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Senate Rept. 103-111

103 S. Rpt. 111

RELIGIOUS FREEDOM RESTORATION ACT OF 1993

DATE: July 27, 1993, (legislative day, June 30). Ordered to be printed

SPONSOR: Mr. Biden, from the Committee on the Judiciary, submitted the following

REPORT together with ADDITIONAL VIEWS
(To accompany S. 578)

TEXT:

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.

S. 578, the Religious Freedom Restoration Act of 1993, responds to the Supreme Courts 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.

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".

SECTION 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) Findings. The Congress finds that

(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.

SECTION 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) In General. Government shall not burden a persons 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 persons 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.

SECTION 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).

SECTION 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.

SECTION 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.

SECTION 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 ones 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, but by governmental rules of general applicability which operate to place 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.

Meaningful constitutional protection against these abuses began 30 years ago, with the Supreme Courts landmark decision in *Sherbert v. Verner*. 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. 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.

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).

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. 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.

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 applicants 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.

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.

[In her dissent] Justice O'Connor reviewed the Courts 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 persons 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 Amendments 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.”

b. Impact of the 4 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 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. At the committees 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”

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.”

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 a pluralistic society. For the Court to deem this comment a luxury, is to denigrate the very purpose of a Bill of Rights. "