "least restrictive means" when restricting the behavior of inmates. In many cases alternatives allowing inmate behavior are available but at great cost to the state or federal government. In other cases, the least restrictive means can disrupt the security and order of the prisons. Third, since other first amendment claims by prisoners are evaluated by the courts with a reasonable standard which is easier for prisons to meet, prisoners will begin to bring all first amendment claims (including those for special privileges) under the guise of the exercise of their religions.

A. RELITIGATION OF PREVIOUSLY DESCRIBED CLAIMS

S. 578 is intended to overturn *Employment Division, Department of Human Resources of Oregon* v. *Smith,* 494 U.S. 872 (1990),[1] and *O'Lone* v. *Estate of Shabazz,* 478 U.S. 342 (1987). All claims in federal and state courts decided pursuant to these two bills can be relitigated and some will succeed under the bill's standard which favors the claimant.

B. THE IMPACT OF THE LEAST RESTRICTIVE MEANS TEST

S. 578 guarantees that prison administrators will always be required to find the least restrictive means of achieving legitimate penological goals.

A recent case in California provides a good example of how this new test will be used by the courts. The Warden of San Quentin, noticing patterns in escape attempts, banned certain types of civilian clothing within the prison. Inmates, always quick to challenge prison authority, argued that the right to wear clothing of one's choice is a liberty guaranteed by the Constitution and immediately sued the Warden.

The trial court agreed with the inmates and enjoined enforcement of the prison regulation, based upon the least restrictive means provision in the California state constitution and specifically found that the Warden had not met his burden of providing the absence of less restrictive alternatives to the ban on civilian clothing.

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[1] In the case which the bill seeks to overturn, *Employment Division, Department of Human Resources of Oregon* v. *Smith,* 494 U.S. 872 (1990), the Supreme Court held that generally applicable laws, as long as they are not motivated by a governmental desire to affect religion, are enforceable even if they burden religion. Last month, the Court in *Church of Lukumi Babalu Aye* v. *Hialeah,* in striking down a city ordinance prohibiting animal sacrifice, applied the compelling state interest test since the law is not neutral nor of general application. Clearly, the Supreme Court has not totally thrown out the compelling state interest/least restrictive test in all Free Exercise cases, as S. 578 and the Committee report would indicate.

In short, given a choice between inconveniencing the prisoners and inconveniencing the taxpayer, the taxpayer lost.

This result provides an indication of what we can expect from S. 578. Rather than tampering with the inmates' "right" to wear clothing of their choice, the judge focused on the alternative of strengthening security measures to prevent escapes.

San Quentin is already one of the most unassailable maximum security institutions in the country; nevertheless, the argument can always be made that it could be made even more secure. Indeed, there is no shortage of methods by which security could be improved, including hiring additional staff, creating more checkpoints, initiating more "pat-down searches" or modifying the physical plant of San Quentin itself.

The common theme of these options is a requirement that the government spend more money. After protracted, costly litigation the trial court's decision was eventually overturned on appeal. In re Alcala, 222 Cal. App. 3d 345, 271 Cal. Rptr. 674 (Cal. 1990). S. 578, however, provides inmates with a winning argument—if an inmate argues that his or her "religion" requires a certain type of clothing, courts would be required by the new statute to allow such clothing. The prison, in turn, would be required to pay enormous costs to permit this conduct.

The new test proposed by S. 578 is not simply a less restrictive means, it is the least restrictive means. Hence, S. 578 will become a social blueprint for judges to establish their vision of how prisons should be run by forcing state or Federal government to allow increasingly burdensome forms of inmate conduct. In the process, the nation's prisons will not only become more expensive to administer, they will become infinitely more dangerous to operate.

C. PRISONERS WILL OPT FOR EASIER FREE EXERCISE CLAIMS

It is easy to imagine that creative and industrious inmates will discover that a Free Exercise challenge, with the higher strict scrutiny/least restrictive means standard proposed by the Religious Freedom Restoration Act, might provide success where other types of claims have failed. Current cases reveal that prisoners will bring challenges to get special privileges for everything imaginable such as the services of prostitutes, the right to own and use nunchucks (weapon used in the martial arts), *Abdool-Rashad* v. *Seiter,* No. 84–3816 (6th Cir. Aug. 8, 1985) (unpublished opinion), and a special diet of organically-grown produce washed in distilled water, *Udey* v. *Kastner,* 805 F.2d 1218 (5th Cir. 1986).

It is not unusual for inmates, especially those with considerable "time on their hands", to create "religions" just to obtain special benefits or to avoid certain prison requirements. In *Theriault* v. *Silber,*[2] inmates requested Chateaubriand and Harveys Bristol Cream every other Friday as part of the practice of their religion. The Committee Report correctly states that courts have found in some cases that a claimed religion is, in reality, "a masquerade designed to obtain First Amendment protection." What the Committee Report fails to say is that, under the bill's standard of review

[2] 453 F. Supp. 254, 260 (W.D. Tex. 1978) appeal dismissed 579 F.2d 302 (5th Cir. 1978), cert. denied, 440 U.S. 917 (1979).

of religion claims, even the most thinly veiled attempts to use religion to get special benefits or to otherwise circumvent prison rules, cannot be disposed of without extensive and expensive procedures and appeals (See next section.)

MORE DIFFICULT FOR COURTS TO DISPOSE OF UNDESERVING CLAIMS

S. 578 will do more than simply increase the raw number of inmate lawsuits; it will also dramatically affect the manner in which these cases are resolved.

The linchpin of S. 578 is the least restrictive means test. Disputes involving prison regulation of conduct will turn in every instance on whether the regulation is indeed the least restrictive method of achieving the desired result. As the Supreme Court stated in one of the cases that will be overruled by S. 578, "every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand." *Turner* v. *Safley,* 482 U.S. 76 (1987).

Thus, evidentiary hearings will be necessary in almost every instance to determine whether there is a less restrictive method of achieving the government's purpose. Furthermore, in almost every situation, there will be a less restrictive means—it will simply entail the spending of additional taxpayer funds.

In response to the claims of increased and burdensome litigation, the Committee Report also states that "[e]xisting analytical tools are also adequate to uncover false religious claims that are actually attempts to gain special privileges or to disrupt prison life." Page 12. The Committee Report then cites an interesting and informative case, *Green* v. *White,* 525 F. Supp. 81, 83 (E.D. Mo. 1981), aff'd 693 F.2d 45 (8th Cir. 1982), cert. denied, 462 U.S. 1111 (1983). This case perfectly demonstrates my point that the bill creates unnecessary and endless procedures for prison claims under the compelling state interest/least restrictive means test.

Green involved a hearing before a trial court, an appeal to the Eighth Circuit Court of Appeals, a remand to the trial court, another appeal to the Eighth Circuit, and a subsequent remand—seven separate appearances before Federal courts. On the final remand, the trial court judge made the following statement: "The time and resources expended by state and federal officials in coping with plaintiff's litigation barrage is enormous. At the evidentiary hearing, plaintiff gloated over this fact. He proudly announced that he has suits pending in every United States Court of Appeals and that he has sued every prison system in the country. He estimated that he has filed close to one thousand lawsuits on his own behalf and on behalf of others in the past ten years." Not content with this response, the inmate appealed yet again and then appealed to the Supreme Court.

The Committee Report's model of how well the system is working is, in fact, a model of how time-consuming and costly it is to dispose of underserving claims. As the "Statistical Report, United States' Attorneys' Offices," at page eight, makes quite clear: "These appeals are time-consuming and require a thorough review of the entire record in the case; filing of a Brief and Reply Brief; and, in

most cases, an oral argument requiring travel to the city where the Court of Appeals for the Circuit is situated."

THE SUPREME COURT'S REASONABLENESS STANDARD IS APPROPRIATE FOR PRISONS

I agree with the Supreme Court that prison practices which keep order, safety and security for all within the prison walls, both inmates and prison workers, must be evaluated with a reasonableness standard and be given due deference, even against prisoners' religious claims.

While the Supreme Court has determined that prisoners have First Amendment rights, including the right to freely exercise their religion,[3] it is equally clear that the Court has established that penological interests should be given considerable deference. In the case of *O'Lone* v. *Estate of Shabazz,* (one of the cases which the Majority on this Committee seeks to overturn) a five-Justice majority, in rejecting prisoners' claim that they had the right to attend Muslim services held at times otherwise conflicting with prison functions, held that the prison authorities must merely behave reasonably, thus giving prison officials considerable deference.

While I do not assert that a prisoner has no right to exercise his or her religion or other constitutional rights, the Supreme Court has held that there are limits to those rights.[4] Prison authorities should not be required to accommodate practices which significantly interfere with the operation of the prisons. Neither should prison authorities be required to prove that no reasonable method exists by which prisoners' religious rights can be accommodated without creating unreasonable costs or bona fide security problems. *O'Lone,* 482 U.S. at 2405.

Though the availability of alternatives to accommodate a prisoner's religious practices is relevant to the reasonableness inquiry, the Supreme Court rejected the notion that "prison officials * * * have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Turner* v. *Safley,* at 90–91.

The Supreme Court recognized that "courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform." "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the Legislative and Executive Branches of Government." *Turner,* at 84–85. In prisons, "rules * * * far different from those imposed on society at large must prevail within prison walls," and judges "are

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[3] *Bell v. Wolfish,* 441 U.S. 520, 545, 99 S Ct. 1861, 1877, 60 L. Ed. 2d 447 (1979); See *Turner v. Safely,* 482 U.S. 78, 84, 107 S. Ct. 2254, 2259, 96 L. Ed. 2d 64 (1987); *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119, 129, 97 S. Ct. 2532, 2539–40, 53 L. Ed. 2d 629 (1977). Inmates clearly retain protections afforded by the First Amendment, *Pell v. Procunier,* 417 U.S. 817, 822, 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495 (1974), including its directive that no law shall prohibit the free exercise of religion.

[4] "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston,* 334 U.S. 266, 285, 68 S. Ct. 1049, 1060, 92 L. Ed. 1356 (1948). The limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives—including deterrence of crime, rehabilitation of prisoners, and institutional security. *Pell v. Procunier, supra,* 417 U.S., at 822–823, 94 S. Ct., at 2804; *Procunier* v. *Martinez,* 416 U.S. 396, 412, 94 S. Ct., 1800, 1810–11, 40 L. Ed. 2d 224 (1974).

not equipped by experience or otherwise to 'second guess' the decisions" of legislators or administrators "except in the most extraordinary circumstances." *Wolff* v. *McDonnell,* 418 U.S. 539, 561 (1974).

Prisons are, by their very nature, designed to be closed societies. Within these closed societies, there must be rules to protect all within the prison walls. NOt only can an inmate's religious practices undermine the security and administration of a prison, but it might well impinge on or offend another's religious or moral beliefs or conduct. See *Dettmer* v. *Landon,* 799 F. 2d 929 (4th Cir. 1986) (where inmates requested the tools to practice witchcraft); *McCorkle* v. *Johnson,* 881 F. 2d 993 (11th Cir. 1989) (where inmate alleged infringement of right to exercise the satanic religion, including access to "The Satanic Bible"). Other cases in state courts include the request for protection of the following "religions": Aryan Nations, a white racist organization; the Ku Klux Klan; and the followers of Yahweh Ben Yahweh, who promotes violent retaliation against white racism (and whose followers wish to circulate racially-charged materials).

As I stated before, the reasonableness standard has been applied by the Supreme Court for all other First Amendment challenges in the prison context. In each case, the Court has refused to apply the very standard which S. 578 seeks to apply, and has instead adopted a reasonableness standard.

The Committee Report states that "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, of post-hoc rationalizations will not suffice. * * *" However, in some cases it may be impossible to prove with any degree of certainty the impact of allowing certain types of behavior.[5]

The Committee Report states that "[T]he Committee expects that the courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators * * * [.]" Page 11. Instead of making an exception to the bill for prisoner claims, the Majority leaves this task to the Courts. But under S. 578 there is little discretion for the courts, unless they choose to ignore the Act, since the plain meaning of "least restrictive means" can hardly be misinterpreted to allow due deference to a prison administrator's analysis of a particular issue.

CONCLUSION

In conclusion, I remain troubled by the prospect of Congress forcing the states to commit even more of their law enforcement budgets to inmate litigation. The Federal Bureau of Prisons has slightly over 87,000 inmates in its care. The states, by contrast, are responsible for nearly 900,000 inmates. Should we pass S. 578 unamended, the lion's share of the bill's burden will fall directly on the states. At the Committee hearings, there was not a single wit-

[5] For example, prison violence is a serious problem, particularly at higher security facilities. While a warden may have a legitimate fear that a particular publication will incite violence, he will rarely be able to prove a likelihood of violence or disorder as a result of the admission of a particular publication. The inability to prove the existence of a substantial security risk in a particular case does not necessarily mean that the warden's fears are exaggerated. Requiring a strict scrutiny review could result in the admission of publications which, even if they did not lead directly to violence, would exacerbate tensions and lead indirectly to disorder.

ness called to speak on the issue on behalf of the state Attorneys General or the correctional administrators.

I was the single "nay" vote when the Judiciary Committee approved this legislation. I stated to the Committee at that time that I intended to offer an amendment to address my concerns about the application of the bill in the prison context and was assured by my colleagues that language in the committee report would ease those concerns—concerns which, I would add, were shared with all members of the committee in a letter, dated May 5, 1993, signed by twenty-six States' Attorneys General. (See attached letter.)

The letter from the Attorneys General stated that S. 578 would be seriously disruptive of the effective administration of prisons unless it were amended to provide for a prison exception. The Attorneys General asked the committee to include language which stated that religious practices could be "burdened" if the restrictions served "legitimate penological interests."[6] The Executive Director of the Association of State Correctional Administrators has written that all state correctional administrators share the Attorneys General concern about the adverse effects of S. 578. (See attached letters.)

Since the bill was considered by the House of Representatives before the impact of the bill on prisons was raised, many House members supported the bill without exception. However, several House members have already stated that, should the Senate exempt the prisons from the bill, they would support such an amendment. See attached letter.

Not only was I disappointed in the Committee's failure to address the legitimate concerns raised by many of our chief law enforcement officials, I was also puzzled that, in addition to overruling the single case of *Employment Division, Department of Human Resources of Oregon* v. *Smith,* 494 U.S. 872 (1990), the committee intended also to overrule the *O'Lone* decision. I object most strongly to that—especially in light of the fact that the touted purpose of this, in my view, ill-advised legislation, was to overrule only the *Smith* case.

Despite my colleagues' assurances to the contrary, the Committee Report not only fails to ease my concerns, but flatly states that it is the clear intent of the legislation to overrule the United States Supreme Court decision which established in the law exactly the standard of review which I—and many Attorneys General—were supporting during all of the committee's deliberation.

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[6] The phrase "legitimate penological interests" is a term of precise meaning. It is derived from the United States Supreme Court's decision in the case *O'Lone* v. *Estate of Shabazz,* 482 U.S. 342 (1987).

STATE OF FLORIDA

OFFICE OF ATTORNEY GENERAL
ROBERT A. BUTTERWORTH

Via Messenger

May 5, 1993

Members of the Senate Judiciary Committee
Joseph R. Biden, Jr., Delaware, Chairman
Edward M. Kennedy, Massachusetts
Howard M. Metzenbaum, Ohio
Dennis DeConcini, Arizona
Patrick J. Leahy, Vermont
Howell Heflin, Alabama
Paul Simon, Illinois
Herbert Kohl, Wisconsin
Dianne Feinstein, California
Carol Moseley-Braun, Illinois
Orrin G. Hatch, Utah
Strom Thurmond, South Carolina
Alan K. Simpson, Wyoming
Charles E. Grassley, Iowa
Arlen Specter, Pennsylvania
Hank Brown, Colorado
William S. Cohen, Maine
Larry Pressler, South Dakota

RE: Senate Bill 578

Dear Senator:

We, the undersigned Attorneys General, are writing to express concern regarding the detrimental impact the current draft of S.578 will have on the administration of local, state, and federal correctional facilities. Although this broadly worded bill has the laudable purpose of protecting the right of freedom of religion, the Act, in its current form, would have the unintended consequence of upsetting the delicate balance between the rights of inmates to practice their religion and the security needs of our jails and prisons. If the drafting omissions are not corrected, the Act will significantly increase the cost of prison administration and create a potential for the perpetuation of life-threatening situations, such as occurred in Ohio last week. This letter offers suggestions for correcting the omissions to the Act which should avoid these unintended consequences.

The Act, as currently written, would overrule the Supreme Court's decisions in *Turner v. Safley*, 482 U.S. 76, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987); *O'Lone v. Estate of Shabazz*, 482 U.S. 340, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987); and *Thornburgh v. Abbott*, 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989). These cases established a three part test for evaluation of prison regulations which allegedly infringe upon inmates' constitutional rights.

Current test

Under this test, prison regulations which impact on the exercise of First Amendment rights will pass constitutional muster if they are "reasonably related to legitimate penological interests." This test strikes an appropriate balance between the rights of individual inmates and the interests of the institution and the inmate population as a whole. In applying this test, there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it. Additionally, consideration is given to whether there are alternative means of exercising the right available to prison inmates and on the impact accommodation of the asserted constitutional right will have on staff, other inmates, and the allocation of limited prison resources generally.

very important point

The "reasonably related" test is appropriate in the prison context, due to the closed nature of prison society. In prison, the balance between the state's interests and the individual's rights must consider factors far different than those considered in society at large. For instance, drugs, violent behavior, gangs, racism, and bigotry are much more pernicious in prison.

Inmates are unable to walk away or avoid offensive conduct -- they cannot simply avert their eyes. Jews, Muslims, Catholics, Protestants, Satanists, white supremacists and other racist organizations, and cultists of every stripe are packed tightly together in an explosive combination. Controversial behavior, unique clothing, religious paraphernalia, or the enjoyment of special exceptions to normal prison regimen by an individual or group can have dangerous repercussions. Furthermore, correctional facilities have limited resources to address the myriad needs of the inmates charged to their care and custody. Consequently, inmates' individual rights must be balanced against those of the prison community as a whole and must yield where security and order reasonably demand.

In *Turner*, the United States Supreme Court summarized the deleterious impact of holding corrections to the "compelling state interest" test and the "least restrictive means" standard:

> Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decision making process for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it has a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbitrators of what constitutes the best solution to every administrative problem, thereby "unnecessarily perpetuat[ing] the involvement of the federal courts in the affairs of prison administration."

In its current form, S.578 will subject local, state and federal correctional facilities to the precise result the Supreme Court sought to avoid in *Turner*, *O'Lone*, and *Thornburgh*. Further, the risk and expense of litigation under this Act will leave governments vulnerable to manipulation by inmates.

Under this Act as currently drafted, inmates will be provided far greater latitude to attack and undermine legitimate prison authority, necessary to maintain security and order, by cloaking disobedience to rules and a request for special privileges in religion. The recent tragedy in Lucasville, Ohio, bears witness to this potential. There, black Muslim inmates demanded, as a condition to the release of their hostages, an exemption from the requirement to be tested for tuberculosis, asserting religious reasons.[1]

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[1] An appendix is attached to this letter with references to cases which illustrate the [illegible] of inmates to attempt to manipulate prison administrators and disrupt

Senate Bill 578 should be clarified to address these concerns. The Act should expressly adopt the "reasonably related to legitimate penological interest test" as the standard for evaluation of laws and regulations affecting correctional facilities. This cannot be accomplished by the inclusion of a mere statement of intent in a committee report. The continued vitality of the "reasonably related" test must be codified in the text of the Act.

The following additions will best address these concerns:

(a) Findings -- The Congress finds that --

* * *

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing governmental interest in society at large.

(b) Purposes -- The purposes of the Act are --

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is burdened in society at large; and . . .

(3) the purpose of this Act is not to overrule the Supreme Court's decisions in *Turner v. Safley*, 482 U.S. 76, 107 S.Ct. 2254, 96 L.Ed. 2d 64 (1987) and *O'Lone v. Estate of Shabazz*, 482 U.S. 340, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987), and *Thornburgh v. Abbott*, 490 U.S. 401, 109 S.Ct 1874, 104 L.Ed.2d 459 (1989).

Their proposed amendment would effectively exclude penal institutions from the bill's strict requirements on government interference with the exercise of religion

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED

* * *

(b) Exception -- Government may 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 state interest, or

(3) is reasonably related to a legitimate penological interest.

* * *

SEC. 5. DEFINITIONS.

As used in this Act -

* * *

(5) the term "in society at large" does not include local, state, or federal correctional facilities.

(6) all aspects of the administration and operation of local, state, and federal correctional facilities constitute a "compelling state interest" within the meaning of that term as it is applied in this Act.

SEC. 6. APPLICABILITY.

(a) IN GENERAL. -- This Act applies to all Federal and State law affecting society at large, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.

We strongly believe that this is not the time to impose additional and unnecessary costs for incarcerating felons on a crime weary public. Our nation has a severe shortage of prison resources to address the rising tide of violent crime which plagues our people. Safely and humanely housing the most violent members of our society is an unenviable, grueling, and dangerous task. We should not impose additional, heavy burdens on the professionals on whom we depend to operate our prisons by imposing a standard which is not adapted to the realities of the unique, brutal, and closed society that they manage.

The *Turner* balancing test should be expressly incorporated into S.578, codifying the "reasonably related to legitimate penological interests" test as the appropriate standard of review of neutral laws and regulations which affect the practice of religion in the prison context.

Sincerely,

Robert A. Butterworth
Attorney General of Florida

Grant Woods
Attorney General of Arizona

Daniel E. Lungren
Attorney General of California

Robert A. Marks
Attorney General of Hawaii

Roland W. Burris
Attorney General of Illinois

Bonnie J. Campbell
Attorney General of Iowa

Robert T. Stephan
Attorney General of Kansas

Chris Gorman
Attorney General of Kentucky

Michael E. Carpenter
Attorney General of Maine

Frank J. Kelley
Attorney General of Michigan

Frankie Sue Del Papa
Attorney General of Nevada

Robert J. Del Tufo
Attorney General of New Jersey

Michael F. Easley
Attorney General of North Carolina

Theodore R. Kulongoski
Attorney General of Oregon

Jan Graham
Attorney General of Utah

Jeffrey L. Amestoy
Attorney General of Vermont

Rosalie Simmonds Ballentine
Attorney General of the Virgin Islands

Christine O. Gregoire
Attorney General of Washington

Joseph B Meyer

Charles E. Cole

Gale A. Norton
Attorney General of Colorado

Jeffrey B. Pine
Attorney General of Rhode Island

APPENDIX

Religion has commonly been used as a reason for special exemptions from hair and beard rules. Inmates claim membership in both mainstream religions which have recognized hair and beard tenets or create new religions with tenets to suit their fancy.

An additional area in which religion is used to gain special privileges is food. Inmates claim the need for special diets, special food preparation techniques, or special eating times. This can range from the need of Muslim inmates for a pork free diets to the ludicrous, such as the Church of the New Song's ("CONS") claim for steak and Harveys Bristol Cream sherry. Applying the "least restrictive means" test does not permit officials to balance such requests against the cost or burdens on prison administrators. Accordingly, a request for a Kosher kitchen in a system with 16 Jewish inmates will be subjected to a far different analysis under S. 578, than under the "reasonably related to legitimate penological interests" standard now applied by courts.

The following examples illustrate some of the problems faced by prison administrators when religion is used as a means of obtaining special privileges or exemptions from the requirements of neutral prison policies and regulations.

FLORIDA *Lawson v. Dugger*, 840 F.2d 781 (11th Cir. 1988), reh. den., 840 F.2d 779 (1988), *cert. granted and judgment vacated, sub nom, Dugger v. Lawson*, 490 U.S. 1078, 109 S.Ct. 2096, 104 L.Ed.2d 658 (1989). In *Lawson* the "Temple of Love", founded by Yahweh ben Yahweh (recently convicted in federal court in the Southern District of Florida of conspiracy to commit murder and racketeering), attempted to send its racially inflammatory literature into the state prison system by asserting that it was "religious" material protected by the First Amendment. Gruesome cartoon illustrations of African-Americans being mutilated, tortured and oppressed by whites and text preaching racial hate and the need for separation formed the basis of the "religious" tracts contained in this material.

The United States District Court for the Southern District of Florida, applying the "compelling state interest" test and strict scrutiny analysis, ordered Florida to provide this literature to the inmate population. *Lawson v. Dugger*, No. 83-0409, Civ-SMA (S.D. Fla.). This ruling was affirmed by the Eleventh Circuit Court of Appeal. *Lawson v. Dugger*, 840 F.2d 781 (11th Cir. 1988). Significantly, in denying a petition for rehearing, the Eleventh Circuit held that strict scrutiny analysis was the appropriate standard "because the constitutional rights of nonprisoners [the Temple of Love were] at issue." *Lawson v. Dugger*, 840 F.2d 779, 780 (11th Cir. 1988) (emphasis added). A petition for certiorari was granted and the judgment was vacated by the United States Supreme Court for further consideration in light of *Thornburgh v. Abbott*, *supra*. *Dugger v. Lawson*, 490 U.S. 1078, 109 S.Ct. 2096, 104

L.Ed.2d 658 (1989). Obviously, the passage of S. 578 in its current form will change this result in this still pending litigation.

IDAHO *McCabe v. Arave*, 626 F.Supp. 1199 (D. Idaho 1986), White supremacists, calling themselves the "Church of Jesus Christ Christian", attempted to subvert correctional policies and procedures. In reality, these inmates were all members of the Aryan Nations, a white supremacist group based in Hayden Lake, Idaho.

INDIANA An inmate in the Indiana State Farm claimed to be a Muslim and used a prison chaplain to coordinate a visit with a person claiming to be a Muslim volunteer. Their visit unexpectedly became a Black Panther rally attended by some 160 inmates.

-- A "new" Muslim sect at the Indiana State Prison is, in reality, an extension of a criminal gang which is trying to muscle in on activities of the other Muslim sect. The Black Gangster Disciples claim to have religious principles at the root of their gang.

-- Muslims at the Westville Correctional Center have demanded to meet in groups, combining inmates who have been separated for security reasons.

-- An inmate at the Indiana Reformatory claimed that he needed candles, incense and a crystal ball to practice Satanism.

-- An inmate at the Westville Correctional center sued state officials for intercepting "The White Man's Bible," a publication of the "Church of the Creator" based at a post office box in North Carolina. Another inmate claims to be an adherent of "Odinism" and received materials which exhort "Odinists" to save the future for white children and promote "temples of death" for blacks.

VIRGINIA In *Dettmer v. Landon*, the U.S. District Court for the Eastern District of Virginia held that the "Church of Wicca" (witchcraft) was a religion for purposes of the free exercise clause and that the prisoner bringing suit was a "sincere follower". The district court, applied the "least restrictive means" test and determined that the prison officials refusal to give the inmate access to candles, salt or sulfur, incense, a kitchen timer, and white robes impermissibly infringed upon the inmate's right to freely exercise his religion. On appeal, the Fourth Circuit held that the "least restrictive means test is not an appropriate measure of a prisoner's first amendment rights" because to do so is inconsistent with the need to give due deference to the security decisions of prison administrators. *Dettmer v. Landon*, 799 F.2d 929, 933 (4th Cir. 1986)(Butzner, Senior Circuit Judge).

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WYOMING An inmate of Chinese ancestry recently submitted a request to participate in the American Indian religion sweat-lodge ceremonies, although he has no history of involvement in that religion. His request was denied on the grounds that he is considered to be one of the highest escape-risk inmates in the maximum security facility, and because the sweat-lodge is located, for safety reasons, immediately adjacent to the institution's outer perimeter fence. The inmate is asserting a violation of his religious freedom.

Association of State Correctional Administrators

May 5, 1993

Senator Joseph Biden, Chairman
The Judiciary Committee
224 Dirksen Building
Washington, D.C.

Re: U.S. Senate Bill S.578

Dear Senator Biden:

On behalf of the directors of every state department of corrections in the country, who are responsible for administering more than 1,300 prisons, controlling more than 800,000 prisoners, and supervising more than 300,000 employees, I am imploring you to amend S.578. As currently written, this legislation will cause untold harm and suffering for everyone in corrections.

The changes in language that have been suggested to you by the Attorneys General of this country in their letter to you of April 29 should be inserted into the bill. Those changes and their rationale for making them speak for themselves. I will not repeat them here, other than to say that we unanimously support the amendment that they have conveyed to you.

In its present form, this legislation epitomizes, what many in the public perceive as Washington's inability to fathom the ramifications of good intentions. It is simply not enough to be right. Our "freedoms" are precious and must be preserved. How and where they are preserved must be carefully formulated so that in the process of protecting them we do not put others at peril.

We pray that you and the members of your committee will amend S.578 so that our religious freedoms are preserved and protected without putting in jeopardy the good order of our prisons and the safety of the staff and inmates within them.

Sincerely,

George M. Camp

George M. Camp,
Executive Director

Office of Executive Director • Spring Hill West • South Salem, New York 10590 • 914-533-2862

Association of State Correctional Administrators

July 22, 1993

Senator Joseph Biden, Chairman
The Judiciary Committee
224 Dirksen Building
Washington, D.C. 20510-6275

Re: U.S. Senate Bill S.578

Dear Senator Biden:

As you will recall, I wrote to you on May 5 with regard to the devastating yet unintended consequences that Senate Bill S.578 will have on the management of our country's prisons. Your response of June 18 is appreciated, but misses the mark. Of greater concern are some of the statements contained in the Judiciary Committee's Draft Report on the Religious Freedom Restoration Act of 1993 (dated July 20, 1993).

On pages 9 through 12 of the Report you address the impact of the Act on corrections. While it is troubling that your interpretation of the law runs counter to that of legal counsels of state correctional agencies and most state Attorneys General, and secondly that you believe the courts are more likely to interpret the ACT on the basis of "legislative intent" rather than the language contained in the ACT, it is shocking that your conclusions about the law's effect on the management of prisons were reached entirely without testimony or comment from the people who run our country's prisons.

You state on page 12 "The Committee is confident that the compelling interest standard established set forth in the ACT will not place undue burdens on prison authorities." Such a statement could only have been made absent any input from the correctional community. Legislating in a vacuum may be appropriate in Washington, D.C., but it serves only to weaken the credibility of those in the Congress who say they have the people's interest at heart.

On behalf of the directors of every state department of corrections in the country, who are responsible for administering more than 1,300 prisons, controlling more than 800,000 prisoners, and supervising more than 300,000 employees, I implore you to amend S.578 by incorporating on the Senate floor the changes suggested to you by the Attorneys General of this country in their letter to you of April 29, 1993, and which we understand will be offered formally by Senator Reid. Those changes and the rationale for making them speak for themselves and we unanimously support them.

In its present form, S.578 will produce unnecessary turmoil and strife between prisoners and administrators, the consequences of which are too unpleasant to contemplate. The amendment we suggest will not weaken the ACT, but it will preserve the delicate balance between the rights of the confined and the responsibilities of prison administrators.

Sincerely,

George M. Camp

George M. Camp,
Executive Director

cc: Members of the Judiciary Committee

Office of Executive Director • Spring Hill West • South Salem, New York 10590 • 914-533-2562

Congress of the United States
House of Representatives
Washington, DC 20515

July 14, 1993

Senator Alan K. Simpson
Senate Judiciary Committee
Washington, DC 20510

Dear Senator Simpson:

We are writing to express our support for an amendment to the Religious Freedom Restoration Act to exempt the claims of incarcerated individuals from the application of the Act.

Prior to the decision of the United States Supreme Court in Employment Division v. Smith, 110 S.Ct. 1595 (1990) (which the RFRA will overturn) prison regulations impacting on free exercise rights were upheld if they were "reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 76 (1987), O'Lone v. Estate of Shabazz, 482 U.S. 340 (1987), Thornburgh v. Abbott, 490 U.S. 401 (1989). The bill, as written, overturns these cases and, according to twenty-five State Attorneys General and the Association of State Correctional Administrators, will cause "untold harm and suffering" to prison administrators and inmates across the country.

We believe that the bill should be amended to make clear that the Religious Freedom Restoration Act will not apply to the free exercise claims of incarcerated individuals and that the standard set forth in Turner, Shabazz and Abbott will continue to govern such claims. The rule set forth in these cases properly takes into account the closed and often violent nature of prison life and the need of prison officials to safely maintain order, security and discipline.

Because of the procedural mechanism under which the bill was considered in the House, no such amendment was offered. Although there was a colloquy on the prison issue, it would better serve the needs of prison officials to resolve any remaining ambiguity or uncertainty.

Page Two
Religious Freedom Restoration Act

We understand that an amendment will be offered to exempt the free exercise claims of inmates from the RFRA when the bill comes to the Senate floor. We encourage adoption of such an amendment and will support its inclusion in the bill if a House-Senate conference is convened.

In this time of extremely tight resources and expanding prison populations, it is important to explicitly accommodate the needs of law enforcement with respect to prison free exercise claims. We continue to support the Religious Freedom Restoration Act, but also encourage the adoption of an amendment to exempt prisoner's free exercise claims from the application from the Act.

Sincerely,