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PAYING YOUR OWN WAY: CREATING A FAIR STANDARD FOR ATTORNEY'S FEE AWARDS IN ESTABLISHMENT CLAUSE CASES

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

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PAYING YOUR OWN WAY: CREATING A FAIR STANDARD FOR ATTORNEY'S FEE AWARDS IN ESTABLISHMENT CLAUSE CASES

WEDNESDAY, AUGUST 2, 2006

UNITED STATES SENATE,
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS, COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 2:34 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Sam Brownback, Chairman of the Subcommittee, presiding.

Present: Senators Brownback and Feingold.

OPENING STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR FROM THE STATE OF KANSAS

Chairman BROWNBACK. I will call the hearing to order. Thank you for joining us today. My colleague, Senator Feingold, will be here shortly. We are going to go ahead and start the hearing.

I want to thank all the witnesses for coming today and for appearing in front of the Subcommittee. I look forward to hearing your testimony.

Since the founding of the American legal systems, courts have required that all parties to a lawsuit pay their own attorney's fees. This standard is known as the "American rule," and that was an explicit break from the "loser pays" systems employed by English courts. I was a practicing lawyer myself. That was the rule in the system that I played under. The American rule applies in all circumstances except where Congress has expressly created an exception, and today we are going to discuss one of those exceptions.

Under 42 U.S.C. 1983, individuals can sue State and local governments for alleged violations of their constitutional rights. And under 42 U.S.C. 1988, successful plaintiffs, technically known as "prevailing parties," can petition a court to recover attorney's fees from the Government. Section 1988, originally known as the "Civil Rights Attorney's Fee Award Act," was adopted by Congress in 1976 to assist individuals in combating civil rights abuses by allowing them to recover their attorney's fees from the Government when the court found a constitutional violation had occurred. A similar exception was adopted in 1994 to allow fee shifting in suits against the Federal Government.

Today, groups like the ACLU and others use these provisions to bring claims against the Government for alleged violations of the Establishment Clause. Here we are not talking about civil rights

cases. We are talking about Establishment Clause cases. If they are successful, they may not only obtain an injunction to stop the offending practice, but they may also recover hundreds of thousands of dollars in fees. We have seen a number of examples of this in recent years.

In 2003, the ACLU sued to prevent the city of San Diego from allowing the Boy Scouts to use a public park. The city settled the case, but not before agreeing to pay the ACLU $950,000 in attorney's fees.

In 2002, ACLU and others sued the Chief Justice of the Alabama Supreme Court to have a monument of the Ten Commandments removed from the Alabama Supreme Court building. In addition to forcing the removal, they collected $550,000 in fees from the State of Alabama.

In 2004, the ACLU collected $63,000 in fees after suing to remove a World War I memorial cross from the Mojave National Preserve in California.

In 2005, the ACLU collected $150,000 in fees after litigating a case in which the court ordered a framed copy of the Ten Commandments removed from the Barrow County Courthouse in Georgia.

In 2004, the ACLU threatened to sue the city of Redlands, California, alleging that its official seal, which contained a cross and a church, was an unconstitutional violation of the Establishment Clause. Rather than risk incurring costly damages, the city complied and removed the cross. When groups protested, ACLU attorney Ben Wizner stated, "If the mayor and city council bend to public pressure and restore the sectarian religious symbol to the city seal, the people of Redlands will get a very expensive civic lesson from the Federal courts."

Based on their success in Redlands, the ACLU then threatened to sue Los Angeles County because the county's official seal contained a tiny cross. The Board of Supervisors voted to remove the cross to avoid expensive litigation.

We actually have a chart of these to show what the original seal looked like and what the new version looked like, and you can see, as they get those held up there—the one on the left, my left, is the original version, on the right is the new one—the size of the offending cross. Thank you very much for holding that up.

With the threat of such large awards looming over their heads, many jurisdictions simply acquiesce to the demands of the ACLU and prohibit all displays of religious faith in order to avoid the potential expensive litigation. The legal fees is the threat that the ACLU uses. The aims of these outside groups have no basis in the text and purpose of Section 1988. Congress' intent in passing the fee- shifting statute in 1976 was to prevent racial injustice and discrimination. Thirty years later, these laws are being used simply to purge religious faith and symbols of any faith from our society at taxpayer expense.

I recently introduced a bill which would require parties in Establishment Clause cases to pay their own attorney's fees. This bill has an identical bill offered in the House, commonly known as "The Public Expressions of Religion Protection Act of 2006." It would amend 42 U.S.C. 1983 and 1988 to limit recovery in Establishment

Clause cases only to injunctive and declaratory relief and to preserve the long-established principle that each side should pay its own way into the courtroom.

And I would note at this point in time just what the Establishment Clause says. It says, "Congress shall make no law respecting an establishment of religion or prohibit the free expression thereof." The bill has several cosponsors, has strong support from a number of outside groups, including the American Legion. I have support from these groups, and I will enter them into the record.

I look forward to the discussion on this important issue from this panel. It is an interesting legal issue. It is one that has a great deal of bearing on a lot of our litigation that takes place in public venues today regarding expression of faith and symbols of faith. So I look forward to the testimony in this hearing and to other hearings that we will have in further delving into this particular issue.

I will now turn to my colleague, Senator Feingold, for his opening statement.

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman. I, of course, want to join you in welcoming our witnesses, and I thank you and your staff for working with us to have this hearing on the remedies available in cases involving challenges to Government action under the Establishment Clause of the First Amendment to the Constitution.

Mr. Chairman, the desire for freedom of religious expression was a very important motivation for both the establishment of the American colonies and the founding of this country. The Constitution contains two important guarantees of religious freedom in the First Amendment: Americans have the right to freely exercise their religion, and Americans of any faith or no faith at all have the right to be free from Government establishment of religion in their lives.

The Establishment Clause and the Free Exercise Clause have created some tension and uncertainty throughout our history, but together they have allowed a freedom of religion and religion itself to thrive in this country for over 200 years. So, Mr. Chairman, when I see proposed legislation that could stifle claims challenging violations of religious freedom, I am wary. I certainly have reservations about the bill you introduced last month, S. 3696, which would prohibit Federal courts from awarding damages and reasonable attorney's fees and costs to parties who prevail in Establishment Clause cases.

For that reason, I find the title of today's hearing, "Paying Your Own Way: Creating a Fair Standard for Attorney's Fees Awards in Establishment Clause Cases," to be a bit misleading. It is hard to see what is fair about a standard that singles out one of the Constitution's twin guarantees of religious freedom to be less worthy of protection than the other or than any other constitutional right.

Congress made the judgment right after the Civil War that citizens should be able to defend their constitutional rights by bringing actions against State and local governments. And 30 years ago, Congress recognized that being able to obtain reasonable attorney's

fees was a crucial component of the right to obtain redress when the Government violates constitutional guarantees. By barring the award of attorney's fees to prevailing parties in certain cases, this legislation will, in fact, discourage people from asserting their rights. And I note that this has nothing to do with deterring frivolous claims since, under Rule 11, sanctions already exist for that purpose. Instead, the bill seems intended to deter even valid claims. Remember also that fees under the Equal Access to Justice Act are available only in cases where the Government's position was not substantially justified. This bill would deny fees even in the narrow category of cases where fees are permitted under that statute.

The only reason I can see for this approach is hostility to decisions that the courts have reached in some religious freedom cases. I understand that some people are upset with how the courts have enforced the Establishment Clause, but we have a system of law in this country that has stood the test of time. The courts are the final arbiter of the meaning of the Constitution, and their decisions can be overturned only by appeal or ultimately by amending the Constitution.

In my view, depriving people of the lawyers they need to assert their rights by trying to deprive the courts of jurisdiction over certain constitutional claims is the wrong way to go about trying to change the law. And it sets a dangerous precedent as well.

What will be the next constitutional right to be relegated to second-class status?

Mr. Chairman, I was struck by something that Peter Keisler, the President's latest nominee to the D.C. Circuit, said in his opening remarks at yesterday's nomination hearing in the full Committee. He was talking about the great honor it is to be a judge in our legal system. He said that in our system, "Anybody can file a case, make an argument, and be heard by a decisionmaker." And he noted with pride that in this country, "People are entitled to their day in court."

I agree with those sentiments. But I would note that they are given meaning by laws like 14 U.S.C. Section 1988 and the Equal Access to Justice Act, which help assure that people with valid constitutional claims will get their day in court even if they can't afford a lawyer.

Again, Mr. Chairman, I believe that both of the religion clauses of the First Amendment are critical in protecting religious freedom and allowing Americans to practice, express, and thrive in whatever religion they choose. Unfortunately, S. 3696, like the bill in the House, would put a finger on the scales of justice, and I cannot support that.

But, Mr. Chairman, I thank you and I look forward to hearing from our witnesses.

Chairman BROWNBACK. Thank you very much.

We have got an excellent panel. Our first witness is Rees Lloyd. He is a Vietnam veteran, a former ACLU attorney, and he current serves as Commander of District 21 of the American Legion, Department of California.

The next witness is Mr. Marc Stern, Assistant Executive Director and General Counsel for the American Jewish Congress.

The third witness will be Mr. Mathew Staver, Founder and Chairman of Liberty Counsel and Interim Dean and Professor of Law at Liberty University.

Next we will hear from Melissa Rogers, who is a Visiting Professor of Law and Public Policy at Wake Forest University Divinity School, previously served as Executive Director of the Pew Forum on Religion and Public Life in Washington, D.C.

And our final witness is Shannon Woodruff, Senior Research Counsel for the American Center for Law and Justice here in Washington.

I will run the time clock—let's run it at 6 minutes— to give you an outline of where you are. You can go over that if you need to. All of your written statements will be placed into the record as if presented. I don't know how Senator Feingold is. I prefer a summary and then to be able to engage in questions and answers. But do as you see fit and as you would like to. But I think this is the first time this Committee has heard this issue. I believe there has been a hearing in the House. We do want to establish a record, but we really want to try to get thoughts and input from people on a topic that may have multiple hearings to come in the future. So all your written statements will be placed in the record as if presented. We will do that already.

Mr. Lloyd, delighted to have you here. The floor is yours.

STATEMENT OF REES LLOYD, COMMANDER, DISTRICT 21, DEPARTMENT OF CALIFORNIA, THE AMERICAN LEGION, BANNING, CALIFORNIA

Mr. LLOYD. Thank you very much, Mr. Chairman. I am very thankful for the opportunity that has been extended to the American Legion to present its views on this issue, and I am honored to be able to represent the largest wartime veterans organization in the world, with 2.7 million members in our family in the American Legion of Legionnaires, Auxiliary, and the Sons of the American Legion involving some 4 million members.

I was very interested in the opening statements that were made from both of the Senators, and I will try to address some of the things that were raised. I was particularly interested in the notion that the filing of lawsuits under the Establishment Clause would be stifled if attorneys were not able to collect fees therefrom. I would think that if an examination of the cases under the Establishment Clause in the last 20 years would indicate anybody with an Establishment Clause in this country who goes without a lawyer, it would be astounding to me because the ACLU would be rushing there, as they have in every case. I do not believe there would be any stifling whatsoever. But I do think that it ought to be appreciated that there is a chilling effect on the First Amendment rights of those who are opposed to the view of the ACLU and others epitomized by the ACLU, and that chilling effect comes about because these attorney fees are not at all awarded on the basis of prevailing party. The ACLU wins, they collect. They lose, they don't pay.

The reason for that is that filing of a lawsuit under the Establishment Clause is itself a First Amendment right, and in order for a plaintiff to have to pay fees is a very, very high standard, almost

legally frivolous. So this is not in any way a level playing field in terms of prevailing party receiving attorney fees.

The other dimension is, I think, exemplified best or illuminated by what happened in the Senate yesterday, and that was a unanimous vote to approve the Mount Soledad Protection Act. Mount Soledad right now is a case of national attention involving the Veterans' Memorial in San Diego, California, which has existed for half a century. A lawsuit was brought by an atheist, backed by an attorney who was backed by the ACLU. Litigation has gone on for some 17 years. A judge in May ordered the cross destroyed, or he would fine the taxpayers $5,000 a day. As a result of that, there is a lot of litigation involved, including the Supreme Court's stay order and this action yesterday.

We in the American Legion are amicus curiae in that case. We would like to be able to more fully participate. But I cannot advise my clients to do so because they then run the risk of paying the ACLU's attorney, usually at the tune of $350 an hour.

I would like the Senators to appreciate that in the initial litigation in Mount Soledad, the plaintiffs included the president of the San Diegans for Mount Soledad, Mr. Phil Thalheimer, the son of Holocaust victims. It included a war hero, Dr. John Steele, Navy pilot and later medical officer. It included George and Craig Dewhurst, who were the sons of the person who built the monument.

When the lawsuits were filed with them, the attorney representing the plaintiff sent letters to them threatening them, "If you remain in this lawsuit, we will seek attorney fees against you individually to the tune of $300,000." All three of them had to withdraw.

In your opening statement, Mr. Chairman, you indicated some of the cases in California, one of which is the L.A. Seal case. The boards that you demonstrated show a tiny seal, and, in fact, that is an exact representation of the Hollywood Bowl. And if you go to the Hollywood Bowl and look out, you are going to see that cross because it stands on private land on a mountain. It is an exact replication, but history has to be changed now because that is offensive to the ACLU, although that cross is part of our environment in Los Angeles on private land.

In addition, you will notice the substitution that has been made. That is the San Gabriel Mission. On that mission, there is a cross on the top. If you hold up the board again, you are not going to see that cross because it has been whitewashed out. It is no longer there. That is a church. The ACLU is offended by the tiny cross, but not by the mission, San Gabriel. But what they did was to airbrush out the cross on the top of the mission apparently so those who are not from California won't realize what it is. That is the kind of hocus-pocus that is going on to accommodate views that are absolutely in the extreme and have made the ACLU the Taliban of American liberal secularism.

I do not speak as a person who has an inveterate hatred of the ACLU. I was an ACLU staff attorney in Southern California. I am proud of my service there. I have been a civil rights attorney my entire professional life. I was an attorney for Cesar Chavez and the Farm Workers Union for 20 years. I know a little bit about civil

rights, and I know I never took a case because I had to be bribed into taking it by an attorney fee provision. We took those cases because we believed in them and we did it on principle. And this Act is absolutely vital and necessary to stop the assaults on our veterans' memorials, other institutions of our country, symbols of our American heritage that are being wiped out because they are offensive to some small group of people, even though they are actual symbols of our American history and heritage.

We are vitally concerned about preservation of our veterans' memorials all across this country in the American Legion, and they are under attack. Suits are being filed all across the country. Taxpayers are unaware of the millions of dollars that are being expended in attorney fees in profits, and it is being used as a bludgeon on local elected bodies who cannot even consider our complaints because their minds are made up in advance because they cannot risk attorney fees being imposed.

And, finally, there is nothing in the law today to stop the precedents being set in the Mojave Desert Veterans' Memorial case and the Mount Soledad case from being used by Islamist terrorists or sympathizers in our midst to sue our American institutions, our veterans' memorials, and then seek and receive attorney fees. And I would ask you to appreciate that. I know some people took that lightly when I raised it before. I suggest they take a look at all the litigation out of Guantanamo and the litigation to release the photographs from Iraq, all of which were brought by sympathizers.

I thank you, Mr. Chairman.

[The prepared statement of Mr. Lloyd appears as a submission for the record.]

Chairman BROWNBACK. Thank you, Mr. Lloyd. I appreciate your testimony and look forward to question-and-answer session.

Mr. Stern, thank you for joining us today.

STATEMENT OF MARC D. STERN, GENERAL COUNSEL, AMERICAN JEWISH CONGRESS, NEW YORK, NEW YORK

Mr. STERN. Thank you, Mr. Chairman.

I don't take Mr. Rees Lloyd's charge lightly that we took his remarks lightly about terrorism. I don't take that lightly at all. It is a form of modern-day McCarthyism that charges that anybody who brings a lawsuit that the American Legion doesn't like is a fellow traveler of al Qaeda and other terrorists, as if those groups routinely resort to our courts to achieve their aims. I would think that we can have a hearing without that sort of name-calling.

The bill before us differs in two important respects from the House bill. They ought to be noted. One is a marked improvement; that is, the House bill even prohibited declaratory judgments. The Senate bill would allow declaratory judgments to be sought and awarded. That is clearly an advance over the House bill. However, and perhaps inadvertently, the Senate bill, in referring to the ban on attorney fees "notwithstanding any other provision of law," would seem to prohibit the award of attorney's fees even where a defense is frivolous within the meaning of F.R.Civ.P. Rule 11 or in cases where there was a contemptuous defiance of a court order, as there was in the case of Judge Roy Moore. It is well settled that district courts have the authority to award attorney's fees to par-

ties who were forced to bring enforcement actions in contempt proceedings. The ban on fees in cases may be inadvertent, but the bill appears to forbid the award of attorney's fees or damages even when those occur in a contempt situation. So those are differences with the House bill. Again, I don't know if they are intentional or not, but there they are.

The central question before the Committee is whether there is a reason to distinguish Establishment Clause cases, as Senator Feingold said, from the entire universe of constitutional and civil liberties claims. There are difficult constitutional issues across the Constitution. Those of us who suffered through law school remember the difficulty in determining—this was a long time ago when the law was a lot of simpler—between a regulatory taking that was permissible and one that gives rise to a cause of damage. Constitutional lawyers have been fighting about what that means since *Pennsylvania Coal* up to, I think, the last Supreme Court term or the term before.

The public forum doctrine is completely chaotic. The Fourth Amendment, as the police regularly complain, is incoherent. As for law professors—open any law review and you will find some law professor complaining about some line of constitutional cases not making any sense. There is nothing particularly unique about the Establishment Clause being difficult.

If the Committee wants to create a good-faith exception where local governing body could not figure out what the constitutional answer is, because nobody can figure out the answer, then that exception should apply not only to Establishment Clause claims but to all constitutional cases. Whether that is a good idea or not is a separate question. The question that needs to be asked today is: Why is the Establishment Clause different?

I have not heard or read anything, both in the House hearing and the testimony here and the statements of the members of the Committee today, which explains that distinction, other than perhaps a hostility to the way the courts are deciding Establishment Clause cases.

The bill before this Committee attacks two problems: remedies, particularly monetary damages, nominal damages, actual damages, and the like; and attorney's fees. Most of what we have heard today, most of what we heard in the House of Representatives Committee hearing, was about the problem of attorney's fees. We have not heard much which would justify the denial of actual damages in Establishment Clause cases.

There are two problems with the provisions relating to damages. One is there are actually Establishment Clause cases where there are real damages. For instance, there is a lawsuit now pending in the District of Columbia brought by non-liturgical church chaplains claiming that plaintiffs are at a disadvantage in the Navy promotion process—I believe it is the Navy—because there is a favoritism in favor of so-called liturgical churches.

Plaintiffs are seeking promotions and back pay. Those are real, hard, tangible, traditional damages. They would be barred by this bill.

There are cases—Municipal Rescue Mission, that case, which started in the 1930s, is still going on. There you have regulation

of disfavored religious charities, and a pass for favored religious charities. Disfavored charities have sought damages for additional costs and for lost solicitations. Those are traditional damages. They would be barred by this bill.

Moreover, I have in my hands, which I would like to make part of the record, the final judgment in *Hansen* v. *Ann Arbor Public Schools*, a case in which on a Diversity Day, liberal ministers were invited to explain why the Bible does not ban homosexuality. When students asked to have a conservative pastor brought in to participate in that panel, he was barred.

The District Court, quite properly, found a violation of the Establishment Clause. The judgment is in favor of plaintiffs, against defendants, in the amount of $35 nominal damages and $87,000 in attorney's fees. That is not an ACLU lawsuit. It is a conservative lawsuit, a conservative legal fund, and you have nominal damages.

Without those nominal damages, the lawsuit would have been moot. It was a one-time event. It was over by the time it could be litigated. Eliminating nominal damages meant that the plaintiffs in *Hansen* would have been out of court.

There are other such cases. The elimination of damages, which I have not heard justified, has serious implications, both on the merits and in procedural terms.

Finally, there is the question of attorney's fees, which I have dealt with at length in American Jewish Congress's written testimony. Exactly how radical this proposal is for at least some of its proponents on this side of the table is illustrated by two of the cases that Ms. Woodruff cites in her written remarks, as exemplifying how the ACLU, has abused the privilege of attorney's fees. Those cases are *Freiler* v. *Tangipahoa Parish School Board* and *Wynne* v. *Great Falls School District*. I want to tell you the facts of those cases because they illustrate exactly how far this bill goes.

Freiler involved a school board's disclaimer of the theory of evolution. I think disclaimer can be written, and ought to be written, but not the way Taugipakoa Parish did. This particular disclaimer read that the theory of evolution is not necessarily in conflict in the school board's view, with—and I am quoting here—"the biblical version" of the creation of man.

Now there is no "the biblical version" of the creation of man, except for absolute biblical literalist. But there are lots of religious views, which are catalogued in my amicus brief in that case, by very orthodox religious groups that don't read the Bible literally. Here you have the Government taking a stand about how people ought to read the Bible.

In *Wynne*, a town council always prayed in Christian terms, in the words of the Fourth Circuit, hardly one of the ACLU's favorite circuits, you had a government affiliated with a specific faith.

Those are the sorts of cases which arise, which are clear violations of the Establishment Clause on almost anybody's reading of it, an official preference for one faith or the other, not in the historical context but in a current, contemporary context, and which would be barred from attorney's fees by this legislation. *Wynne*, incidentally, was not an ACLU case. It was a private lawyer who was handling the case for an impecunious individual on her own.

Freiler I believe was an ACLU case. *Wynne* is a case that would be really out of court if this bill were adopted.

Thank you very much.

[The prepared statement of Mr. Stern appears as a submission for the record.]

Chairman BROWNBACK. Thank you, Mr. Stern.

Senator FEINGOLD. I apologize for interrupting, but I have to leave the hearing.

Chairman BROWNBACK. Before I forget, you had a written statement that you wanted at the end of that or something entered into the record.

Senator FEINGOLD. Yes.

Chairman BROWNBACK. That will be placed in the record.

Senator FEINGOLD. I have a similar request. I apologize for having to leave. This is an important hearing, but I have to go to an important hearing of the Intelligence Committee. And before I go, I wanted to put a few things in the record, if that would be all right.

Chairman BROWNBACK. Without objection.

Senator FEINGOLD. I hope to be able to return, but if I cannot I want to thank all the witnesses, and please excuse me for not being able to stay.

I would like to submit for the record letters from the American Civil Liberties Union, the Americans United for Separation of Church and State, and the Jewish Council for Public Affairs expressing opposition to S. 3696.

Chairman BROWNBACK. Without objection.

Senator FEINGOLD. Thank you, Mr. Chairman.

Chairman BROWNBACK. Thank you. Thank you for being here. I hope you can return. We will have a good dialogue.

Mr. Staver, thanks for being here.

STATEMENT OF MATHEW D. STAVER, FOUNDER AND CHAIRMAN, LIBERTY COUNSEL, AND INTERIM DEAN, LIBERTY UNIVERSITY SCHOOL OF LAW, LYNCHBURG, VIRGINIA

Mr. STAVER. Mr. Chairman, Senator Feingold, members of the Committee, thank you for inviting me. My name is Mathew Staver. I am Founder and Chairman of Liberty Counsel and the Interim Dean and professor of Law of Liberty University School of Law.

I come to this Committee having litigated and taught extensively in the areas relevant to the subject matter of S. 3696. Sections 1983 and 1988 are exceptions to the American rule for damages and attorney's fees. Absent an authorizing statute, the American rule provides that each party bear their own cost. These sections are particularly suited for those cases in which plaintiffs are ill-financed and where the law has relatively predictability. However, in Establishment Clause cases, many, if not most, of the plaintiffs are represented by public interest law firms which will finance the case, irrespective of these statutes.

Moreover, Establishment Clause jurisprudence is the most unpredictable and confusing area of law. There have been and remain sharp disagreements among the Justices of the Supreme Court over the meaning and application of the Establishment Clause. In an area of law where there are conflicting court decisions for every

conceivable proposition, it makes little sense to award damages and attorney's fees to plaintiffs with diametrically opposed positions. Instead of encouraging ill-financed plaintiffs to vindicate their rights, these statutes have become a financial bonanza to attorneys on both sides of the Establishment Clause cases.

While conflicting court opinions will invariably occur in any area of law, it is particularly troubling when conflicting opinions are the rule rather than the exception. In my written testimony, I discuss in detail absurd examples of court decisions that reached opposite and irreconcilable results. One sad example involves New York City public school funding cases which were litigated at enormous expense over a decade or more. The same school district paid large attorney's fees after losing its case at the Supreme Court. But 10 years later, following a second challenge, this time this same school district won. In the *Agostini* decision, the Court overruled its prior precedent involving the same New York City school district. However, the scarce tax dollars were diverted to attorneys rather than to the disadvantaged school children.

By providing damages in a fee-shifting statute in such a confused area of law, the complaining plaintiff often uses the mere threat of financial punishment to force government officials to a desired result, even if the result is not the right one. The confused and conflicted opinions of the Establishment Clause is certainly evident with the Supreme Court itself. The Supreme Court Justices have called the Establishment Clause "hopelessly confusing." I don't think there is any other area of law that they have criticized so vociferously as in the Establishment Clause.

The Court currently uses several tests, some of which conflict with one another, and sometimes the high Court forgoes using any test at all. The Court uses the oft-maligned three-prong *Lemon* test. The Court later modified the three prongs to two prongs. But in certain institutional funding cases, the Court may resurrect the third prong.

For several years, the Court added what is called the "political divisiveness prong," but then overruled itself and eliminated this prong. The Court also uses the historical analysis in *Marsh*. In most cases, the *Marsh* test cannot be reconciled with the *Lemon* test. The plaintiff can win under one test and lose under the other, but we are left with little or no guidance to determine which test should be used.

The Court in *Lee* v. *Weisman* developed the so-called coercion test, but Justices are not in agreement when it should be used, nor do they agree whether coercion is psychological only or whether it involve some kind of force or penalty.

Knowing the problem created by the Court itself, Justice Sandra Day O'Connor, shortly before her retirement, proposed a brand new test in the Newdow case that was supposed to be used in limited situations. Justice Thomas, however, has now advocated that the Establishment Clause does not even apply to nor bind the States.

Then, of course, the Court sometimes uses no test at all and, even worse, provides absolutely no explanation as to why no test is used.

If the Justices of the Supreme Court are conflicted over the meaning of the Establishment Clause, then it is particularly inap-

propriate to punish government officials with the threat of damages and attorney's fees for a mere misstep in this constitutional mine field.

For example, the Ten Commandments case, one of which I argued in 2005, is absolutely irreconcilable. No professor of law or practitioner in this area has argued that these cases are reconcilable, no matter what side of the aisle you come from on the Establishment Clause. The Supreme Court on the same day heard oral arguments on Ten Commandments decisions and handed them down on the same day as well. Justice Sandra Day O'Connor, just before her retirement, said the Court had an opportunity to clarify but missed the opportunity in this case and, in fact, caused further confusion.

Indeed, on December 20, 2005, a unanimous Court of Appeals for the Sixth Circuit Court of Appeals said that, "The Supreme Court has left us in Establishment Clause purgatory."

Another peculiarity with the Establishment Clause besides its absolute confusion, I think that would be admitted by all parties, that makes Section 1983 and 1988 inappropriate is the exception to the normal rules of standing. In every other area of law, a plaintiff must experience a direct and concrete injury. But in Establishment Clause cases, Federal courts have relaxed these requirements and carved out exceptions to the normal standing rules. In most lower courts, a plaintiff can bring an Establishment Clause challenge simply because the litigant claims that he or she is offended by some imagery, words, or alleged action. This exception to the general rules of standing have opened the floodgates of litigation.

And so when you combine an exception to the rule that has opened the floodgates of litigation wherein you can simply file suit for a mere offense that something is an image, a word, or an action and at the same time the area of law is absolutely confusing and you can find decisions on both sides of the same exact decision—take Good Friday. There are courts going both ways. It makes no sense to have Section 1983 and 1988 punish government officials who are not Justices of the United States Supreme Court.

I urge this Committee to pass S. 3696. Thank you for allowing me to speak.

[The prepared statement of Mr. Staver appears as a submission for the record.]

Chairman BROWNBACK. Thank you very much. That was a very good, very concise set of thoughts. I look forward to the dialogue and the interaction in the Committee as we analyze some of that.

Professor Rogers?

STATEMENT OF MELISSA ROGERS, VISITING PROFESSOR OF RELIGION AND PUBLIC POLICY, WAKE FOREST UNIVERSITY DIVINITY SCHOOL, WINSTON–SALEM, NORTH CAROLINA

Ms. ROGERS. Good afternoon, Mr. Chairman, and thank you for holding this hearing and for inviting me to participate in it. I appreciate that.

At the outset, I just want to make a couple of quick comments. As I have listened to the rhetoric surrounding this bill—the debate about it and the bill that was proposed in the House—it seems to me that one could get a false impression from some of this rhetoric.

Some of the rhetoric seems to suggest that the First Amendment requires religion to be stripped out of the public square, and that is just wrong. The First Amendment prohibits the Government from promoting or endorsing religion, but it protects the rights of individuals and groups to advance their faith in American public life.

And, of course, we only need to look all around us in Washington, D.C., to see evidence that the First Amendment protects those rights. If we look at the National Mall, for instance, there have been Promisekeeper rallies on the Mall. The Pope has held Mass on the Mall. We have Million Man Marches on the Mall. Here in Congress today, religious groups will be on the Hill to talk about issues as different as the minimum wage, State tax repeal, Internet gambling, marriage issues, Middle East policy, and the genocide in the Sudan, which I know is an issue you have worked on very hard, Senator.

So these are issues where the First Amendment protects the right of individuals to bring their faith into the public square, and quite properly so. There is no sense from the First Amendment that religion has to be purged from the public square or cleansed, and those are verbs that I have heard quite often used.

Similarly, in the White House, the President often makes reference to his faith and how it shaped his life, and that is all quite proper. Religious groups are invited to the White House to talk about issues or to celebrate Passover or Christmas or another religious ceremony.

And then if we go across the river to Arlington Cemetery and the gravestones there, we have to think about the fact that these are people who have made the ultimate sacrifice and that there are religious symbols, if the family wishes, on those gravesites, whether they are the Star of David or the Cross or some other religious symbol. That is quite appropriate. And I would reject any suggestion that those are under any kind of threat by the First Amendment. They are not. That is protected religious expression, and properly so.

So I think it is very important for us to remember in this discussion that the First Amendment protects the rights of individuals and groups to advance their faith in the public square, and those are just a few of the ways that are clearly protected by the First Amendment today, and properly so.

Looking at this legislation today, I think that the concern that has been mentioned thus far is that the Establishment Clause is singled out by this legislation. It is the defining characteristic. If you look at it, it is quite striking because the bill does not talk about all constitutional claims or even all church-state claims. It singles out the Establishment Clause. And like Marc Stern has mentioned, I have searched for legitimate explanations of that, but it seems that the explanation that I am gathering is that some don't like some of the Establishment Clause principles or the way they have been applied by the Supreme Court. And I would suggest that that is a disturbing and dangerous basis for Congressional action.

As Senator Feingold said earlier, what right tomorrow will be made a second-class citizen because some do not like the principles

that the Supreme Court has articulated or the way that they have been applied? That is a dangerous precedent to set.

Some have tried to suggest that the Establishment Clause is uniquely confusing or unpredictable or unstable. I think that is just not true. There are many parts of the Establishment Clause that are exceedingly clear that would be affected by this bill.

For example, it has already been mentioned that the Supreme Court has said that one of the clearest commands of the Establishment clause is that the Government may not prefer one faith over another faith. In other words, there is a requirement under the Establishment Clause that the Government treat all faiths equally, and that is a bedrock principle. But this bill would disfavor claims that involve Government discrimination against certain faiths.

Some of the cases that involve this kind of discrimination have already been mentioned, and I talk about some others in my testimony at greater length. I have mentioned a case that involved an incident where a public school teacher was saying how bad Mormonism was in front of a Mormon student. There have been allegations in a case out of Delaware that the public schools have favored Christianity in a variety of ways, with teachers saying that there is only one true religion in this public school and teachers giving special privileges for students who go to Bible Club.

Marc Stern already mentioned a case out of Ann Arbor, Michigan, that was troubling where the school hosted a panel on homosexuality and religion, but the school only invited clergy leaders who believed that homosexuality and the Bible were compatible. When a student tried to invite a clergy person with a different view who believed that the Bible and homosexuality are not compatible, the school refused. So the student sued and won in that Establishment Clause lawsuit. The court found that the principal effect of the school's action was to suggest a preference for a particular religious view, and that violates the Establishment Clause. Well, this bill would disfavor and discourage these kinds of claims. I would submit, however, that none of these claims should be disfavored by the law.

And, finally, I would like to mention there is often also the suggestion that the Establishment Clause—or the Supreme Court's interpretation of it reflects some kind of hostility to faith. That is not what the Establishment Clause says. It is not how the Supreme Court has interpreted it. One of the principles of the Establishment Clause is that the Government should not promote religion. It is not the Government's business to promote religion. It is the business of citizens and religious groups. And, indeed, when the Government promotes religion, it harms not only religious liberty but also religion; not only minority faiths that are not favored, but also the majority faith that is favored by the Government.

And here I want to quote a Baptist pastor from the 1800s, John Leland, who said, "Experience, the best teacher, has informed us that the fondness in magistrates to foster Christianity has done it more harm than all the persecutions ever did."

I think that it teaches us today that we should be very careful about trying to discourage or disfavor lawsuits that would allow the Government to promote symbols of faith, particularly one sym-

bol of faith over another, but to promote religion generally is also a problem under the Establishment Clause.

For example, I as a Christian hold a deep reverence for the Cross. I do not want the Government to be involved in promoting the Cross and the Gospel. That is my job as a Christian. That is not the Government's job. And I am very fearful that the day the Government gets its hands on the Cross is the day that the Cross is used as a means to a political end. I do not want the Government to begin to co-opt religious symbols. That is a very scary prospect.

So, in my opinion, this bill is very disturbing. I think it ought to disturb Christians when the Government tries to co-opt our religious symbols. I think this bill is disturbing because of the dangerous precedent it will set in picking and choosing among constitutional rights, some for favor, some for disfavor. And I think it will discourage compliance with parts of the Constitution and harm religious liberty.

So for these and other reasons, I would respectfully urge the Committee, to reject the bill.

[The prepared statement of Ms. Rogers appears as a submission for the record.]

Chairman BROWNBACK. Thank you for your testimony. Our final witness today will be Shannon Woodruff to testify. Thank you for joining us.

STATEMENT OF SHANNON D. WOODRUFF, SENIOR COUNSEL, AMERICAN CENTER FOR LAW AND JUSTICE, WASHINGTON, D.C.

Ms. WOODRUFF. Thank you. Good afternoon. I appreciate your allowing me to come and express the views of the American Center for Law and Justice in support of this law.

I want to start by addressing one of the statements made by Senator Feingold, his concern about this bill putting a finger on the scales of justice. I would suggest that, in the absence of this removal of attorney's fees, the ACLU will have no reason to remove its fists from the same scales of justice.

While Section 1988 was enacted for the very laudable purpose of making sure that poor plaintiffs were able to protect their basic civil rights, it has had the unintended effect of financing a fierce campaign by a few advocacy groups, a campaign of intimidation against any and all religious expression, acknowledgment, and accommodation in the public square. The threat of costly litigation has put Government officials into a sort of secular straitjacket where they actually become predisposed toward religious discrimination rather than accommodation in order to protect their limited budgets.

This chilling effect is felt on two levels. At the local level, it encourages plaintiffs to bring lawsuits that are not well grounded in the law. It also causes the Government officials to surrender to demands that might not be constitutionally required. Second, on a national level, it spreads a wave of fear when these large attorney's fees awards come down that creates a backlash against free speech and free exercise rights. The Government officials are taking a calculated risk that it actually might be safer to suppress this reli-

gious expression from a liability standpoint than accidentally allowing too much and draw the attention of these eager plaintiffs. The chilling effect at both levels is unacceptable. By eliminating taxpayer dollars from the equation, this law would remove the financial incentives for these overly zealous plaintiffs to challenge permissible religious expression.

I just want to touch on the confused state of the Establishment Clause, although I think Mr. Staver did a good job of that. But that certainly is fueling this campaign, in addition to these large attorney's fees awards that the ACLU uses to basically bear some defendants into submission.

Nowhere is this problem more evident than in the Ten Commandments cases that were discussed in *McCreary* and *Van Orden* last summer. In each case, the vote was 5–4. Seven Justices issued a total of ten opinions and in neither case applied the same legal analysis. One commentator declared it as "adding mud to murky water." And so that confusion at the Supreme Court is only magnified when you look at the lower courts.

This indecision can only be described as an analytical schizophrenia, and so plaintiffs will use this legal uncertainty to threaten local governments with hundreds and thousands of dollars of attorney's fees unless they stop whatever the activity is that is offending them. Even where a claim borders on frivolous, the fear factor can force a government, a local government, into settlement, not based on the merits but just on the fear of those attorney's fees.

Under those circumstances, it is both counterintuitive and counterproductive to award attorney's fees to the prevailing party. Where Supreme Court Justices cannot consistently discern the parameters of the Establishment Clause, it is important that local government officials are given at least a small margin of error when they attempt to do the same.

Fee awards in these cases can be devastating, especially when we are dealing with small towns and school boards. The recent high-profile case in Dover, Pennsylvania, illustrates this. The court ordered the school board to pay over $2 million in attorney's fees for including an arguably constitutional disclaimer in its evolution teaching. The ACLU reduced that $2 million fee to $1 million when the school board agreed not to appeal this case. The ACLU is quick to use this award to continue its campaign of intimidation, stating, and I quote, "The $2 million was a very conservative number, so they got a terrific deal. The next school district isn't going to get the same break that Dover did."

San Diego paid the ACLU $950,000 for leasing land to the Boy Scouts. Great Falls, South Carolina, a small town, was sued, and the fees totaled more than a quarter of the town's annual administrative budget.

And I think it is important to recognize that the ACLU is not only challenging Government religious expression. It is challenging any case where the Government even allows private religious expression. And I think some of the comments today have steered it to appear as pure Government action, and that is not the case.

A lot of times, municipalities will just fold immediately. They will not even defend the expression at the district court level. The city council in Duluth, Minnesota, agreed to remove a 40-year-old Ten

Commandments monument after the local newspaper warned readers that standing up to the ACLU could cost up to $90,000. So the constitutionality of that monument was never litigated, but the ACLU was able to use the settlement to pressure other municipalities.

I think it was Professor Rogers who referred to the need for—or maybe it was Senator Feingold, that Rule 11 will prevent these frivolous claims. Well, the fact of the matter is that most of these lawsuits don't ever get into a courtroom because of this pressure and this immense fear.

This law would not deprive any rights; rather, it is based on the inherent difference between the Establishment Clause and traditional civil rights cases. The reason the Establishment Clause can be singled out in this manner is because there is abuse that is not present in other civil rights cases, and this inherent difference I think eliminates any concern about a domino effect.

There is a qualitative difference, for example, between the individual rights protected by the Free Speech, Free Exercise Clauses, the Fourth Amendment Search and Seizure Clause, or the right to vote, and a declaratory judgment that some county's Christmas display does not have enough reindeer next to the Baby Jesus.

These are not twin guarantees, as Senator Feingold suggested. They are both important, but they are not the same. This law will not affect the prosecution of legitimate Establishment Clause claims. The fact of the matter is these claims are not being brought by impoverished plaintiffs. There are plenty of organizations with resources to help any plaintiff who seeks to enforce the Establishment Clause. The current situation is actually frustrating the proper enforcement of the Establishment Clause.

The ACLU or other organizations are not never going to turn down a valid Establishment Clause case. The hope is that they will, however, be a little bit more judicious in their selection of those cases.

Litigation under the current system has truly transformed the Establishment Clause into a very real and complex obstacle for many Americans to exercise their First Amendment freedoms. It has also forced many local and State governments to sever their ties with America's rich religious traditions. Although 1988 was designed to protect the little guy and help the little guy, it is being used by the big guys to actually strap local governments and with the threat of litigation silence them. This law is necessary to end this abuse.

Thank you.

[The prepared statement of Ms. Woodruff appears as a submission for the record.]

Chairman BROWNBACK. Thank you. I appreciate it. I appreciate all the testimony of the witnesses, and in case you are wondering the motivation for introducing the bill itself, I put it forward—it is something—we are all products somewhat of our own past and our background, I guess—as a small town lawyer representing a couple of small towns. And I would see—I did not see these when I was practicing there, but I have read enough of them when groups come forward, and it typically is the ACLU. There are other groups, but it is typically the ACLU that comes up to a small town with a lim-

ited budget and not a large staff at all, and they say, We don't like this particular item that has some Establishment Clause feature to it, and then the threat is always—and what the city council members are always asking about, What are the attorney's fees in this case? And it is a bludgeon. It is blackmail from any sort of free discussion of, well, maybe we should take that off because it does not reflect what the citizens here have. Or others say, well, no, we should not do that because we are not trying to put our hands on the cross, I guess, as Professor Rogers is asking if that is the purpose. It is not the purpose of doing this. It is simply to allow there to be a fair discussion and it not being decided by the threat of legal fees. It should be decided by courts and not by a threat of legal fees. And that is why this is being put forward. That is why I put forward this bill.

I would like to know, Mr. Lloyd, going to some specific questions, you said that there are a number of examples of where local units of the American Legion are being threatened with legal fees if they do not—or a number of examples of local suits. Could you cite some of those? Or perhaps they are in your written testimony, but do you know of some that are current situations where people are being threatened with legal fees?

Mr. LLOYD. The threat that was absolute as in the Mount Soledad litigation to save the Mount Soledad Veterans' Memorial as it is, where it is. The "as it is" includes a cross. That is part of the integrity of the entire memorial, and we are opposed to desecration by amputation because it happens to be a symbol not only of sacrifice but to have a religious aspect as well. The original plaintiffs in that case, as I said, were Phil Thalheimer, who is Jewish; the president of San Diegans for Mount Soledad; Dr. John Steele, a Navy pilot, a medical officer later; and the sons of the person, the contractor who actually built it. And they were plaintiffs, and they were threatened. And those letters are in the record of the Fourth District Court of Appeals at this time.

Chairman BROWNBACK. Do you have other cases? That one is a well-known case. Are there others that you hear about from American Legion groups or other local units of government across the country? Mr. Lloyd. What I hear is obvious because I am lawyer for them. And, by the way, I am a pro bono lawyer for the American Legion. I don't have to be bribed into doing the right thing.

We have to advise and I have to advise the American Legion that when we go into a case, if we intervene as a party to fully participate—and I would hope—you mentioned your background as a municipal attorney. They are not experts on constitutional law, the Establishment Clause. Chairman Brownback. I certainly was not. I want to enter that for the record.

Mr. LLOYD. Well, they have to either go out and hire attorneys, or you send in somebody whose whole life is litigating constitutional issues against somebody who knows all about contracts in the municipal sector, and then they end up looking at all these attorney fees.

I have to advise the American Legion—and I do—if we go in and intervene in the case and fully participate and bring the degree of expertise that we can to the case, you can end up paying the ACLU's attorney fees.

We have not gone in. We are an amicus curiae, a friend of the court, in the *Soledad* case. We are an amicus curiae in the *Mojave Desert* case, the *Mojave Desert World War I Veteran's Memorial* case. We would like to be participating fully. Our First Amendment rights are being throttled because we cannot get in front of those courts because of that risk.

And I would say to you, in regard to that, in the *L.A. County Seal* case where you had this display, nobody got involved in that case because the county settled rather than face the risk of the imposition of these fees. They are spending $1 million to change their seal, fearful that a court would award even more in light of what happened in San Diego.

In Redlands City Council, very similar to the examples you were giving, all five council people said, "We don't want to change our seal, but we are being advised by our pro bono counsel that we could end up paying their fees. We cannot do that. We need the money for civil services." They cannot afford to change it. They are calling in everybody who has a badge in their town, and they are drilling holes through the cross on the badges of police and fire and inspectors.

I suggest to you that is obscene that we have elected bodies so fearful of these attorney fees that they would drill holes through the badges in order to satisfy the whims, the constitutional whims, of the ACLU with one threat: "You will pay our attorney fees." I am on a memorial honor detail team, and I think of Attorney Rogers' statement. She rejects the notion there is a threat. Really? I am on an honor guard team of Riverside National Cemetery. It is the largest one in the country in terms of space, over 80,000 graves there with crosses and Stars of David and other religious symbols that are the choice of the family. I suggest to you, Senator, if it is unconstitutional to have a religious symbol on Federal property, which is what the ACLU says and asserts, you cannot have somebody make a choice to do it. But beyond that, these symbols are not limited to what is on gravestones. At Riverside National Cemetery is the United States National POW–MIA Memorial, done by artist Lee Millett, a Vietnam veteran—and, by the way, Vietnam era. He is a Vietnam vet of a recondo unit. His father was a Medal of Honor recipient—is a Medal of Honor recipient. He designed that statue that is there. It is absolutely magnificent. But he also inscribed a prayer in it. That is a target. Almost every one of our veteran cemeteries also has symbols that are not on gravesites but in the park itself, in the cemetery itself. They are all at risk.

And who is to say that those who hate America are not going to bring these suits? And I heard the objection, oh, this is McCarthyism. That is absolute nonsense. There is nothing in your bill that would stop anybody from filing a suit. They just are not going to get attorney fees for it. And we should—

Chairman BROWNBACK. Let me—

Mr. STERN. Senator, could I respond—

Ms. WOODRUFF. Senator, could I—

Chairman BROWNBACK. I knew we were going to get this way. I will give you a chance to respond. I want to ask a couple of questions here, and then I would be happy to have you respond. Really, I want to look at this as much as we can as a legal issue that obvi-

ously everybody looks at and has deep concerns of how in careens out of control. I think that is most people's concerns here. But I want to look at it as a narrower legal issue. And, Mr. Staver, if I could ask you along—

Mr. LLOYD. Senator, with all respect, with all the excited utterances, I did want to talk about the *Mojave Desert* case.

Chairman BROWNBACK. We will hit that at another point, maybe. I want to get narrowed in on some of these.

Mr. Staver, you have litigated these sorts of cases before. I hear the claim that this is going to hurt bringing of these sorts of cases or it is going to limit this constitutional right by removing the legal fees as provided for in Section 1988. Why is injunctive relief, declaratory relief insufficient to bring these sort of cases? And I am going to direct the same question towards you on that, Mr. Stern. I believe you raised that issue. But why is this insufficient, injunctive or declaratory relief?

Mr. STAVER. Mr. Chairman, I think that is a good question. It is not insufficient. It is totally sufficient for what is needed to remedy any constitutional violation under the Establishment Clause. Professor Rogers and Mr. Stern have raised issues, and they have mentioned rhetoric and putting aside the rhetoric. I think when you really do that, you look at this in history and the historical context and what is really being addressed here and what is not.

From 1976 to the present is the only time in American history that we had Section 1988. That changed the American rule in allowing attorney's fees and damages in these kinds of cases. So for two centuries of our history, we haven't followed this fee-shifting provision. In fact, if you look back, when we look at the constitutional Establishment Clause cases that came from the 1940s and the 1960s, we did not have Section 1983. The Bible reading and prayer in school were litigated prior to Section 1983.

When 1976 came and the 1988 statute was amended to allow—and I said 1983. I should correct that to be 1988. When 1976 came and Section 1988 was amended to allow this fee-shifting statute, it was done coming out of the idea of the civil rights movement, and one of the things they wanted to do is to finance ill-financed plaintiffs, people who were discriminated against primarily because of their race or their gender, people who lost their jobs—

Chairman BROWNBACK. Primarily civil rights cases.

Mr. STAVER. Exactly. They lost their jobs because of the color of their skin or their gender. Obviously, they did not have the money to go out and hire an attorney to litigate that basic constitutional right, for which we passed three separate constitutional amendments to protect, and passed a number of strong pieces of legislation in the 1960s.

But now the time has changed as it relates to this area in two specific respects. Number one, the rise of public interest law firms. There will not be one less suit brought that is legitimate if you take away this attorney-fee-shifting statute because you still have the ACLU, you still have other organizations, that are very well-financed public interest law firms that will bring the cases irrespective of whether there is a fee-shifting statute.

One of the things that it will prohibit, however, is the intimidation threat that a Government official, who is simply trying to do

his or her job, that is confused, as all of us are—and anyone who says they are not is either disingenuous, does not litigate, does not teach, or is dishonest in addressing what the Establishment Clause jurisdiction is today. But a Government official who is simply trying to do his or her job gets the threat of an attorney's fee letter from the ACLU will back down from their activity, even though it is constitutional if litigated all the way up to the Supreme Court, simply because of the threat of attorney's fees. So it will not stop the legitimate cases. Injunctive relief and declaratory relief are absolutely essential, but it will take away this attorney's fee provision that I do not believe is appropriate under these circumstances in the Establishment Clause cases.

Chairman BROWNBACK. Mr. Stern, he says it far better than I, but that is my experience as a small town lawyer, that you get these sort of threats and the city council just says, "We do not have enough money to deal with this."

You know, as a lawyer, I get my back up and I say, well, no, let's go fight it. Well, then they say, "How much is it going to cost for you and how much is it going to cost for those other guys?" And it quickly adds up, and they say, "We are just not interested in this." It just happens all the time.

I am wondering why the injunctive relief is not— injunctive and declaratory relief is not sufficient to keep these cases coming so people's legitimate rights are protected.

Mr. STERN. I want to go back to what I said. We need to keep clear in our heads that there is a difference between the remedies, whether monetary damages ought to be available, and the attorney's fees issue.

Take the *Hansen* case in Ann Arbor. It is a one-time, once-a-year diversity program. What was challenged was a particular configuration of a particular panel. By the time the case gets to court and can be litigated, there is more injunctive relief available. The issue is moot. The Diversity Day has occurred. There is no showing it is going to happen next year. You cannot get an injunction.

You cannot get a declaratory judgment because in *O'Shea* v. *Littleton*, the Supreme Court said you cannot get a declaratory judgment for a completed constitutional violation for which there is no other remedy available.

So in that sort of complete violation, in the case in Delaware—

Chairman BROWNBACK. Let me get you to a sharper point. So you are saying in that type of case, the only tool that is of any use is the—

Mr. STERN. Is damages or nominal damages.

Chairman BROWNBACK. Is attorney's fees.

Mr. STERN. No. You cannot even get a declaration that the act was unconstitutional unless you are able to seek either real damages or nominal damages. If you have a complete constitutional violation for which you cannot—you can't get an injunction because there is no likelihood of it recurring, the only way you are going to get a court to declare that the act was unconstitutional and to settle issues—because there are lots of issues that need to be settled—is by allowing nominal damages. That is what happened in the *Hansen* case. They sought and were awarded nominal damages. If there had been no nominal damages available, we would not

have had a decision that says you cannot exclude conservative pastors from a panel on homosexuality.

Chairman BROWNBACK. Let me turn the question this way. You are an accomplished lawyer, very accomplished individual and contributed a lot to this country and I appreciate it. Do you deny that this goes on, that attorney's fees are used in these cases to threaten city councils?

Mr. STERN. Certainly. There is no question it goes on. It goes on not only in the Establishment Clause area; it goes on in the free speech area.

Let's play out a case in which I was involved. A school board as a defense to plaintiffs urged that the Establishment Clause required it to act as it did. If the Establishment Clause is not clear when plaintiffs invoke it, it is not clear when defendants invoke it. The case involved whether a teacher could teach an after-school Bible Club in her own elementary school. The school district said you can teach in some other school, but not in your own building, because we think that second and third graders will not be able to tell the difference between you before 3 o'clock and after 3 o'clock. We think it said, if we were to allow you to do that, that would be an Establishment Clause violation.

The teacher challenged the school board's decision raising free speech and free exercise claims. She won that lawsuit in the Eighth Circuit. She is entitled to attorney's fees under this bill.

I told the school board—and I consulted with Professor Douglas Laycock, a well-known expert in the field. We both thought that the decision of the Eighth Circuit was flat-out wrong. We were prepared, pro bono, to carry the case to the Supreme Court. The school board voted not to carry the case to the Supreme Court because they would have to pay plaintiffs attorney's fees if we were unsuccessful.

Let's play that out the next year. Ms. Wigg is in her classroom before 3 o'clock and says to the kids, "By the way, kids, you know, I have a Bible study class right after school, and we have a good time." Parent brings a challenge saying that amounts to coercion. They allege that Ms. Wigg's speech constituted an establishment of religion. Those plaintiffs cannot get attorney's fees even if they win, even though it is the same facts, the same uncertainty, the same unclarity in the law.

So if there is unclarity—and I can tell you, because I saw the letters in the 1980's from the head of the American Center for Law and Justice when equal access for student clubs was very much up in the air, writing letters to school districts saying if you do not do what I want, I am going to sue—or I don't remember if it was with ACLJ or another group at the time—and we will get attorney's fees.

So there is lots of this threatening stuff going on on both sides.

Chairman BROWNBACK. And that is my exact point there. So why should you—

Mr. STERN. So this does not—

Chairman BROWNBACK. In American jurisprudence, we have not had—it does not seem to me that we have had the use of attorney's fees being a threatening tool. It is really that there should be a relief granted—

Mr. STERN. Fine. If you want to take—as I said in my testimony—

Chairman BROWNBACK.—then attorney's fees being the club and—

Mr. STERN. Sure.

Chairman BROWNBACK. You acknowledge, as others do, that that is the club that is being used here.

Mr. STERN. Right. And if you want—and there are ways—

Chairman BROWNBACK. If you can help us draft it better—

Mr. STERN. I have only done it—I actually only threatened once, when a school superintendent ran for election against our lawsuit, so I figured it was fair enough to hit him with something back.

But my problem is not that there is a club. I grant you that is a club. In some measure, that is a necessary club because, otherwise, you get people who think there is cost-free political advantage in violating known constitutal. Roy Moore was running for Governor on the back of his Ten Commandments display. No serious scholar thought that he was going to get away with a 5-ton Ten Commandments in the middle of Alabama Supreme Court building. The Supreme Court, right before it took the other two Ten Commandments cases, pointedly turned that one down.

But we do not have to go there. My point is simply this: If there is a coercive effect—and there is—and if local government sometimes fail to assert plausible defenses because they are afraid of attorney's fees, it is not only when I, representing plaintiffs, threaten to bring an Establishment Clause case and seek attorney's fees. There are cases in which people are seeking access to the public schools, the school board is defending on the Establishment Clause. It is the same uncertainty and it is the same club. So if you are going to deal with that problem, deal with the problem of the club as a whole, but in ways that are neutral to the merits.

Chairman BROWNBACK. That is my point. That is the point of this, is to take the club—

Mr. STERN. No, but this bill does—it only solves—it takes away the club for me and it leaves the club in Ms. Woodruff's hands.

Chairman BROWNBACK. It does not leave it in her hands.

Mr. STERN. Sure it does. She brings a free speech and free exercise claim.

Chairman BROWNBACK. She cannot claim attorney's fees in this. We take the attorney's fees—we are saying that this is going to be the American jurisprudence system that—

Mr. STERN. No, no, because it does not say—

Chairman BROWNBACK. —the loser pays.

Mr. STERN. When Ms. Woodruff sues the school district saying, "I want access to the building," she is claiming under the Free Speech and Free Exercise Clause. If she wins, she is entitled to attorney's fees. Since the school board does not know if she is going to win or their Establishment Clause defense is going to prevail, you have got exactly the club problem you describe. They are afraid that if she wins, they will have to pay their own attorney and her attorney, because their defense is the Establishment Clause.

If you flip the facts around and the plaintiff is invoking the Establishment Clause, in this bill there is no club.

Chairman BROWNBACK. Would you support the bill if the club is taken from both sides then to your satisfaction?

Mr. STERN. That would leave a level playing field.

Chairman BROWNBACK. Would you support that sort of—

Mr. STERN. I would have to think about it, but I think I could.

Chairman BROWNBACK. Ms. Woodruff?

Ms. WOODRUFF. I just want to respond. I think the club that is left in our hands in those equal access cases, the free speech cases, is, in fact, the Freedom of Speech and the Free Exercise Clause in the First Amendment. It is a different club. The only reason that we have engaged in an educational campaign to school districts, superintendents, city councils, is in specific response to the intimidation campaign of groups like the ACLU. You cannot deny that there is a qualitative difference between the affirmative civil rights for which 1988 was originally intended and Establishment Clause violations. There is a qualitative difference in the injury that is suffered in each of those, and that is what makes singling out the Establishment Clause legitimate.

Ms. ROGERS. Senator Brownback, could I—

Chairman BROWNBACK. Please, Ms. Rogers.

Ms. ROGERS. Thank you so much. And let me thank you for your conducting this in such an open and probing manner. I really appreciate the way that you are digging into these issues and letting us all contribute to the conversation.

There are a couple of things I want to get to really quickly. Mr. Lloyd talked about—and I think it is in his testimony—if the religious symbol is unconstitutional under the Establishment Clause because it is on Federal ground, as the ACLU otherwise insists, no person can choose to commit an unconstitutional act. It must be unconstitutional, I assume he is saying, if it is on the gravestone where the family has chosen it as it is when the Government erects a cross like Mount Soledad or some other case. And I would submit those cases are very different.

Our constitutional rule is not that religious symbols cannot be in the public square. It is, "To whom is the religious symbol attributable or the religious expression attributable?" And the Court has said there is a crucial difference between Government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Exercise and Free Speech Clauses protect.

Now, that does not mean the place determines. It is who is doing the speaking. To whom is the speech attributable? The United States is not France. France in some respect cleanses the public schools of religious expression. We do not do that. We ask, "Is the religious attributable to an individual or is it attributable to the Government?" And that is the dividing line, and that is where the ACLU is drawing the line in the case involving the grave markers where they are saying when the religious symbol is clearly attributable to the family on the gravestone, that is protected by the First Amendment. They take a different position when it has to do with the Government erecting a Government-sponsored cross in a cemetery and then doing it that way.

So that is a very important distinction. It goes to the core of constitutional law, and we ought to recognize that. And the ACLU, I

believe, on the House side wrote a letter saying that they are not threatening the markers on these gravestones. So that is very important.

Then I will say that the club is not different than the ones Ms. Woodruff is talking about. It is pressure coming from different sides about different issues, but it is not different qualitatively. It is pressure to enforce constitutional rights.

Chairman BROWNBACK. Ms. Rogers, could I address you on that point? Mr. Stern was kind enough to say obviously there is a club here and it is used.

Ms. ROGERS. Right.

Chairman BROWNBACK. Would you agree with that, that these attorney's fees is a club and it is used often across the country?

Ms. ROGERS. Yes, I mean, it is pressure brought from different sides on different issues, and it happens.

Chairman BROWNBACK. And I would think you—I know you are teaching at the Divinity School, but you are a trained lawyer and you have worked these cases, too.

Ms. ROGERS. Well, I would say I am not a litigator. I am an attorney.

Chairman BROWNBACK. Okay. We do not usually set our system up such that the attorney's fees are what you use for a club to get somebody to do something, because normally our system—the American system of legal decisions is you pay your legal fees, I pay my legal fees. So usually this is not a club in the American jurisprudence system.

Ms. ROGERS. Well, each pays his own is the typical rule, but, of course, it is different under 1988.

Chairman BROWNBACK. Yes. My point is here—and that is the only point with this that we are trying to get at, and if we have inartfully drafted this, submit suggestions to us, because I want to look at it and I want to consider what you have.

Ms. ROGERS. Thank you.

Chairman BROWNBACK. In an area where we have got now— we are at 40 years plus of litigating and trying to decide where we are on the Establishment Clause and what it means. This has been going on for some period of time, and this has been up and down to the Court a lot of times, and it is a confused—I think most people would say there is some confusion in this area of the law. And so if you are on that local level, the deciding factor should not be the club of attorney's fees, and that is all we are trying to get at here. And if you agree with that point, I would appreciate you telling us how we ought to redraft this so that we make it balanced and the attorney's fees is not the club, that it is actually somebody wanting to change this.

Ms. ROGERS. Just two quick comments on that. What jumps out at you in the bill is the way that the Establishment Clause is selected out. Now, I am not saying what other arguments I would make about 1988 generally, but when you single out the Establishment Clause, it really raises questions. So I appreciate your openness to asking about, well, how can I be not selective, because this bill is quite selective. And that raises questions.

Now, I would say there are areas of confusion with regard to the Establishment Clause. There are areas of great clarity and there

are areas of confusion. But the Establishment Clause is not uniquely confused. You can ask law professors all across the country, and I have quotes in my testimony about scads of areas that are difficult and very challenging. The Establishment Clause is not unique in this respect. And so when you single it out, that tends to add more to the questions that are being raised here.

Mr. STAVER. Mr. Chairman?

Chairman BROWNBACK. Mr. Staver, please.

Mr. STAVER. Section 1988 is never applied to the Federal Government. The Federal Government does not have the fee-shifting statute under Section 1988. No one would argue that the Federal Government has run roughshod over constitutional rights regarding the Establishment Clause, simply because there is no threat of an attorney's fee.

Chairman BROWNBACK. That is a good point.

Mr. STAVER. You do not have damages in the Federal claims. Michael Newdow was not hesitant in any respect in bringing his challenge against the Pledge of Allegiance, and one of the entities he sued was at one time Congress. He would do that and the ACLU would do that and anyone else would do that if they felt an Establishment Clause violation occurred. In fact, the ACLU in Nebraska several years ago, a local affiliate of the ACLU brought suit against "In God We Trust." The fact is there is no rampant example within the Federal Government of running roughshod over constitutional rights in Establishment Clause cases simply because we have never from the history of our founding to the present had a fee-shifting statute. All this particular statute does is put the State and local governments in the exact same position that the Federal Government is in.

A couple of these things that I would ask of my colleagues here. I think Mr. Stern has tried to argue a difference between damages and fees, on the one hand, saying that since this does not have a damage provision, then in this illustration that he mentioned with regard to the *Hansen* case and the diversity program, then he would not be able to file suit, or if he did it would be mooted because it would be over and there would be no nominal damage.

Well, first, there are exceptions to the mootness doctrine. There are a number of those kinds of exceptions. One of those is capable of repetition yet evading review.

Secondly, the declaratory judgment is, as the Supreme Court said, a much lesser or less harsh remedy and, therefore, you should—in places where injunctive relief were not appropriate, you could still declare the constitutional rights.

But, finally, I would throw out to my colleagues, would they be different, would they support this bill if this bill were to be amended to say that you could have no more than a nominal damage claim? And a nominal damage claim is $1 to $10. Would they all that? That would address their issue of mootness, and then we are back to the square one issue why we are here. Why should we have attorney's fees as a club, which they have acknowledged it is, in a confusing area of law, which they acknowledge it to be, simply as a club? I don't think that that is an appropriate way to use attorney's fees. That is not the way 1988 was designed.

Mr. STERN. Can I respond to that, Senator?

Chairman BROWNBACK. I am going to go back to Mr. Lloyd, and then I will turn to you, Mr. Stern.

Mr. LLOYD. Thank you, Senator, and I want to reference specifically the comments made by Ms. Rogers and veterans' memorials. She said the difference is that individuals can choose, family members can choose what they want, and that makes it constitutionally different. Senator, the land is Federal land. No private citizen has a right to say, "I want to erect this thing on Federal land." But I think she is unaware of or ignoring the fact when she testifies if the Government puts it up, that is different. There are 9,000 crosses at Normandy Beach—9,000 crosses, raises crosses, raised Stars of David, put up by the Government, our Government, maintained by France but it is considered American land. We put those up as a Nation to honor those who gave their lives. Those were not family decisions.

The other thing, the reference that the ACLU sent you a letter and said they will not sue. Who can put any credence on that? Maybe today they will not. Maybe if you pass your bill or your bill gets defeated, maybe they will.

I started to talk about the *Mojave Desert* case before I got so rudely interrupted. In *Mojave Desert*, who would have dreamed that the ACLU or anyone else would sue a World War I memorial 11 miles off the road in the desert? It is two tubes strapped together on a rock outcrop in 1934 by veterans to honor veterans of World War I. Here, during the Clinton administration in 1994 or 1995, it is incorporated in the Mojave Desert Preserve. At that time the Assistant Superintendent was a man named Frank Buono. He does not say a word. He does not say you cannot do this. He does not complain and say no, no. He is the Assistant Superintendent. He has got all the power in the world to stop it. He does not say a word.

The ACLU sues. It is out in the middle of the desert, no people, no press, no nothing. It is a stealth lawsuit. Nobody knows about it until the judge says destroy it and gives them $63,000 to destroy that veterans' memorial.

You have to drive to it, Senator, to be offended by it. You better take water or you might not make it back. That is how far they would go.

So I put no credence whatsoever that we have a guarantee. Oh, they wrote a letter, "We won't do it." What stops the other people who hate America from doing it? And then a very crucial thing in this discussion, all we are talking about here is money for attorneys. Money for attorneys. These statutes were passed to benefit poor people. Who is the plaintiff in the *Van Orden* case out of Texas? A homeless lawyer. That ought to bring a tear to any American eye.

I do not think that was passed to benefit people like that. Who is the plaintiff who would destroy the Mojave Desert Veterans' Memorial? Frank Buono—the same guy who was the Assistant Superintendent. He got his pension. He moved to Oregon, and he sues in California. And what is his theory, Senator? What is the injury? He might come back to visit and he might drive on that road and

he might see the cross, and if he sees it, he would be offended by it.

In his testimony, Senator, he says he has no religious objection. He says he is Roman Catholic. He just objects on constitutional grounds.

Those kinds of suits may not result in fees under Rule 11. They are tearing it down. But look at the dimension that it puts us in. We cannot even go in as the American Legion to fight a case like that because we might end up having to pay that $63,000. And I think it is critical to understand—and every Senator should—we are not only talking about attorney fees. There are no attorney fees. I was an ACLU attorney. I know to a certainty under the rules of the ACLU every case is done by staff or a volunteer pro bono attorney, who are forbidden to receive fees. The clients have no fees. The ACLU has no fees. And this is pure profit.

In the *Dover* case that counsel represented, $2 million was awarded by a court in the Dover intelligent design case, even though the pro bono firm representing the ACLU said in court and publicly announced they were waiving all fees. The ACLU had no attorney fees.

So a benevolently developed statute to protect poor people is being used for pure profit, because there are no fees. And the other dimension to your fee provisions as they exist, Senator, is those fees are supposed to belong to the clients, not the attorneys. And there is case after case after case in which municipalities and other Government entities will settle cases—maybe you are familiar with this—and they will offer a settlement that says this include attorney fees, and that puts the attorney and the client in an adverse position, and the client then can say, "I will take that," even though the attorney wants a lot more money. Every other statute that I know of, Senator, says "attorney fees incurred," except this one. In this area, we will sue you, we will demand attorney fees, and we will get market rate even though we have none. And in California, it is $350 an hour, and the municipalities cannot pay that. It is a club, and I thank you for trying to remove it.

Chairman BROWNBACK. Well, I think this is trying to establish some fairness of the debate on the Establishment Clause in this country, which is a very long and deep one. We do it based upon what is actually there and not some club that I think seems to me to be an inappropriate tool to be able to use.

I want to wrap this hearing up. Can I give you a minute? We are going to be called over for a vote, Mr. Stern, and I want to be fair with your—

Mr. STERN. The ACLU actually once brought a lawsuit challenging a cross as a war memorial. The county's defense was, if you allow them to take down the monument, they will take down the crosses and the Stars of David over individual graves. The ACLU said, "No, we are not going to do that." So it is not a question of speculation. It is not merely relying on a letter to the House committee. They have actually litigated in that fashion.

Secondly, in my earier career, I spent a lot of time on civil rights. I can tell you that municipality after municipality changed their civil service rules because the extent of Title VII was unclear. They

were afraid of paying attorney's fees to organizations that were litigating on behalf of minorities. There were settlements that were coerced in exactly the same way that has been described. This is a problem of an attorney's fee award. There are advantages. But the disadvantages are the ones you talked about.

Finally, Mr. Staver talks about nominal damages only. In the run of cases, that is probably an attractive idea. If you think, however, of the chaplains' case here in D.C. where people are talking about thousands of dollars of salary and pension, you are cutting them off. In the *Municipal Army* case, which has got a new name, where there were real solicitations lost. If you limit people to nominal damages in Establishment Clause cases, you are harming those plaintiffs.

And, finally, I come back to *Wynne*, a case brought by a private attorney, not by the ACLU, who said the only reason he could do it was because he hoped he would get attorney's fees. That sort of case, which is a clear violation of the Constitution, no uncertainty there whatsoever, would be cut off this way. If you are going to do it, at least do it so that it is across the board. When an Establishment Clause issue is fairly in the case, nobody gets attorney's fees.

Ms. ROGERS. Mr. Chairman?

Chairman BROWNBACK. And I hope you will work with us then in looking at how you would suggest that to be written so that we could have a situation where you actually had the cases discussed and decided and local communities making decisions based on merit and not on the threat of attorney's fees. That is what we are trying to get at with this particular bill.

It would be my hope at the end of the day we might get cross-aisle support that a lot of people would look at that and say, you know, this is such a tough, contentious area of law, neither side should have attorney's fees clubs, and this should be litigated by the courts. And let's have it dealt with there, but let's not throw it out at the very earliest stages just because a community is scared of the attorney's fees. On such an important, key public policy debate and confused area of the law, that seems to me to just be fundamentally fair.

We will keep the record open for 7 days—Ms. Rogers, if you have just one minute, I will take a minute; otherwise, I need to—

Ms. ROGERS. Yes, sure. Thank you so much. I just want to underscore that I think the award of attorney's fees can be helpful in many situations, for example, on RLUIPA, the Religious Land Use and Institutionalized Persons Act, the Free Exercise Act that you worked on in 2000, that allows reasonable attorney fees to be awarded to prevailing parties. So we need to be very careful about this. I think we need to be very evenhanded at least, and also very careful.

Chairman BROWNBACK. I hope you can help us with that in that process, too.

The record will remain open 7 days. I ask unanimous consent that a series of letters supporting the bill be entered into the record, and they will be.

I want to thank the panelists and those in attendance. The hearing is adjourned.

[Whereupon, at 4:02 p.m., the Committee was adjourned.]
[Questions and answers and submissions for the record follow.]
[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

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Senate Judiciary Committee
Subcommittee on the Constitution, Civil Rights and Property Rights
"Paying Your Own Way: Creating a Fair Standard for Attorneys' Fees Awards in Establishment Clause Cases"
August 2, 2006

Questions Submitted by U.S. Senator Russell D. Feingold

Answers to Questions for Mr. Mathew Staver

1. **Has Liberty Counsel represented plaintiffs in religious freedom cases? What percentage of your litigation in such cases is handled by staff lawyers and how much by affiliated attorneys?**

   Yes, Liberty Counsel has represented plaintiffs in religious freedom cases. A staff attorney is assigned to and does the primary research for one hundred percent of the litigation in religious freedom cases.

2. **Please describe Liberty Counsel's policies regarding seeking attorney's fees in cases where it participates either directly or through the work of an affiliated attorney.**

   When representing a plaintiff in a case involving a fee shifting statute, Liberty Counsel has asked for attorney's fees, but it is not the policy of Liberty Counsel to do so in every case.

3. **Has Liberty Counsel sought attorney's fees under 42 U.S.C. § 1988 or the Equal Access to Justice Act when your client was the prevailing party in litigation?**

   Liberty Counsel has sought attorney's fees under 42 U.S.C. § 1988, but not under the Equal Access to Justice Act when our client was the prevailing party in litigation.

4. **Has an attorney or law firm affiliated with or referred by Liberty Counsel sought fees when its client was the prevailing party? Has Liberty Counsel received any fees from such affiliated attorneys?**

An affiliate attorney would not be involved in a case without the presence of a Liberty Counsel staff attorney; however, an affiliate attorney has in a few cases, sought attorney's fees. Liberty Counsel has never received any fees from such affiliated attorneys.

5. **Please provide the subcommittee with a list of attorney's fees awards Liberty Counsel or an affiliated attorney has received under 42 U.S.C. § 1988 or the Equal Access to Justice Act from January 1996 to the present. For each award of fees, provide a brief description of the case and the amount awarded. In cases where fees were awarded to affiliated attorneys, indicated what portion of the fees was ultimately provided to Liberty Counsel.**

This list of cases must be compared to the total number of cases litigated by Liberty Counsel. The number of cases in which Liberty Counsel has received attorney's fees under 42 U.S.C. § 1988 represents only a small fraction of the total number of cases litigated and represents an even smaller fraction of the number of cases resolved without filing suit.

On average, Liberty Counsel represents approximately seventy litigated cases and over two hundred non-litigated cases. Of the total non-litigated cases, approximately ninety-five percent resolve without litigation, resulting in no lawsuit or claim for attorney's fees. Liberty Counsel has handled thousands of non-litigated cases in which a suit was never filed and there was never a claim for attorney's fees.

Please see attached chart for list of attorney's fees awards.

6. **Please provide the subcommittee with copies of all letters dated January 1, 2001 to present that were sent to a public authority by Liberty Counsel or an affiliated attorney demanding a change in policy that discusses the possibility of litigation if the public authority refuses to change its policy.**

It would be too burdensome to provide copies of all letters dated January 1, 2001 to present that were sent by Liberty Counsel or an affiliate attorney to a public authority. We would have to read a very large volume of letters to determine if there are any that discuss the possibility of litigation if a policy is unchanged. Most of the letters sent by Liberty Counsel are educational or informational in nature and do not discuss the possibility of filing a lawsuit. Most letters focus on the facts of the case and asking the particular public authority to comply with the current state of the law. In rare cases, a demand letter has at most stated that failure to comply with the law will result in the plaintiff seeking any and all legal recourse. We do not use the threat of attorney's fees in demand letters.

We are enclosing, as a sample, copies of two letters we sent to the City of Deltona, Florida before we filed a lawsuit in February 2006 on behalf of an artist after his religious art was censored from a Black History Month display. The first was an informational letter wherein we informed the City of its unconstitutional actions, urged it to reconsider allowing the religious art, and offered free legal assistance if the painting display was challenged by other parties. We also contacted the City by telephone. The second letter was sent after the artist requested help from Liberty Counsel. The letter states that our client will seek a temporary restraining order and pursue all other available legal remedies. A lawsuit was filed in that case. The City then complied and followed the law by reinstating the paintings. We did not

pursue damages, attorney's fees, or costs.

7. **Would you support legislation that would prohibit the awarding of attorney's fees under 42 U.S.C. § 1988 and the Equal Access to Justice Act in both Establishment Clause and Free Exercise Clause cases?**

Yes, Liberty Counsel would support legislation that would prohibit the awarding of attorney's fees under 42 U.S.C. § 1988 and the Equal Access to Justice Act in both Establishment Clause and Free Exercise cases.

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Reply to: Florida

February 9, 2006

Via Facsimile (386) 789-7230 & U.S. Mail

L. Roland Blossom
City Attorney and Acting City Manager
City of Deltona
2345 Providence Blvd.
Deltona, FL 32725

RE: Removal of Religious Art

Dear Mr. Blossom:

Liberty Counsel is a nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the traditional family. Established in 1989, we are a national organization headquartered in Orlando with a branch office in Virginia and hundreds of affiliate attorneys. We have been contacted by a number of Deltona residents who are disturbed about the city's decision to remove two pieces of artwork from the city's "Black History Month" display. According to these citizens, and to national news reports, the paintings were removed because of a concern that they might be viewed as an impermissible "establishment" of religion because they contain the word "Jesus" and because a Bible is pictured in one portion of one of the paintings.

The display of these paintings does not violate the Establishment Clause of the First Amendment. In fact, the United States Supreme Court has specifically noted that a number of religious paintings are on display and have been on display in the National Gallery in Washington D.C. *Lynch v. Donnelly*, 465 U.S. 668, 677 (1984).

> Art galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith. The National Gallery in Washington, maintained with Government support, for example, has long exhibited masterpieces with religious messages, notably the Last Supper, and paintings depicting the Birth of Christ, the Crucifixion, and the Resurrection, among many others with explicit Christian themes and messages.

Id. "There are countless other illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage." *Id.* Therefore, "[r]ather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith-as an absolutist approach would dictate-the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so." *Id.* The Court found that display of a creche in a city holiday display did not cross that threshold. Certainly, the display of two paintings which have within them references to Jesus and the Bible do not either.

In fact, the city's intentional removal of these paintings from the display evinces an unconstitutional hostility toward religion, which the Supreme Court has repeatedly stated is not permissible.

In light of this information, we would encourage the city to reconsider its decision. We are available to provide free legal assistance or defense if the city should receive any challenges to its display of the paintings.

Sincerely,

Mary E. McAlister[†]

[†]"Admitted only in California and Florida"

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Reply to: Florida

February 14, 2006

Via Facsimile (386) 789-7230 & U.S. Mail

Mayor Dennis Mulder
L. Roland Blossom
City Attorney and Acting City Manager
City of Deltona
2345 Providence Blvd.
Deltona, FL 32725

RE: Lloyd Marcus and Black History Month Display

Dear Mayor Mulder and Mr. Blossom:

We represent Lloyd Marcus, the artist whose paintings were removed from the city's "Black History Month" display because of their Christian content. By removing Mr. Marcus's paintings from the display, the City has violated the First Amendment of the United States Constitution.

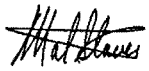
In opening City Hall to a display of artwork, including student essays about Black History Month, the City has created a "limited public forum" for First Amendment activities. Having done so, the City is prohibited from refusing to include materials based upon their religious content, and, more particularly, because of their Christian content. *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995). The Supreme Court has specifically stated that "Discrimination against speech because of its message is presumed to be unconstitutional." *Id.* at 828-829. In particular, "[w]hen government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* "Viewpoint discrimination is thus an egregious form of content discrimination." *Id.* The City has told Mr. Marcus and has been quoted in the news media as saying that it is refusing to display Mr. Marcus's paintings because of explicit references to the Christian faith – in other words, because of Mr. Marcus's Christian viewpoint on the religious aspect of Black History. This blatant viewpoint discrimination is a violation of Mr. Marcus's First Amendment rights.

As we noted in a previous letter regarding this issue, the display of these paintings does not violate the Establishment Clause of the First Amendment. *Lynch v. Donnelly*, 465 U.S. 668 (1984). It is worth noting that even the ACLU has indicated that the City has over-reacted in removing Mr. Marcus's paintings.

On behalf of Mr. Marcus, we request that the City return his three paintings to the Black History Month display in Deltona City Hall. Because of the urgency of the situation, we request that the City confirm in writing to the Florida address listed above **no later than noon on February 15, 2006** that it will permit the display of Mr. Marcus's paintings.

If the City refuses to permit the display of Mr. Marcus's painting, then Mr. Marcus will seek a temporary restraining order and pursue all other available legal remedies.

Sincerely,



Mathew D. Staver

Senator Arlen Specter
United States Senate
Committee on the Judiciary
Washington, DC 20510-6275
December 11, 2006

Dear Senator Specter:

Attached are my answers to written questions relating to the hearing before the United States Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Property Rights, entitled "Paying Your Own Way: Creating a Fair Standard for Attorney's Fees Awards in Establishment Clause Cases." As requested, I've also enclosed an edited hearing transcript.

Thank you for inviting me to participate in this hearing. Please contact me if you have any questions about these materials.

Sincerely,

Melissa Rogers

Melissa Rogers
Visiting Professor of Religion and Public Policy
Wake Forest University Divinity School
P.O. Box 221
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Questions for Professor Melissa Rogers

1. **Mr. Lloyd seemed to argue that it is constitutionally impermissible for the government to place a religious symbol of a service member's choosing on his or her gravestone at places like Arlington National Cemetery. Does the Constitution prohibit this kind of action?**

No. The Constitution clearly permits the placement of religious symbols on individual gravestones at places like Arlington National Cemetery. When a religious symbol is placed on an individual gravestone at the request of a service member or his or her family, this is protected personal religious expression and exercise rather than prohibited government-sponsored religion. See Doe v. Santa Fe Indep. Sch. Dist., 530 U.S. 290, 302 (2000)("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.")

2. **Could you elaborate on your answer to Senator Brownback regarding the ways in which the possibility of an award of attorney's fees under Section 1988 may exert pressure on governmental bodies?**

The pressure exerted by Section 1988 is pressure to comply with the law. Lawyers use this pressure to bring governmental bodies into line with the law, whether that law is the Free Exercise, Free Speech or Establishment Clause or some other constitutional or civil rights provision. That is one of the legitimate purposes of the statute.

3. **Can you comment on Ms. Woodruff's argument in her testimony that there is an inherent difference between the rights conferred by the Establishment Clause and other civil rights? She says, for example, that the Establishment Clause is an abstract, structural limitation on government, much more like the Commerce Clause than a specific protection of individual civil rights. How do you respond to that?**

A number of constitutional guarantees could be classified as both structural and rights-based. For example, the provision protecting the freedom of the press protects the right of the press to speak and publish messages. At the same time, it also plays a structural role by creating an independent check on government and thereby helping to safeguard the democratic process.

The Establishment Clause places a structural limit on the government. It prohibits the state from promoting or endorsing religion, for example. At the same time, by doing so, the Establishment Clause protects rights, such as the right to be free from governmental discrimination based on one's religious status and the right to be free from governmental pressure on religious matters. As my testimony demonstrates, there is nothing abstract about protecting these rights. These rights are crucial to human dignity and to the genius of our system of religious freedom. Sections 1983 and 1988 appropriately encompass Establishment Clause claims.

September 15, 2006

Senator Arlen Specter
Attn: Barr Huefner
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Specter:

Please find enclosed answers to the questions submitted by committee members following our testimony on August 2, 2006 at the United States Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Property Rights, hearing entitled "Paying Your Own Way: Creating a Fair Standard for Attorneys' Fees Awards in Establishment Clause Cases."

We have accumulated the most accurate estimates and information possible in the time allotted and we remain available to answer any further questions committee members may have. As requested, an electronic copy has been sent to Barr_Huefner@judiciary.senate.gov. If you have any questions, please contact Erik Zimmerman at 757-226-2489 or ezimmerman@aclj.org.

Sincerely,

Colby May, Senior Counsel and
Director, Washington Office
Shannon Demos Woodruff, Senior
Research Counsel
American Center for Law & Justice
201 Maryland Ave., N.E.
Washington, DC 20002

1. Has the American Center for Law and Justice (ACLJ) represented plaintiffs in religious freedom cases? What percentage of your litigation in such cases is handled by staff lawyers and how much by affiliated attorneys?

Yes, the ACLJ has represented plaintiffs in religious freedom cases. Approximately ninety-five (95) percent of our overall litigation in those cases is handled by ACLJ attorneys with non-ACLJ attorneys assisting with approximately five (5) percent.

2. Please describe ACLJ's policies regarding seeking attorneys' fees in cases where it participates either directly or through the work of an affiliated attorney.

The ACLJ seeks attorneys' fees in cases where authorized by law.

3. Has ACLJ sought attorneys' fees under 42 U.S.C. § 1988 or the Equal Access to Justice Act when your client was the prevailing party in litigation?

Yes.

4. Has an attorney or law firm affiliated with or referred by ACLJ sought fees when its client was the prevailing party? Has ACLJ received any fees from such affiliated attorneys?

The ACLJ has no independent knowledge as to whether and in which cases other attorneys or law firms have sought attorneys' fees. The ACLJ does not seek nor accept any fees or compensation for referrals.

5. Please provide the subcommittee with a list of attorneys' fees awards ACLJ or an affiliated attorney has received under 42 U.S.C. §1988 or the Equal Access to Justice Act from January 1996 to the present. For each award of fees, provide a brief description of the case and the amount awarded. In cases where fees were awarded to affiliated attorneys, indicate what portion of the fees was ultimately provided to ACLJ.

The following is the most accurate list that we could compile in the time allotted of cases where a court has awarded the ACLJ attorneys' fees under 42 U.S.C. § 1988 or the Equal Access to Justice Act. This list does not include cases that were resolved through a negotiated settlement where no court award of attorneys' fees occurred.

Church on the Rock v. City of Albuquerque, U.S. Dist. Ct. D.N.M., No. 94-cv-1101.
ACLJ represented plaintiffs in a challenge to the City's restrictions on showing a religious film and distributing Bibles at a senior center. The Church won the case and ACLJ was awarded $90,397.90, which was split with affiliate counsel on a *quantum meruit* basis.

Springfield v. San Diego Unified Port Dist., U.S. Dist. Ct. S.D. Calif., No. 3:96-CV-01669.
ACLJ represented plaintiffs who weren't allowed to proselytize on airport property. Plaintiffs' motion for preliminary judgment was granted because plaintiffs showed a likelihood of success

on the merits. Attorneys' fees were awarded in the amount of $32,470.75. Fees were divided between ACLJ, another nonprofit legal services organization, and affiliate counsel on a *quantum meruit* basis.

Gentala v. City of Tucson, U.S. Dist. Ct. D. Ariz., No. 97-CV-327.
ACLJ represented a couple whose group was prohibited from holding a National Day of Prayer event in the city park because the event would be from a religious viewpoint. The City's action was held unconstitutional and the ACLJ was awarded $256,491.82 in attorneys' fees, which were shared with another non-profit legal services organization on a *quantum meruit* basis.

Phillips v. Missouri, U.S. Dist. Ct. W.D. Mo., No. 4:97-cv-00748.
ACLJ represented a state employee who claimed he was fired for requesting an accommodation of his religious beliefs in the workplace. The jury found in plaintiff's favor. Court awarded $59,942.95 in attorneys' fees. All fees were retained by affiliate attorney.

Amandola v. Town of Babylon, U.S. Ct. App. 2nd Cir., No. 00-9006.
ACLJ represented a pastor and his congregation that were not allowed to use the Town Hall on an equal basis with other community groups. After the Second Circuit ruled in our favor, the ACLJ was awarded $87,500.00 in attorneys' fees. Fees were divided between ACLJ and affiliate counsel on a *quantum meruit* basis.

Christian Coalition Int'l v. United States, U.S. Dist. Ct. E.D.Va., No. 2:00-CV-136.
ACLJ represented the Christian Coalition in challenging IRS's refusal to grant it tax-exempt status. CC won and was awarded attorneys' fees and costs. Fees were awarded in amount of $58,940.96. Fees were retained by ACLJ.

Diaz v. Riverside County, U.S. Dist. Ct. C.D. Calif., No. 5:00-cv-00936.
ACLJ represented a nurse who was fired after refusing to agree to assist in abortion procedures. Jury found in plaintiff's favor. Court awarded $64,875.70 in attorneys' fees. Fees were divided between ACLJ and affiliate counsel on a *quantum meruit* basis.

Schmidt v. Cline, U.S. Dist. Ct. D. Kan., No. 5:00-cv-04138.
ACLJ defended County Treasurer against suit by ACLU challenging treasurer's display of "In God We Trust" in county office. After dismissing ACLU's case as "frivolous," the District Court directed ACLJ to move for attorneys' fees. Court awarded $8,130.00 in fees. Fees were retained by ACLJ.

Nichol v. Arin Intermediate Unit 28, U.S. Dist. Ct. W.D. Pa., No. 2:03-CV-646.
ACLJ represented an instructional assistant who was suspended by her employer for wearing a cross pendant on her necklace. The case settled after the court granted our motion for preliminary injunction, and the court approved an agreement whereby the ACLJ received $24,000 in legal fees and our affiliate counsel received $8,567.20.

6. Please provide the subcommittee with copies of all letters dated January 1, 2001 to the present that were sent to a public authority by ACLJ or an affiliated attorney demanding a change in policy that discusses the possibility of litigation if the public authority refuses to change its policy.

See Enclosures.

7. Would you support legislation that would prohibit the awarding of attorneys' fees under 42 U.S.C. § 1988 and the Equal Access to Justice Act in both Establishment Clause and Free Exercise Clause cases?

No. S. 3696 is both logical and reasonable to the extent that it distinguishes between Establishment Clause claims and the various civil rights protected by 42 U.S.C. §§ 1983 & 1988, including the right to Free Exercise of Religion. Establishment Clause claims differ both in application and definition. The civil rights identified under these sections deal largely with concrete, individualized harms, while the Establishment Clause is primarily "a specific prohibition on forms of state intervention in religious affairs." *Lee v. Weisman*, 505 U.S. 577, 591 (1992). Free Exercise claims, for example, seek to remedy specific violations of individual rights, whereas Establishment Clause claims seek to define or clarify often abstract structural limitations on government. In this respect, the Establishment Clause is much more like the Commerce Clause and other generalized limitations on government power than it is like a specific protection of individual civil rights. The remedy of attorney's fees is appropriate in civil rights actions because the vindication of one's constitutional rights is vital to the public interest. The Supreme Court in *Elrod v. Burns*, 427 U.S. 347, 373 (1976), recognized that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." By contrast, the injury in most Establishment Clause cases is abstract, consisting of mere "offense." Just as the irreparable harm that accompanies a civil rights violation supports the notion of fee-shifting in those cases, the lack of such harm in Establishment Clause cases weighs against it. After all, there is no right not to be offended. S. 3696 is designed to address an unintended misuse of the attorney's fees statute in Establishment Clause cases that is not present in cases involving the Free Exercise Clause and other civil rights provisions, recognizing that free exercise cases are not used to compel municipalities into flooding the public square with religion.

SUBMISSIONS FOR THE RECORD

TESTIMONY

of the

ALLIANCE DEFENSE FUND

before the

SENATE JUDICIARY COMMITTEE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

concerning

S. 3696, THE PUBLIC EXPRESSIONS OF RELIGION ACT OF 2006

August 9, 2006

The Alliance Defense Fund ("ADF") thanks the Chairman and members of the Subcommittee for inviting ADF to submit testimony on the constitutionality of S. 3696, the Public Expressions of Religion Act of 2006 ("PERA"). ADF is a national legal alliance defending the right to hear and speak the Truth through strategy, training, funding and litigation. ADF, through its many staff attorneys and hundreds of allied private practice attorneys across America, regularly litigates First Amendment issues in federal and state courts.

ADF is honored to address the Subcommittee regarding Congress' clear power to enact PERA, as a legislative correction to the application of the Civil Rights Attorney's Fees Act of 1976 beyond its originally-intended scope.

I. Congress clearly intended the Civil Rights Attorney's Fees Act of 1976 to encourage pursuit of "civil rights" claims, i.e., remediation of prohibited discrimination.

The legislative history of 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Act of 1976 ("Section 1988," "the 1976 Fees Act"), is straightforward. Congress enacted prevailing party attorney's fees as a legislative incentive for private enforcement of federal civil rights guarantees. It did so in reaction to the Supreme Court's decision the prior year in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

Congress did not intend the 1976 Fees Act to be revolutionary or even evolutionary. Congress instead intended to restore the historically consistent availability of attorney's fees

in suits to enforce federal civil rights guarantees. *Alyeska Pipeline* had disrupted that consistency by disapproving fee awards in cases brought under statutes lacking express authorization for such relief. Yet while Congress intended to provide a limited fee shifting opportunity for a specific class of cases, the United States Supreme Court's expansive readings of 42 U.S.C. §§ 1983 and 1988 have expanded the 1976 Fees Act far beyond recognition.

In *Alyeska Pipeline*, the Supreme Court held that federal courts do not have inherent power to award prevailing party attorney's fees to remedy government violations of the law. The Court observed that the "American Rule" (each party bearing its own attorneys fees) is "deeply rooted in our history and in congressional policy." 421 U.S. at 270. Accordingly, fee-shifting relief can only validly be awarded by courts when statutorily authorized by Congress, in specific exceptions to the general rule. *Id.* at 269. One example the Court gave of such an exception was where "encouragement of private action to implement public policy has been viewed as desirable," that is, the private attorney general concept. *Id.* at 270.

With the 1976 Fees Act, Congress gave the express authorization *Alyeska Pipeline* required for courts to award attorney's fees to prevailing parties, in federal civil rights cases not already covered by fee-shifting statutes:

> In response to the *Alyeska* decision, Congress swiftly enacted numerous fee-shifting statutes. Foremost among them was the Civil Rights Attorney's Fees Awards Act of 1976 ("Fees Act"), which "authorizes the courts to award reasonable attorney's fees to the prevailing party in suits instituted under certain civil rights acts." The Fees Act explicitly applies to suits brought under 42 U.S.C. § 1983, the statute that provides a federal cause of action for instances of official discrimination, such as violations of the Equal Protection Clause of the Fourteenth Amendment of the Constitution.

Daniel Steuer, ANOTHER BRICK IN THE WALL: ATTORNEY'S FEES FOR THE CIVIL RIGHTS LITIGANT AFTER BUCKHANNON, 11 Geo. J. on Poverty L. & Pol'y 53, 54 (2004) (footnotes omitted). *See also* S. Rep. No. 94-1011, p. 1 (1976), 1976 U.S.C.C.A.N. 5908, 5909 (noting the Act is intended to "remedy anomalous gaps in our civil rights laws created by" *Alyeska Pipeline*, by giving federal courts "discretion to award attorneys' fees to prevailing parties in suits brought to enforce the civil rights acts which Congress has passed since 1866").

The legislative history for Section 1988 is replete with references to Congress' intent to encourage private parties to pursue federal civil rights litigation. Authorizing courts to grant attorney's fees to prevailing parties in such cases was considered an important incentive to plaintiffs and their attorneys. The Senate Report declares:

> The purpose and effect of S. 2278 are simple -- it is designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits *to enforce the civil rights acts which Congress has passed since 1866.* S. 2278 follows the language of Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. 2000a-3(b) and 2000e-5(k), and section 402 of the Voting Rights Act Amendments of 1975, 42 U.S.C. 1973l(e). All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

S. Rep. No. 94-1011, p. 2 (1976), 1976 U.S.C.C.A.N. 5908, 5909-10 (emphasis added). The character of the existing laws given here as analogs for the 1976 Fees Act emphasize Congress' intent to encourage plaintiffs seeking enforcement of federal civil rights statutes.

The Senate Report stresses that both early and modern civil rights legislation has depended on attorney's fees relief to encourage private plaintiffs to advance Congressional policy. Not only has "[t]he remedy of attorneys' fees . . . always been recognized as particularly appropriate in the civil rights area, and civil rights and attorneys' fees have always been closely interwoven," but "[m]odern civil rights legislation reflects a heavy reliance on attorneys' fees as well." *Id.*, S. Rep. No. 94-1011 at 3, 1976 U.S.C.C.A.N. at 5910-11. Emphasizing the latter point, the Senate Report notes that "[s]ince 1964, every major civil rights law passed by the Congress has included, or has been amended to include, one or more fee provisions." *Id.*, S. Rep. No. 94-1011 at 3, 1976 U.S.C.C.A.N. at 5911.

The point of the Report's review of the history of encouraging private federal civil rights enforcement through fee shifting provisions is clear. Congress only intended to restore the historically consistent availability of attorney's fees in suits to enforce federal civil rights guarantees. *Alyeska Pipeline* had disrupted that consistency by disapproving fee awards in cases brought under statutes lacking express authorization for such relief. It is this context that the Senate Report notes that the Fees Act "is limited to cases arising under our civil rights laws, a

category of cases in which attorneys' fees have been traditionally regarded as appropriate." *Id.*, S. Rep. No. 94-1011 at 4, 1976 U.S.C.C.A.N. at 5912. The closing sentence of the Senate Report stresses one final time Congress' limited intent: "If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases." *Id.*, S. Rep. No. 94-1011 at 6, 1976 U.S.C.C.A.N. at 5913.

The greater weight of legislative history on the 1976 Fees Act was generated by the Senate. Nevertheless, the House Report confirms that Section 1988 was intended to encourage private enforcement of federal civil rights guarantees, as the Act's formal name indicates. It was not intended to encourage private litigation of claims arising under any and all federal law, whether statutory or constitutional in nature. One chief example of this intended narrow focus is found in the House Report's discussion of the scope of the bill. After noting that "the affected sections of Title 42 generally prohibit denial of civil and constitutional rights in a variety of areas," the House Report discusses each of those sections in turn. H. Rep. No. 94-1558, pp. 4-5 (1976). The Report emphasizes that Section 1983 provides a claim to remedy "official discrimination, such as racial segregation imposed by law" (citing *Brown v. Board of Education*), while acknowledging that Section 1983 is also applied where race is not a factor. Examples of the latter included claims arising from criminal rights violations, poll taxes, and discrimination aimed at political affiliation. H. Rep. No. 94-1558, *id.*

The statements of individual Senators and Congressmen during the debates over the 1976 Fees Act consistently confirm this Congressional intent to encourage private enforcement of federal civil rights laws. For instance, when Senator John V. Tunney, the Chairman of the Senate Judiciary Subcommittee on Constitutional Rights introduced the bill that would eventually become the 1976 Fees Act, he stated:

> [t]he purpose and effect of this bill is simple — it is to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who must go to court to vindicate their rights *under our civil rights statutes* . . . . This bill simply applies the type of "fee-shifting" provision already contained in titles II and VII of the 1964 Civil Rights Act to *the other civil rights statutes* which do not already specifically authorize fee awards.

121 Cong. Rec. 26,806 (1975) (introduction of S. 2278 by Senator Tunney) (emphases added).[1]

II. The Supreme Court has expanded the availability of prevailing party attorney's fees far beyond Congress' clearly expressed intent in enacting the 1976 Fees Act.

The 1976 Fees Act is now thirty years old. Since its passage, the Supreme Court has read the Act in a progressively expansive manner, despite the limited intent of Congress clearly expressed in the legislative history. Some justices of the High Court have criticized this expansive interpretation, albeit in different contexts than that of Establishment Clause litigation addressed by the bill before this Subcommittee. They have noted its inconsistency with the clear tenor of limited Congressional intent displayed in the legislative history.

Just four years after the passage of the 1976 Fees Act, the Supreme Court rejected the limited scope Congress clearly intended for Section 1988, in a case which also dramatically expanded Section 1983 beyond its intended scope. In the case of *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502 (1980), the Court first held that Section 1983 creates a cause of action for deprivations under color of state law of *any* federal statutory right. The Court rejected the notion that Section 1983 was only meant to cover suits to vindicate civil rights, *i.e.*, "federal legislation providing specifically for equality of rights." 448 U.S. at 7-8. The Court summarily asserted that the legislative history of Section 1983 "does not demonstrate that the plain language was not intended" to have the broad scope the Court found it to have. 448 U.S. at 8. Nevertheless, the Court suggested that arguments that Section 1983's language was not

[1] Many similar statements from Senators and Congressmen speaking in support of the passage of the 1976 Fees Act appear in the Act's legislative history. *See generally*, SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 94TH CONG., CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 (PUBLIC LAW 94-559, S. 2278), SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS (Comm. Print 1976). A comprehensive review of the legislative history of the 1976 Fees Act will be featured in a forthcoming law review article by Steven W. Fitschen, President of the National Legal Foundation and an instructor at Regent University School of Law. *See* Steven W. Fitschen, FROM BLACK MALES TO BLACKMAIL: HOW THE CIVIL RIGHTS ATTORNEY'S FEES AWARD ACT OF 1976 (42 U.S.C. § 1988) HAS PERVERTED ONE OF AMERICA'S MOST HISTORIC CIVIL RIGHTS STATUTES, draft available online at http://www.nlf.net/articles/blackmail.pdf (site last reviewed August 8, 2006).

carefully drafted to reflect Congress' true intent were "best addressed to Congress, which, it is important to note, has remained quiet in the face of our many pronouncements on the scope of § 1983." *Id.*

Similarly emphasizing plain language over any contrary legislative history, the Court also rejected any limitation on which classes of Section 1983 claims could merit prevailing party attorney's fees under Section 1988. *Thiboutot*, 448 U.S. at 9. Though the majority found the plain language of Section 1988 conclusive, it added that "the legislative history [of Section 1988] is entirely consistent with the plain language." *Id.*

Justice Powell, joined in dissent by Chief Justice Burger and Justice Rehnquist, assailed the majority's literalistic reading of both Section 1983 and Section 1988, as departing radically from Congress' intended scope for both laws:

> The Court holds today, almost casually, that 42 U.S.C. § 1983 creates a cause of action for deprivations under color of state law of any federal statutory right. Having transformed purely statutory claims into "civil rights" actions under § 1983, the Court concludes that 42 U.S.C. § 1988 permits the "prevailing party" to recover his attorney's fees. These two holdings dramatically expand the liability of state and local officials and may virtually eliminate the "American Rule" in suits against those officials.

Thiboutot, 448 U.S. at 11-12 (Powell, J., dissenting).

Justice Powell took the majority to task for an inadequate reading of and inadequate judicial respect for the legislative history of the civil rights laws at issue, then turned specifically to Section 1988. His strong criticism of the majority's failure to read Section 1988 in the limited fashion Congress intended presages the concerns now animating the proposal before this Subcommittee:

> No one can predict the extent to which litigation arising from today's decision will harass state and local officials; nor can one foresee the number of new filings in our already overburdened courts. But no one can doubt that these consequences will be substantial. And the Court advances no reason to believe that any Congress-from 1874 to the present day-intended this expansion of federally imposed liability on state defendants.
>
> . . . .

> Even when a cause of action against federal officials is available litigants are likely to focus efforts upon state defendants in order to obtain attorney's fees under the liberal standard of 42 U.S.C. § 1988. There is some evidence that § 1983 claims already are being appended to complaints solely for the purpose of obtaining fees in actions where "civil rights" of any kind are at best an afterthought . . . . The uses of this technique have not been explored fully. But the rules of pendent jurisdiction are quite liberal, and plaintiffs who prevail on pendent claims may win awards under § 1988. Consequently, ingenious pleaders may find ways to recover attorney's fees in almost any suit against a state defendant. Nothing in the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 suggests that Congress intended to remove so completely the protection of the "American Rule" in suits against state defendants.

Thiboutot, 448 U.S. at 24 (internal citations and footnotes omitted).

Members of the Supreme Court have repeatedly contested the Court's expansive reading of Section 1988 after the *Thiboutot* majority somewhat flippantly suggested Congress could rein it in if it chose to do so. For instance, Justice Powell reminded the Court that "[i]t is clear from the legislative history that § 1988 was enacted because existing fee arrangements were thought not to provide an adequate incentive to lawyers particularly to represent plaintiffs *in unpopular civil rights cases*." *City of Riverside v. Rivera*, 477 U.S. 561, 586, 106 S.Ct. 2686, 2700 (1986) (Powell, J., concurring) (emphasis added).

Similarly, Justice Kennedy, joined by Chief Justice Rehnquist, scolded the Court for extending the 1976 Fees Act beyond its originally intended scope:

> In the Civil Rights Attorney's Fees Awards Act of 1976, Pub.L. 94-559, 90 Stat. 2641, codified at 42 U.S.C. § 1988, Congress authorized the award of attorney's fees to prevailing parties in, inter alia,§ 1983 litigation. The award of attorney's fees encourages vindication of federal rights which, Congress recognized, might otherwise go unenforced because of the plaintiffs' lack of resources and the small size of any expected monetary recovery. See S.Rep. No. 94-1011, p. 6 (1976), U.S.Code Cong. & Admin.News 1976, p. 5908. *Congress was reassured that § 1988 would be "limited to cases arising under our civil rights laws, a category of cases in which attorneys fees have been traditionally regarded as appropriate."* Id., at 4, U.S.Code Cong. & Admin.News 1976, p. 5912.

Dennis v. Higgins, 498 U.S. 439, 464, 111 S.Ct. 865, 879-880 (1991) (Kennedy, J., dissenting) (emphasis added). As with Justice Powell in *Thiboutot*, Justice Kennedy noted that the Court's

overly broad readings of Section 1983 and Section 1988 created results far beyond Congress' intent to promote enforcement of civil rights. "[T]he significance of the Court's decision, in this and future Commerce Clause litigation, is that a § 1983 claim may permit dormant Commerce Clause plaintiffs to recover attorney's fees and expenses under 42 U.S.C. § 1988." *Id.* at 464.

III. Congress clearly may enact PERA as a legislative correction to overly broad judicial application of Section 1988.

Objective consideration of the bill before this Subcommittee, S. 3696, should take place against this backdrop of the Supreme Court's repeated expansion of Section 1988 through broad construction. Congress can rationally choose to begin rolling back the judicial over-expansion of Section 1988, by first identifying those areas in which the encouragement of aggressive pursuit of claims through fee shifting has proven most problematic. Indeed, as noted by the majority in *Thiboutot*, arguments that Section 1988 should not reach as broadly as the Supreme Court has construed it "can best be addressed to Congress." 448 U.S. at 8.

This Subcommittee has been presented with evidence, through the testimony of witnesses Rees Lloyd (American Legion Dept. of California), Mathew Staver (Liberty Counsel), and Shannon Woodruff (American Center for Law and Justice), that aggressive assertion of prevailing party attorney's fees in the specific sphere of Establishment Clause claims has pressured government into censoring permissible religious expression. Congress could rightly conclude that PERA is a needed corrective to the expansion of the 1976 Fees Act beyond its originally intended scope.

Evidence presented in this hearing indicates that in Establishment Clause cases, the threat of liability for plaintiffs' attorney's fees has the effect of encouraging government actors to adopt an attitude of practical hostility toward expression of or about religion in any public manner. The result is unnecessary and unfortunate censorship: self-censorship of the government's own permissible recognition of the value of religion in the history and public life of America, and censorship of the public religious expression of private citizens. This

censorship comes from a misperception that merely *allowing* public religious expression could be deemed a forbidden "establishment of religion" exposing the government to liability.

Congress could decide that the promotion of such attitudes among the government bodies in our nation is antithetical to the fundamental policies underlying the First Amendment. Other witnesses before this Committee have thoroughly documented how the last few decades of Establishment Clause litigation have created great confusion over government's proper and permissible role. The Establishment Clause was intended by the Framers and understood by the first several generations of Americans to protect religious freedom broadly by preventing the government from restricting permissible belief and practice to a specific state-approved orthodoxy. Understood this way, the prohibition on establishment of religion was intended to protect rigorous free exercise rather than act as a check on it. The unified goal of the First Amendment religion clauses was a citizenry well-equipped by strong religious conviction for the moral and ethical demands of self-government. The current litigation environment has instead prompted suppression of public expression concerning religion by government and private citizens, out of fear that some citizens may be offended that the government has even a minimally positive attitude toward religious belief.

Ironically, around the time that Congress passed the 1976 Fees Act, Justice Brennan sagely observed:

> The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion . . . . It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.

McDaniel v. Paty, 435 U.S. 618, 641, 98 S.Ct. 1322, 1336 (1978) (Brennan, J., concurring).

More recently, the United States Court of Appeals for the Sixth Circuit noted that the practical hostility by government toward religion promoted by the present confusion in Establishment Clause jurisprudence contravenes the intent of the First Amendment. In *ACLU of Kentucky v. Mercer County*, 432 F.3d 624 (6th Cir. 2005), the Sixth Circuit dismissed an ACLU Establishment Clause challenge to the presence of the Ten Commandments in a courthouse display of numerous historical documents formative in our nation's legal history. The court

first identified the chief culprit of modern Establishment Clause confusion:

> [T]he ACLU makes repeated reference to "the separation of church and state." This extra-constitutional construct has grown tiresome. The First Amendment does not demand a wall of separation between church and state.

Mercer County, 432 F.3d at 638-639 (citing *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984), *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971), *Zorach v. Clauson*, 343 U.S. 306, 312 (1952), *Brown v. Gilmore*, 258 F.3d 265, 274 (4th Cir. 2001), *Stark v. Indep. Sch. Dist., No. 640.*, 123 F.3d 1068, 1076 (8th Cir. 1997), and *ACLU of Ohio v. Capitol Square Review and Advisory Bd.*, 243 F.3d 289, 300 (6th Cir. 2001)).

The *Mercer County* court hearkened to the Sixth Circuit's earlier *en banc* decision in *Capitol Square* dismissing strict church/state separatism as "a notion that simply perverts our history." *Mercer County*, 432 F.3d at 639 (quoting *Capitol Square*, 243 F.3d at 300). According to the Sixth Circuit, the "tiresome extra-constitutional construct" of the so-called "separation of church and state" is fundamentally incompatible with America's "unbroken history" of government acknowledgment and accommodation of the religious beliefs of its citizens:

> Our Nation's history is replete with governmental acknowledgment and in some cases, accommodation of religion. *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983) (upholding legislative prayer); *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961) (upholding Sunday closing laws); *see also Lynch*, 465 U.S. at 674, 104 S.Ct. 1355 ("There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."); *Capitol Square*, 243 F.3d at 293-99 (describing historical examples of governmental involvement with religion). After all, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach*, 343 U.S. at 313, 72 S.Ct. 679. Thus, state recognition of religion that falls short of endorsement is constitutionally permissible.

Mercer County, 432 F.3d at 639.

Some witnesses before this Committee who oppose the passage of PERA posit that excluding Establishment Clause cases from the statutory fee-shifting authority lacks any rational legislative purpose. They assert that PERA could only be motivated by an impermissible hostility toward enforcement of the Establishment Clause. But the testimony from various witnesses before this Subcommittee demonstrates that encouraging the aggressive pursuit of Establishment Clause claims, in the modern environment of legal

uncertainty as to its proper scope and application, carries a risk not present with most other species of Section 1983 litigation. Establishment Clause claims frequently involve one private plaintiff pressuring government to censor the religious expression of other private citizens, or pressuring government to self-censor legitimate acknowledgment of the religious faith of its citizens. Modern Establishment Clause claims thus present a unique "zero sum" situation – a win by the plaintiff private citizen typically means a loss to other private citizens, through censorship of their religious expression or loss of their government's acknowledgment of the importance of religion to them. This dynamic is not at work in other common civil rights litigation, where the only directly interested and affected parties are the plaintiff and the government defendant (*e.g.*, an excessive force claim against a police department, a claim of free speech infringement, or an equal protection challenge).

Those opposed to PERA have done little more than weakly feint with supposed constitutional problems with the proposal, instead focusing almost entirely on policy objections. There is a reason for this: Congress plainly and logically has the power to repeal a remedy that was not constitutionally compelled when it was enacted, particularly in an area where experience shows that it is achieving undesirable results.

In the first place, the federal cause of action for a violation of constitutional rights by a state actor, 42 U.S.C. § 1983, is itself a statutory expression of the discretionary power granted to Congress by Section 5 of the Fourteenth Amendment. Section 5 states that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *See Monroe v. Pape*, 365 U.S. 167, 171 (1961) (Section 1983 was "one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment"). Thus, as vitally important as Section 1983 has become as part of our nation's scheme for ensuring that federal rights are afforded equally to every American, it is in the end a legislative policy choice as an enforcement mechanism, not a constitutional mandate.

Accordingly, the kinds of relief a court is permitted to award in cases brought under Section 1983 are also within the discretion of Congress to regulate. Indeed, the statutory

authorization for an award of attorneys fees to a prevailing party in a Section 1983 action was not enacted until 1976, more than 100 years after Section 1983 was adopted. Yet, such authorization was given by Congress under the same authority as Section 1983 itself – § 5 of the Fourteenth Amendment. *See* S. Rep. No. 94-1011 (1976), p. 5 ("Fee awards are therefore provided in cases covered by S. 2278 in accordance with Congress' powers under, inter alia, the Fourteenth Amendment, Section 5").

As discussed in Section I above, the 1976 Fees Act was motivated by legislative policy choice rather than constitutional imperative. The Act was adopted in response to the Supreme Court's *Alyeska Pipeline* decision holding that prevailing party fee awards are not a form of relief inherent in the power of courts to remedy government violations of the law, and can only validly be awarded when authorized by statute.

Inherent in any area of Congress' legislative discretion is the choice to address only those parts of a public policy problem that seem most needful of a statutory remedy. As the Supreme Court has observed:

> Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Tigner v. State of Texas*, 310 U.S. 141, 60 S.Ct. 879, 84 L.Ed. 1124. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086. The legislature may select one phase of one field and apply a remedy there, neglecting the others. *A.F. of L. v. American Sash Co.*, 335 U.S. 538, 69 S.Ct. 258, 93 L.Ed. 222.

Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 489 (1955). A logical corollary of Congress' right to address only "one phase of one field" while "neglecting the others" is its right to repeal that portion of a statutory scheme which has proven unwise, unworkable, or otherwise undesirable. A legislative act repealing a statute which was not constitutionally compelled is itself constitutionally valid. *See Perpich v. Department of Defense*, 496 U.S. 334, 354-355 (1990) (repeal of statutory requirement not compelled by Constitution was constitutionally permissible legislative policy choice).

PERA can thus be viewed as a valid exercise of Congress' discretion to roll back a

statutory remedy not constitutionally compelled, in a particular area where Congress may conclude that it has produced undesirable results.

Conclusion

For the reasons discussed above, PERA is a constitutionally permissible step toward restoring Congress' original limited intent for Section 1988. In the unique arena of modern Establishment Clause litigation, confusing, contradictory and constantly shifting jurisprudence has created a mine field for local and state governments. The potent threat of expensive prevailing party attorney's fees awards currently aids aggressive litigation by strict separationist and secularist plaintiffs. This has created an environment where both public expression of private religious beliefs, and public acknowledgment of the importance of religion in American history and life, are presumed to violate the Establishment Clause. Congress has the prerogative to conclude that this should not be the prevailing environment under our First Amendment, in which religious freedom is the first liberty. Congress has the discretion to enact PERA to change the currently prevailing incentives for government censorship of religious expression.

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August 10, 2006

The Honorable Sam Brownback
United States Senate
Washington, D.C. 20510

Dear Senator Brownback:

The ***American Civil Rights Union*** is pleased to offer its unqualified support for your efforts to amend the statutes on "civil rights" attorneys fees back to their original, laudable purpose. As you can tell both from our Policy Board shown on this letterhead and our legal activities shown on our website, we often find ourselves locked in legal battles with the ACLU. We agree with you that the taxpayers' dollars which flow into ACLU coffers through court-awarded fees and costs are making our task more difficult, and causing increasing harm to American history, culture, education, and citizenry.

Now and in the future we will be writing about the issues you raise, and raising them ourselves as we engage in litigation against the ACLU, primarily in First Amendment cases. The Supreme Court is beginning to show the traditional common sense concerning mentions of religion in American public arenas that applied in our first two centuries. However, there are many other federal judges with lifetime tenure who will continue to make such fee awards to the ACLU -- until your bill becomes law, and terminates the power of any court to make such awards in "religious" cases, regardless of their willingness to do so.

Thank you for your contribution to the preservation of America's religious history -- across all sectarian boundaries -- exactly as the Framers of our Constitution intended.

Cordially,

Susan A. Carleson
Chairman and CEO

1600 Wilson Boulevard, Suite 960 Arlington, VA 22209 Phone: 877.730.ACRU Fax: 703.566.2322 E-mail: info@theacru.org

August 1, 2006

Honorable Sam Brownback
United States Senate
303 Senate Hart Office Building
Washington, DC 20510-1604

Dear Senator Brownback:

The American Legion, the nations largest war-time veterans organization, would like to thank you for sponsoring and allowing testimony on S. 3696, ***Veterans' Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006***. This bill would amend the Revised Statutes of the United States to eliminate the chilling effect on the constitutionally protected expression of religion by State and local officials that results from the threat that potential litigants may seek damages and attorney's fees. It would also protect the Boy Scouts ability to use public property without fear of expensive legal defense bills.

With the enactment of the Civil Rights Attorney's Fees Awards Act in 1976, attorney's fee awards were awarded to nearly all prevailing parties in any civil action brought by or against the U.S. government, any government agency or any Federal official acting in an official capacity. The Act applied to suits brought for deprivation of constitutional rights and covered suits brought under, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, and the Civil Rights Act of 1964. It was never the intent of Congress, in writing 42 US Code 1988, to twist the statute in "Establishment Clause" cases to claim attorney's fees. Cases in which a plaintiff suffers no real injury to person, property or civil right, but is merely "offended" at the sight of some symbol of America's religious history or heritage.

The American Legion believes Congress should amend 42 U.S.C. Section 1988 to expressly preclude Courts from awarding attorney's fees under that statute in lawsuits brought to remove or destroy religious symbols, or to litigate against the Boy Scouts. We appreciate you taking the lead on this issue in the United States Senate.

Sincerely,

Steve Robertson, Director
National Legislative Commission

200 Maryland Avenue, N.E.
Washington, D.C. 20002-5797

Alliance of Baptists

American Baptist Churches USA

Baptist General Association of Virginia

Baptist General Conference

Baptist General Convention of Texas

Baptist State Convention of North Carolina

Cooperative Baptist Fellowship

National Baptist Convention of America

National Baptist Convention U.S.A. Inc.

National Missionary Baptist Convention

North American Baptist Conference

Progressive National Baptist Convention Inc.

Religious Liberty Council

Seventh Day Baptist

July 31, 2006

Dear Senator,

The Baptist Joint Committee for Religious Liberty (BJC) urges you to oppose S. 3696, the so-called "Veterans' Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006." The BJC is a 70-year-old education and advocacy organization dedicated to the principle that religion must be freely exercised, neither advanced nor inhibited by government. Our mission stems from the historic commitment of Baptists to protect religious freedom for all.

We oppose this legislation that seeks to limit access to the federal courts for individuals seeking the enforcement of the Establishment Clause. To prohibit the recovery of attorney's fees and limit the remedy available to injunctive and declaratory relief would essentially shut the courthouse door to many who seek to defend our first freedom. Enforcement of the First Amendment is essential for the defense of religious freedom. The protections of the First Amendment, however, are not self-enforcing. If someone is forced to sue the government to enjoy their constitutional rights, justice and fundamental fairness dictate they be able to recover the legal fees expended to do so.

Despite the claims of the bill's sponsor, this legislation does not promote the free expression of religion. Instead, the bill undermines fundamental constitutional protections that have provided for a great deal of religious expression in the public square. The Establishment Clause exists to protect the freedom of conscience and to guard against government promotion of religion, leaving religion free to flourish on its own merits. This point was well-stated by former Supreme Court Justice Sandra Day O'Connor in her concurring opinion in *McCreary County, Kentucky v. ACLU (2005)*. She noted, "Voluntary religious belief and expression may be threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices."

Governmental entities should be encouraged to uphold constitutional values, not invited to ignore them. Yet, passage of S. 3696 would encourage elected officials to violate the Establishment Clause whenever they find it politically advantageous to do so. By limiting the remedies for a successful plaintiff, this measure would remove the threat that exists to ensure compliance with the Establishment Clause.

We urge you to oppose S. 3696. The bill is an assault on an essential constitutional freedom. If passed, it would greatly harm religious freedom and set a dangerous precedent for other constitutional protections.

Sincerely,

K. Hollyn Hollman

K Hollyn Hollman
General Counsel

Phone: 202-544-4226 • **Fax:** 202-544-2094 • **E-mail:** bjc@BJConline.org • **Website:** www.BJConline.org

Sam Brownback
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FOR IMMEDIATE RELEASE
Contact Brian Hart/John Rankin

NEWS RELEASE
August 2, 2006

BROWNBACK EXAMINES LEGAL FEES FOR JUDICIAL ACTIVIST GROUPS
Groups like the ACLU use civil rights law to force taxpayers to pay their attorney's fees

WASHINGTON – U.S. Senator Sam Brownback today chaired a hearing of the Judiciary Subcommittee on the Constitution to discuss a bill that would prevent judicial activist groups from using a 1970s-era civil rights law to force taxpayers to pay their attorney's fees in cases related to public displays of religious faith.

"Groups with a partisan political agenda should not have their legal costs reimbursed by state and local governments," said Brownback. "If a group like the ACLU wants to sue a city for displaying a religious image, it should pay the bill itself, not take advantage of a provision that was designed to reimburse poor individuals pursuing civil rights cases."

The Public Expressions of Religion Act, S.3696, would require parties to pay their own attorney's fees when litigating cases regarding the First Amendment's Establishment Clause, which prohibits the government from endorsing or promoting a particular religious view. This would remedy a nuance in the Civil Rights Attorney Fees Awards Act of 1976 which allows winning parties in Establishment Clause cases to recover attorney's fees.

At the hearing, Shannon Woodruff of the American Center for Law and Justice testified that, "While the attorney's fees statute of the civil rights bill was enacted for the laudable purpose of ensuring that those who cannot afford an attorney may still seek judicial protection of their basic civil rights, it produced the unintended effect of financing a fierce campaign against any and all expression or accommodation of religion in the public arena. This campaign, orchestrated by a few interest groups, is fueled not only by ideology but by the potential for large fee awards against government defendants."

Brownback added, "It's part of our democracy that a judicial activist group has the right to sue a local or state government for a perceived violation of the First Amendment. But it's wrong for these well-heeled activist groups to abuse civil rights laws so that their legal costs are paid for by taxpayers."

When faced with a lawsuit over an alleged violation of the separation of church and state, most local and state governments acquiesce because losing the case would mean paying the attorney's fees of the group bringing suit. For example, when the ACLU sued Los Angeles County to remove a small cross visible in the county's official seal, the county chose to remove the cross rather than face the risk of losing the case and paying the ACLU's legal bills. When several groups won a case in Alabama to remove a Ten Commandments display from a courthouse, taxpayers were forced to pay the ACLU and others nearly $550,000.

Brownback is a member of the Senate Judiciary Committee and chairs the Subcommittee on the Constitution, Civil Rights and Property Rights.

-30-

THE CATHOLIC UNIVERSITY OF AMERICA
Columbus School of Law
Interdisciplinary Program in Law & Religion
Marriage Law Project
Washington, DC 20064

Subcommittee on the Constitution, Civil Rights, and Property Rights,
Committee on the Judiciary, United States Senate
August 2, 2006

Hearing on
Creating a Fair Standard for Attorney's Fees in Establishment Clause Cases

Written Testimony[♣] of Robert A. Destro[♣] & Lincoln C. Oliphant[♣]

Mr. Chairman and Members of the Committee:

The Marriage Law Project is a public interest research service that serves churches and religious organizations engaged in the legal struggle to defend marriage. A constituent part of the Interdisciplinary Program in Law and Religion of the Columbus School of Law, we have been providing legal aid, litigation support, and legislative counsel services in nearly every state and in several foreign countries informally since 1994 and formally since 1996. Though the primary focus of the work of the Marriage Law Project is marriage, the Law & Religion Program has been focused on religious liberty here in the United States and abroad since its founding in 1985.

Though we never seek or obtain such fees, we are providing this written testimony because attorney's fees are an important part of the cost/benefit equation in the prosecution and defense of religious liberty cases. As such, the rules governing attorney fee awards – including the case law of

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[♣] The testimony presented below is that of the authors. It does not necessarily reflect the position of The Catholic University of America or the Columbus School of Law.

[♣] Professor of Law and Director, Interdisciplinary Program in Law and Religion; Principal Investigator, Marriage Law Project.

[♣] Research Fellow, Marriage Law Project.

e-mail: destro@law.edu *Phone: 202 319 5140* *Fax: 202 319 4498*

the federal courts – are an important, but poorly understood, aspect of the administration of justice under the Constitution and civil rights laws of the United States. The goal of this testimony is to bring attention to the ways in which the attorney's fee rules provide powerful and important financial incentives to those who file the contentious and important lawsuits that are the subject of this legislation, and equally powerful and important financial *disincentives* to those who would defend or litigate them on a full record.

In sum, we think that the American people are entitled to an accounting of the millions of dollars in attorney's fees awarded each year. Congress has mandated payment of such fees, and only Congress can demand the accountability and "transparency" needed to allow an independent analysis of the effects, both good and bad, of current policy.

The "American Rule" on attorney's fees generally requires that each party in a civil lawsuit pay its own legal fees. The courts do not award attorney's fees to prevailing parties unless there is explicit statutory authority to do so. *Buckhannon Board & Care Home v. W. Va. Dept. Health & Human Resources*, 532 U.S. 598, 602 (2001) (affirming a long-standing rule).

Congress, however, has enacted "nearly 200 federal statutes" that permit prevailing parties to shift their fees to the losing party, and the States have added "approximately 4,000" more. J. Toothman & W. Ross, LEGAL FEES: LAW AND MANAGEMENT §6.01 (2003).[1]

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[1] The Appendix to the Toothman and Ross book lists the fee-shifting provisions of the United States Code That Appendix is organized as follows: Agriculture, showing 14 sections of law; Antitrust, showing 13; Banking, 8; Bankruptcy, 10; Child Protection, 8; Civil Rights, 12 (including 42 U.S.C. §1988(b)); Communications, 4; Consumer Protection, 14; Criminal Law and Related Litigation, 7; Debt Regulation, 9; Energy, 7; Environmental Regulation, 35; Federal Procedural Rules, 14; Governmental Operations, 37; Housing, 22; Immigration, 2; Intellectual Property, 14; Labor and Employment, 17; Mining Regulations, 6; Native Americans, 7; Privacy, 11; Securities Regulation, 7, Social Security, 3; Transportation, 7; and Miscellaneous, showing 16 sections of law.

Fee-shifting statutes are written in various ways, but even when written in neutral and contingent language like that of 42 U.S.C. §1988(b)[2], the law has developed into a powerful engine that encourages the *filing* of lawsuits, but not their effective litigation or disposition.

Because prevailing plaintiffs are almost always entitled to attorney's fees, but prevailing defendants are almost never allowed attorney's fees except in special (and rare) circumstances, R. Rossi, 1 ATTORNEY'S FEES §10:20 (3rd ed. 2002), there is a powerful incentive for plaintiffs to *file* and continue lawsuits, and an equally powerful *dis*incentive for defendants to litigate them to judgment. Defendants who lose their cases (or even a relevant part of the case) must pay attorney's fees, even if they acted in good faith under a claim of constitutional or statutory right, or if the financial burden of the payment will fall on innocent taxpayers or intervening parties that seek for personal reasons to intervene in support of the law or practice at issue. *Id.* at nn. 15 & 16. Such facts do not constitute "special circumstances."

We thank the Subcommittee for asking if our present laws are fair and wise, but we respectfully submit that this is – or should be – only the start of a far more comprehensive review of law and policy governing attorney fee awards.

- We encourage the Congress to direct the Government Accountability Office and the Federal Judicial Center to undertake a comprehensive study of attorney fee awards, and to issue a timely report. This report would allow this Committee and the American people to think clearly about the costs and benefits attorney's fees and cost-shifting.

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[2] The statute that S. 3696 would amend, Section 722(b) of the Revised Statutes, 42 U.S.C. §1988(b), says, "In any action or proceeding to enforce a provision of [specified sections of the U.S. Code] 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. . . ." This text is neutral as between plaintiffs and defendants (it speaks only of "prevailing parties"), and it makes fees contingent, not mechanical, to be awarded at the discretion of the court.

- We also encourage the Congress to seek the cooperation of the National Center for State Courts and the National Association of State Attorneys General to undertake a comprehensive study of attorney fee awards in state courts, and to issue a timely report. This report would allow this Committee and the state legislatures to examine the close relationship between federal and state rules governing attorney's fees and cost-shifting.

We make these suggestions because we have looked for the data on attorney's fees. We have asked others to look as well, and it appears that *no one knows* how many millions of dollars the federal, state, local governments and private parties are paying. We also do not know *who* is obtaining these fee awards; for what services; at what hourly rates; and whether the public is getting its money's worth.

We think it is about time that voters learned how much of their money is being paid to the lawyers who sue their school districts, police departments, immigration authorities, military officials, and others. We also think that Congress needs to hear, first hand, from state law enforcement authorities about how the costs associated with such lawsuits affect their ability and willingness to defend otherwise meritorious cases.

Similarly, we are deeply concerned about the vast sums that charitable organizations spend to defend themselves in court. To take but one example, think of the good that the Boy Scouts of America could have done with the millions of dollars they are spending to defend themselves from plaintiffs who would force them to abandon their principles. This is a somewhat different problem than that sketched above with respect to governments, but not entirely. The Boy Scouts have been sued repeatedly under the civil rights laws by plaintiffs who seek nothing less than a change in the Boy Scouts institutional identity and belief system. Some of these cases are governed by the traditional "American Rule" that private parties must bear their own costs, but other cases, in which cities and states are sued *because they associate with the Boy Scouts or allow them to use public property,* do

involve attorney fee awards against the state and local government, and perhaps the Boy Scouts themselves. Our view is that the details of *all* such awards should be matters of public information. To the extent that the Government Accountability Office and the Federal Judicial Center can obtain data on attorney's fees paid by non-governmental institutions, that too would be most helpful.

Nothing we say here should be read as a condemnation of the "private attorney general" principle on which the attorney's fees statutes rest, or as an indication that we oppose attorney fee awards. Such statutes are useful and appropriate because they provide a means by which individuals may redress their grievances in court, but their association with the civil rights laws should not insulate either the attorneys who receive them or the courts that award them from the public accountability and transparency rules that should attend any receipt of taxpayer money. There is a story to be told here, and the only way Congress can learn the details is to "follow the money."

In sum, it is time to review the law, and to do so with a greater understanding of the facts. Perhaps it is time to limit some attorney's fees, as proposed in the Chairman's S. 3696 or Representative Hostettler's H.R. 2679. Perhaps it is also time to take a hard look at the impact of fee shifting rules on the efforts of charitable and religious institutions to protect their own First Amendment rights and institutional identities. In all these cases, it does not appear that we have adequate information about the cumulative effect of fees on taxpayers, governments, charitable and religious organizations, and other litigants.

There are many members of Congress, and millions of taxpayers, who would be most interested to learn how much money American courts order transferred from civil rights defendants to plaintiffs' lawyers. We hope you will agree that research on attorney's fees is long overdue. Please let us know if we can provide additional information. Thank you.

August 1, 2006

Dear Senator:

On behalf of the thousands of families represented by Family Research Council, I am writing to urge that you sponsor S. 3696, the "Veterans Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006," commonly known as PERA, which was introduced by Senator Sam Brownback.

Last year, the ACLU took in about $150 million dollars. Yet to further grow their coffers, they deplete taxpayer dollars by filing lawsuits over everything from nativity scenes to displays of the Ten Commandments to crosses or any other vestige of our Judeo-Christian heritage. To accomplish this money grab the ACLU abuses regulations that were created to protect civil rights and the rights of citizens using these measures to attack religious liberty.

Sections 42 U.S.C. § 1983 and 42 U.S.C. § 1988 of the U.S. Code are sections which allow citizens to not only sue State and local governments for alleged constitutional violations of their individual rights, but also to be awarded attorney fees if they gain any small victory at any stage of judicial review. The results of ACLU's degradation of our nation's laws have created an atmosphere of intimidation, where some state and local governments merely cave to pressure from the ACLU for fear they would not have the funds to pay the exorbitant lawyers' fees the ACLU normally claims. We think that it is important to allow people to challenge the actions of federal, state and local governments on Constitutional grounds. However, we believe this legislation is important to prevent the use of legal fees to threaten local, state and federal governments over establishment clause cases.

I urge you to contact Senator Brownback's office and be a cosponsor of this important piece of legislation. We look forward to working alongside you to protect taxpayers and the public purse.

Sincerely,

Tom McClusky
Vice President of Government Relations
Family Research Council

FAMILY RESEARCH COUNCIL
801 G STREET NW, WASHINGTON, D.C. 20001 • 202-393-2100 • 202-393-2134 *fax* • (800) 225-4008 *order line* • www.frc.org

WRITTEN TESTIMONY OF STEVEN W. FITSCHEN CONCERNING SENATE BILL 3696, VETERANS' MEMORIALS, BOY SCOUTS, PUBLIC SEALS, AND OTHER PUBLIC EXPRESSIONS OF RELIGION PROTECTION ACT OF 2006 SUBMITTED TO THE SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION
August 8, 2006

Mr. Chairman and members of the Senate, I am pleased to be able to submit this testimony to you regarding Senate Bill 3696, Veterans' Memorials, Boy Scouts, Publics Seals, and Other Public Expressions of Religion Protection Act of 2006 (hereinafter PERA). By way of introduction, I am Steven W. Fitschen, President and Executive Director of the National Legal Foundation, and Research Professor of Law at Regent University School of Law. The National Legal Foundation is a public interest law firm, which among other things, defends various governmental defendants when they are sued for allegedly violating the Establishment Clause. Also, as Research Professor of Law, one of my areas of expertise is Establishment Clause jurisprudence.

In neither of these capacities do I endorse legislation. However, I do from time-to-time render opinions on the constitutionality of, or necessity for, various pieces of legislation. I have testified before the Alaska and Colorado legislatures.

In the instant case, I have personal knowledge of the deleterious effect of the possibilities of attorney's fees being awarded under 42 U.S.C. 1988. From 1990-1993, I was employed at the American Center for Law and Justice, a public interest law firm similar to the National Legal Foundation. From 1993 until present I have been employed at the National Legal Foundation. At both of these public interest law firms, it has not been unusual to be contacted by state, county, or local government officials who have been threatened with lawsuits for putative violations of the Establishment Clause by organizations such as the American Civil Liberties Union or other so-called strict separationist organizations.

When we offer our services free of charge to defend these governmental defendants should the lawsuit actually be brought, the strict separationist organization will often reply, in effect, "That is fine if you win. But if you don't, you will end up paying *our* attorney's fees." In such situations, the governments often give in to the demands of the separationist organizations, even though they and we believe that no actual violation of the Establishment Clause has occurred.

Thus, the result has nothing to do with the merits of the asserted Establishment Clause violation. Rather, the outcome is determined by the economic reality—especially with small towns and counties—that the would-be defendant simply cannot take the chance that it will loose and end up having to figure out how to finance attorneys' fees. In this country—where the role of religion has been both historically pervasive and recently controversial; and where Establishment Clause jurisprudence has been in complete disarray—at the very least, the merits of such threatened lawsuits should be determined on a level playing field. America's religious heritage and the public acknowledgment of that heritage should not give way to what I have elsewhere called blackmail.[1] The description just given of the response of governments to

[1] This testimony is largely derived from a forthcoming law review article, tentatively entitled, FROM BLACK MALES TO BLACKMAIL: HOW THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 (42 U.S.C. § 1988) HAS PERVERTED ONE OF AMERICA'S MOST HISTORIC CIVIL RIGHTS STATUTES. In that article, I note that many of the original civil rights statutes were designed to protect Black males. Thus, while "Black males" is sometimes used synecdochially for all minorities, it is also sometimes used literally. This provides the basis for the play on words between "Black males" and "blackmail." Therefore, in the article as well as in my

threats of lawsuits suffices to demonstrate why I call this phenomenon "blackmail."

In light of the above, it would be possible to accumulate numerous examples of the fees actually awarded in various Establishment Clause cases. However, it is more to the point to illustrate how the *threat* of attorneys' fees has perverted the intent of both the Congress that drafted what is today known as 42 U.S.C. 1983 and the Congress that drafted what today is known as 42 U.S.C. 1988. Consider the following quartet of quotations.

The first is a quotation from Senator Tunney as he introduced the bill that became the Civil Rights Attorney's Fee Act of 1976:

> Mr. President, today I am introducing a bill which would allow a court, in its discretion, to award attorney's fees to a prevailing party in suits brought to enforce the civil rights acts which Congress has passed since 1866.
>
> . . . .
>
> The purpose and effect of this bill is simple—it is to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who must go to court to vindicate their rights under our civil rights statutes. . . . [2]

What the civil rights statutes were concerned about, in turn, can be discerned by the second quotation, which is from Senator Coburn during the debate on the Ku Klux Act of 1871. Section 1 of that Act exists today as 42 U.S.C. 1983.

> Affirmative action or legislation is not the only method of a denial of protection by a State, State action not being always legislative action. A State may by positive enactment cut off from some the right to vote, to testify or to ask for redress of wrongs in court, to own or inherit or acquire property, to do business, to go freely from place to place, to bear arms, and many other such things. This positive denial of protection is no more flagrant or odious or dangerous than to allow certain persons to be outraged as to their property, safety, liberty, or life; than to overlook offenders in such cases; than to utterly disregard the sufferer and his prosecutor, and treat the one as a nonentity and the other as a good citizen. How much worse is it for a State to enact that certain citizens shall not vote, than allow outlaws by violence, unpunished, to prevent them from voting? How much more effectual is the denial of justice in a State where the black man cannot testify, than in a State where his testimony is utterly disregarded when given on behalf of his race? How much more oppressive is the passage of a law that they shall not bear arms than the practical seizure of all arms from the hands of the colored men? A systematic failure to make arrests, to put on trial, to convict, or to punish offenders against the rights of a great class of citizens is a denial of equal protection in the eye of reason and the law, and justifies, yes,

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testimony, (other than when quoting) I will use the word "Black" even when older sources might use the words "Negro" or "Colored" or where newer sources might use the term "African American."

[2] 121 CONG. REC. 26,806 (1975) (statement of Senator Tunney introducing S. 2278), *reprinted in* SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 94TH CONG., CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 (PUBLIC LAW 94-559, S. 2278), SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS, at 3 (Comm. Print 1976) [hereinafter SOURCE BOOK].

> loudly demands, the active interference of the only power that can give it. If, in addition to all this, the State should fail to ask the aid of the General Government in putting down the existing outlawry, would not a more complete and perfect case of denial of protection be made out? Indeed, it would be difficult to conceive of a more glaring instance of the denial of protection.
>
> It may be safely said, then, that there is a denial of the equal protection of the law by many of these States.[3]

This was the historical root of the original civil rights statutes. As my testimony will shortly demonstrate, it was still civil rights as historically understood that 42 U.S.C. 1988 was intended to protect. The Establishment Clause was simply not intended to be covered by either § 1983 or § 1988.

However, today that is not the case. And, as suggested above, this has led to a deleterious state of affairs. Consider the third quotation. It is from a popular magazine, U.S. News and World Report, and describes one example of the current state of affairs:

> The yuletide work of the American Civil Liberties Union is never done.
>
> While others frolic, the grinches of the ACLU tirelessly trudge out each year on yet another crèche patrol, snatching Nativity scenes from public parks and rubbing out religious symbols. Sometimes, on school property, they catch a rabbi or a minister mentioning God or carolers singing "Silent Night" instead of just songs about snowmen. Then they have to turn everybody in to a judge. Otherwise, our liberties would be threatened.
>
> Last year, for instance, the crèche squad hit Vienna, Va., arguing that a Nativity scene on town property violated the Supreme Court's so-called plastic reindeer rule. In a notably tortured 1984 decision, the court said that a crèche on private land in Pawtucket, R.I., was permissible because it was part of a predominantly secular display including candy canes and plastic reindeer. In an attempt to ward off the crèche patrollers, the crèche in Vienna was surrounded with two plastic Santas, one reindeer and one snowperson. No good. The ACLU found a judge to strike it down. Presumably a future Supreme Court decision will determine the precise number of reindeer needed to excuse the presence of one baby Jesus in a Christmas display.
>
> This year, *mindful of the legal fees it would have to pay if the ACLU struck again*, the town ordered the Vienna Choral Society to ban all religious carols (including a Hanuka [sic] song) from its performance at the annual Christmas pageant and stick to songs like "Jingle Bells." To its credit, the choral society was unwilling to accept the town's pre-emptive censorship and quit the pageant. Now the town has a Christmas pageant that contains no hint of Christmas, at least as traditionally understood to refer to Jesus. But an ACLU grinch in Richmond, Stephen Pershing, is apparently still not satisfied. According to the Washington Post, he thinks Vienna may be violating the Constitution by having any kind of Christmas program at all.
>
> Frosty, yes. Jesus, no. How did we reach the point where running off to the judges to get every trace of religion extinguished from public life seems

[3] CONG. GLOBE, 42nd Cong., 1st Sess. 459 (1871) (statement of Senator Coburn).

> normal? The Founding Fathers would certainly be aghast at the ACLU's fundamentalist version of what separation of church and state requires. . . .[4]

The final quotation comes from a state representative of the ACLU:

> "If we prevail, we get fees, and they're going to pay the [Indiana Civil Liberties Union] an enormous amount of fees."[5]

It is noteworthy that, although this last statement is now almost six years old, it was made by the same lawyer, Kenneth Falk, who has sued the Indiana legislature to prevent its chaplains from praying as they see fit.

My point is simple: Section 1983 was enacted to protect the civil rights of the newly-freed slaves from the actions of the Ku Klux Klan and from the inaction of the states. It was and is one of America's most historic and important legislative milestones. But now it is being perverted to achieve the agenda of the strict separationists. When strict separationists employ §§ 1983 and 1988 in ways never intended by Congress, it is entirely appropriate for this Congress to enact legislation that will simply return § 1988 to its original boundaries.

Thus, I have previously submitted testimony to the House of Representatives supporting the House version of this bill which would disallow attorneys' fees in all Establishment Clause cases. I believe that such a bill is an entirely appropriate response to the problems that have been and will be identified in my testimony. However, the Senate bill's approach is also defensible. It would, in effect, be saying that the Senate understands that § 1988 has been being employed outside its original boundaries, but that the Senate is deliberately allowing it to continue to be used in some Establishment Clause cases but not others. Everything written hereafter is potentially applicable to either the House or the Senate approach. I simply note that the House approach is a complete return to § 1988's original boundaries, while the Senate approach is a partial return.

I begin by noting that at least one federal court has questioned whether § 1983 is a valid vehicle under which to bring an Establishment Clause claim. In *Cammack v. Waihee*,[6] resident taxpayers of Hawaii challenged the Hawaii law that made Good Friday a state holiday, alleging that it violated the Establishment Clause of the United States Constitution and the co-extensive Establishment Clause of the Hawaii Constitution.[7] The Ninth Circuit upheld the district court's granting of summary judgment in favor of the government defendants.[8] However, along the way, the Ninth Circuit questioned, without further addressing, the "efficacy" of bringing the Establishment Clause claim under § 1983:

> Because the parties have not briefed the point, we express no opinion on the efficacy of bringing an establishment clause challenge under § 1983. We note that this route has been traveled before without exciting controversy (or even comment). *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 785, 77 L. Ed. 2d 1019,

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[4] John Leo, *A Secular Christmas to All*, U.S. NEWS & WORLD REPORT, Dec. 28, 1992, at 31 (emphasis added).
[5] Rick Thackeray, *All Eyes Poised on the 7th Circuit Outcome; 'Commandments' Decision Seen as Key to Glut of Cases*, THE IND. LAWYER, Nov. 22, 2000, at 1.
[6] 932 F.2d 765 (9th Cir. 1991).
[7] Also challenged were state and city collective bargaining agreements regarding paid leave on Good Friday. *Id.* at 767-68.
[8] *Id.* at 768, 782.

103 S. Ct. 3330 (1983) (simply noting that establishment clause challenge was brought under § 1983); *ACLU v. County of Allegheny*, 842 F.2d 655, 656-57 (3d Cir. 1988) (same), *aff'd in part and rev'd in part*, 492 U.S. 573, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989).[9]

However, neither the Ninth Circuit nor any other court has ever revisited the possibility that § 1983 is an improper vehicle. That, of course, is precisely why PERA is a valid response to the "blackmailing" problem discussed above.

I turn first to the purpose of § 1988. While this Congress is free to enact PERA regardless of the original purpose of § 1988, it is instructive to understand, as stated above, that PERA would actually be reinforcing the original purpose of § 1988, not running counter to it.

THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 (42 U.S.C. § 1988) WAS DESIGNED TO AID CIVIL RIGHTS LITIGANTS ONLY

The purposes for which § 1988 was enacted are not hard to discover.[10] The legislative history of the Act is unambiguous. However, the majority and minority opinions of the Supreme Court in *Maine v. Thiboutot*[11] came to opposite conclusions about § 1988's purpose. Therefore, it is necessary to examine the conclusions of the two factions of the Court after examining the legislative history of § 1988 in light of the facts of *Thiboutot*.

A brief description of the case will suffice to set the stage. In *Thiboutot*, the Thiboutots challenged The Maine Department of Human Services' determination that they would no longer receive certain benefits based upon the Department's interpretation of the governing federal statute.[12] The Thiboutots, in addition to seeking review of administrative determinations, filed a claim under § 1983. The Supreme Court faced two questions: "(1) whether § 1983 encompasses claims based on purely statutory violations of federal law, and (2) if so, whether attorney's fees under § 1988 may be awarded to the prevailing party . . . ."[13] While the fight in *Thiboutot* was over what *laws* should be reached by § 1988, this debate has important implications for the question of Establishment Clause claims brought under § 1988.

When a majority and minority of the Court disagree on a matter of legislative history, one of the best ways to determine who had the better of the argument is to see whose survey of the available material is more complete.[14] Driven by this desire to be fair by being thorough, my examination of the legislative history of the Civil Rights Attorney's Fees Awards Act will be fairly extensive.

As introduced, The Civil Rights Attorney's Fees Awards Act of 1976 was designed to do

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[9] *Id.* at 767 n.3.

[10] Similar statements regarding the purposes of § 1988 can be found in many law review articles. *See, e.g.*, Kristina H. Chung, *Kids Behind Bars: The Legality of Incarcerating Juveniles in Adult Jails*, 66 IND. L.J. 999, 1018 n.122 (1991); Stanley M. Grossman, *Statutory Fees Shifting in Civil Rights Class Actions: Incentive or Liability?*, 39 ARIZ. L. REV. 587, 589, 592 (1997); Edward A. Morse, *Taxing Plaintiffs: A Look at Tax Accounting for Attorney's Fees and Litigation Costs*, 107 DICK. L. REV. 405, 420-21 (2003). However, few do anything more than baldly assert the proposition or give a few brief fragmentary quotations (and these are often relegated to footnotes). This article will give more extensive quotations.

[11] 448 U.S. 1 (1980).

[12] *Id.* at 2.

[13] *Id.*

[14] *See, e.g.*, Keith A. Fournier, *In the Wake of* Weisman: *The* Lemon *Test is Still a Lemon, But the Psycho-Coercion Test is More Bitter Still*, 2 REGENT U. L. REV. 1, 18-19 (1992).

one thing. This single purpose was noted in the first of my introductory quotations, to which I now return. Senator John V. Tunney, as Chairman of the Senate Judiciary Subcommittee on Constitutional Rights,[15] noted when he introduced the original version of the bill that became the Act that

> [t]he purpose and effect of this bill is simple—it is to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who must go to court to vindicate their rights under our civil rights statutes. The Supreme Court's recent Alyeska decision has required specific statutory authorization if Federal courts continue previous policies of awarding fees under all Federal civil rights statutes. This bill simply applies the type of "fee-shifting" provision already contained in titles II and VII of the 1964 Civil Rights Act to the other civil rights statutes which do not already specifically authorize fee awards.[16]

Senator Tunney went on to emphasize that the Court, in *Alyeska Pipeline Service Corp. v. Wilderness Society*,[17] was dealing with "an environmental case not a civil rights case."[18] Indeed, *Alyeska*, withdrew the availability of attorney's fees in all cases—not just civil rights—for which Congress had not specifically authorized such fees.[19] However, as Senator Tunney's remarks quoted above indicate, his purpose in introducing his bill was to restore attorney's fees *only* in civil rights cases, not in all cases.

Senator Tunney noted that civil rights litigants often have no funds with which to hire an attorney and that often no damages are awarded from which the attorneys could draw a fee.[20] According to Senator Tunney, "Congress recognized this need when it made specific provision for such fee-shifting in titles II and VII of the Civil Rights Act of 1964, which apply to discrimination in public accommodations and employment."[21] Tunney added that attorney's fees provisions were "equally appropriate in other civil rights statutes, because there, as in employment and public accommodations cases, Congress depends heavily on private enforcement."[22]

Just two more examples out of the many available will suffice to show that Senator Tunney's sole concern was with civil rights litigation. He explained that

> the reason why this legislation specifically authorizing fees awards under all our civil rights laws was not introduced years ago is simply that, until very recently [in *Alyeska*], it was widely believed and held that the courts already had the power to award counsel fees in all civil rights cases as part of their inherent equity power.[23]

Finally, it is profitable to note the specific examples that Tunney used to illustrate his

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[15] SOURCE BOOK at II.
[16] 121 CONG. REC. 26,806 (1975), *reprinted in* SOURCE BOOK at 3.
[17] 421 U.S. 240 (1975).
[18] 121 CONG. REC. 26,806 (1975), *reprinted in* SOURCE BOOK at 4.
[19] *See* 421 U.S. at 269.
[20] 121 CONG. REC. 26,806 (1975), *reprinted in* SOURCE BOOK at 3.
[21] *Id.* at 26,806, SOURCE BOOK at 3-4.
[22] *Id.* at 26,806, SOURCE BOOK at 4 (referring to the private attorney general concept).
[23] *Id.*

concern:

> [*Alyeska's*] effect was to create an unexpected and anomalous gap in our civil rights laws whereby awards of fees are suddenly unavailable in the most fundamental civil rights cases. For instance, fee are now authorized in an employment discrimination suit brought under title VII of the 1964 Civil Rights Act, but not in the same suit brought under 42 U.S.C. 1981, which protects similar rights but involves fewer technical prerequisites to the filing of an action. Fees are allowed in a suit under title II of the 1964 act challenging discrimination in a private restaurant, but not in suits under 42 U.S.C. 1983 redressing violations of the Federal Constitution or laws by officials sworn to uphold the laws.[24]

In making these remarks, Tunney often used language contained in the Report from the Committee on the Judiciary, which he presented to the Senate.[25] So, for example, the Committee Report stated that the purpose of the bill "is to remedy anomalous gaps in our civil rights laws created by [*Alyeska*]."[26] Similarly, the Report expressed concern that attorney's fees were now "unavailable in the most fundamental civil rights cases"[27] and demonstrated the anomaly with the same examples quoted above from Senator Tunney.[28]

However, the Report was more explicit, indeed emphatic, that the attorney's fees were not to be available in all cases impacted by *Alyeska*:

> This bill, S. 2278, is an appropriate response to the *Alyeska* decision. It is limited to cases arising under our civil rights laws, a category of cases in which attorneys fees have been traditionally regarded as appropriate. It remedies gaps in the language of these civil rights laws by providing the specific authorization required by the Court in *Alyeska*, and makes our civil rights laws consistent.[29]

Furthermore, the Report was explicit that the bill was designed to remedy defects in the Reconstruction-era laws: "The Court expressed the view, in dictum, that the Reconstruction Acts did not contain the necessary congressional authorization [for attorney's fees]."[30]

Only two Senators, Senator Hugh Scott and Senator Mathias spoke during the debate of the bill prior to its amendment. Both reiterated the familiar themes: this bill was a direct response to *Alyeska* but it was intended to reach only civil rights cases.[31]

At this point in the debate, Senator Edward Kennedy introduced "an amendment in the nature of a substitute."[32] The original bill, as introduced by Senator Tunney, read in its entirety:

> *Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled*, Revised Statutes § 722 (42 U.S.C. Sec.

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[24] *Id.*
[25] *See generally* S. REP. NO. 94-1011 (1976), *reprinted in* SOURCE BOOK at 7-13.
[26] *Id.* at 1, SOURCE BOOK at 7.
[27] *Id.* at 4, SOURCE BOOK at 10.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] 122 CONG. REC. 31,471 (1976), *reprinted in* SOURCE BOOK at 19-20.
[32] *Id.* at 31,471-72, SOURCE BOOK at 21-22.

> 1988) is amended by adding the following: "In any action or proceeding to enforce a provision of § 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, 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."[33]

Senator Kennedy's substitute did two things. First, it provided for the citation of the act as The Civil Rights Attorney's Fees Awards Act of 1976.[34] Second, it added the words "title IX of Public law 92-318," *i.e.*, the Education Amendments of 1972, between "sections 1977, 1978, 1979, 1980, and 1981 of the Revised statutes" and "title VI of the civil rights Act of 1964."[35] Kennedy stated that the purpose of the amendment was to "expedite final enactment of [the] bill" by conforming it to the version pending in the House of Representatives.[36]

Senator Kennedy then commented upon his amendment. He started by reiterating what Senators Tunney, Scott, and Mathias had previously stated: The bill was a reaction to *Alyeska* and was intended to apply only to civil rights case.[37]

Senator Kennedy then explained why the House had added title IX to its version of the bill: "inclusion of cases brought under title IX would mean that where educational programs which receive Federal assistance discriminate on the basis of sex or blindness, courts would be able to make discretionary awards of attorneys' fees . . . ."[38]

Senator Kennedy was careful to fit the title IX provision squarely under the civil rights rubric, and indeed, within the Fourteenth Amendment rubric, thus implicitly harkening back to the Reconstruction-era legacy:

> In recent years, there has been a growing recognition that discrimination on the basis of sex is both pervasive and persistent. For that reason Congress has banned sex discrimination in such areas as employment, housing, credit, and, in title IX of the Emergency School Aid Act, education programs or activities which receive Federal assistance. The title is the analog, in the field of education, of title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race or sex, they [sic, read "which"?] violate fundamental rights which are at the bedrock of our society's notion of fair play and human decency. It is Congress' obligation to enforce the 14th amendment by eliminating entirely such forms of discrimination, and that is why both title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972 have been included. As basic provisions of the civil rights enforcement scheme that Congress has created, it is essential that private enforcement be made possible by authorizing attorneys' fees in this essential area of the law.

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[33] 121 CONG. REC. 26,806 (1975), *reprinted in* SOURCE BOOK at 5. The *Revised Statutes of 1875* was the first codification of public laws that were categorized by subject matter and assigned title and section numbers. Then, in 1926, the first addition of the *United States Code* was published and sections of the *Revised Statutes* were rearranged, still by subject, into the new titles of the *Code* and assigned new section numbers. Hence, § 1979 of the *Revised Statutes* is the 1875 version of the current *Code* § 1983.

[34] 122 CONG. REC. 31,471 (1976), *reprinted in* SOURCE BOOK at 21.

[35] *Id.*

[36] *Id.* at 31,472, SOURCE BOOK at 21-22 (referring to H.R. 15460).

[37] *Id.* at 31,472, SOURCE BOOK at 21.

[38] *Id.* at 31,472, SOURCE BOOK at 22.

> Title IX also reaches another pernicious form of discrimination—that against blind people and those who are visually impaired—and in these circumstances the same fundamental principles apply.[39]

Senator Kennedy repeatedly emphasized that he was concerned with providing a fee-shifting remedy to fight "discrimination"[40] in areas such as "jobs, housing, credit, or education"[41] using the "civil rights laws."[42] He noted that fee-shifting was currently used in other areas of the law[43] and that fee-shifting in other areas of the law was pending at the moment.[44] Clearly, Senator Kennedy conceived of the amended bill as extending Reconstruction-era protection to women and blind people and no further.

The remainder of the Senate debate was marked by only a handful of notable components. First, numerous Senators who favored the bill reiterated the points discussed above.[45] Second, those Senators who opposed the bill filibustered and offered various amendments, the purpose of which was merely to delay the vote.[46] Third, one amendment was offered by those who supported the bill.[47] Fourth, some substantive discussion of the content of the final bill occurred.[48]

Numerous amendments (in addition to Senator Kennedy's) were offered. None had a serious chance of passage until Senator Allen agreed to "trade" an amendment for ending the filibuster,[49] as will be discussed below. The first amendment was offered by Senator Jesse Helms (R, NC). It would have added six more sections to the bill, running 120 lines long,[50] that would have, in Senator Helm's words, "grant[ed] successful litigants in civil cases or agency hearings against the Federal Government, and acquitted criminal defendants, the right to an award of legal fees and other expenses [such as expert witness fees and costs of studies, reports,

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[39] *Id.*
[40] *Id.* at 31,472, SOURCE BOOK at 22-23.
[41] *Id.* at 31,472, SOURCE BOOK at 23.
[42] *Id.*
[43] *Id.* Also see SOURCE BOOK app. E, listing 90 laws with fee-shifting provision to which many speakers referred. *E.g.*, 122 Cong. Rec. 31,472, 31,851 (1976), *reprinted in* SOURCE BOOK at 23, 92 (Kennedy); *id.* at 32,185, SOURCE BOOK at 138 (Tunney); *id.* at 35,114, 35,117, SOURCE BOOK at 236, 242 (Anderson); *id.* at 35,116, 35,122, SOURCE BOOK at 240, 252 (Drinan); *id.* at 35,124, SOURCE BOOK at 259 (Railsback); *id.* at 35,126, SOURCE BOOK at 263 (Kastenmeier).
[44] 122 CONG. REC. 31,472 (1976), *reprinted in* SOURCE BOOK at 23. The pending bill to which Senator Kennedy referred was introduced early in the year 1976 as S. 2715 "which would authorize, among other things, awards of attorneys' fees in judicial actions for review of certain Federal administrative decisions." *Id.* The bill was an amendment to the Administrative Procedure Act found in title 5, chapter 5 of the U.S. Code, S. REP. NO. 94-863, at 1 (1976), but spent the next four years in both House and Senate Committees until finally enacted in 1980 and codified in 5 U.S.C. §504. Equal Access to Justice Act, Pub. L. No. 96-481, Title II, sec. 203(a)(1), §504, 94 Stat. 2325 (1980).
[45] *See, e.g.*, 122 CONG. REC. 31,832 (1976), *reprinted in* SOURCE BOOK at 74-75 (Hathaway); *id.* at 31,850-51, SOURCE BOOK at 91-92 (Kennedy); *id.* at 32,185, SOURCE BOOK at 138-39 (Tunney).
[46] *See infra* notes 49-62 and accompanying text.
[47] 122 CONG. REC. 31,792 (1976), *reprinted in* SOURCE BOOK at 63-64 (offered by Bumpers).
[48] *See generally* 122 CONG. REC. 32,396, 33,311-15 (1976), *reprinted in* SOURCE BOOK at 169-70, 193-205.
[49] *Id.* at 33,311, SOURCE BOOK at 194.
[50] *Id.* at 31,477-78, SOURCE BOOK at 34-36.

tests, and similar items] incurred in preparing and pursuing the litigation or the defense against prosecution for a Federal crime."[51] The amendment was tabled by a vote of 54 to 27.[52]

Immediately after this vote, Senator Allen (D, AL) offered an amendment adding the title IX provision to Senator Tunney's original bill because he did not want Senator Kennedy's "substitute . . . [to] cut off all other amendments."[53] This amendment was tabled by a vote of 54 to 24.[54] Thereafter, amendments continued to be offered to both the original and the substitute bills.[55]

After these first two votes, it was obvious to those opposing the bill that they did not have nearly enough votes to defeat it. Indeed, Senator Allen explicitly admitted as much on the Senate floor.[56] Nevertheless, the fight went on.

First of all, numerous amendments were introduced, the content of which has been lost to the legislative history. The Senate Debates simply record that they were introduced and were ordered to be printed and to lie on the table.[57] These amendments were obviously dilatory in nature as evidenced, for example, by Senator Allen's introduction of twenty-two and Senator Thurmond's introduction of eleven amendments at once, none of which were ever acted upon.[58]

A few other amendments contain enough information to discuss. Of the remaining seventeen amendments considered significant enough to be included in the legislative history appendices,[59] sixteen were offered by those opposing the bill. Of these, thirteen were tabled.[60] These included five by Senator Helms of North Carolina, five by Senator Allen of Alabama, two by Senator Thurmund of South Carolina, and one by Senator Scott of Virginia.[61] One might assume that because they were offered as delaying tactics by opponents and were quickly tabled, they grant us no insight into the purpose of the Act. And indeed, for some of the amendments that is the case.

However, some of the other amendments do tell us something. The hallmark of these amendments was to make attorney's fees available in a wide range of cases.[62] Had those favoring the bill had no problem with throwing the door wide open they could have agreed to such amendments rather than fight them. This is especially significant for instant purposes since the very point of this march through legislative history is to demonstrate that only civil rights

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[51] *Id.* at 31,478, SOURCE BOOK at 36.
[52] *Id.* at 31,480-81, SOURCE BOOK at 43-45.
[53] *Id.* at 31,481, SOURCE BOOK at 45.
[54] *Id.* at 31,483, SOURCE BOOK at 51-53.
[55] SOURCE BOOK app. C.
[56] 122 CONG REC. 31,488 (1976), *reprinted in* SOURCE BOOK at 58.
[57] *E.g.*, *id.* at 31,500, SOURCE BOOK at 63 (two amendments); *id.* at 31,792, SOURCE BOOK at 64 (fifteen amendments besides Bumpers'); *id.* at 32,326, SOURCE BOOK at 146 (thirty-four amendments).
[58] *Id.* at 32,326, SOURCE BOOK at 146.
[59] Only amendments voted on during the debates were included. SOURCE BOOK app. D at 295 n.1.
[60] SOURCE BOOK app. C.
[61] *Id.*
[62] *See supra* notes 50-51 and accompanying text. Additionally, amendment No. 2378 awarded reasonable attorneys' fees, at the court's discretion, to a prevailing defendant even if they could not show the plaintiff brought the action in bad faith, 122 CONG. REC. 31,792 (1976), *reprinted in* SOURCE BOOK at 64; amendment No. 473 awarded attorneys' fees to the prevailing party upon a showing of bad faith of the losing party, *id.* at 31,834 , SOURCE BOOK at 81; amendment No. 2350 reimbursed taxpayer's expenses in certain cases, *id.* at 31,846-47, SOURCE BOOK at 84-85; amendment No. 2409 awarded reasonable attorneys' fees, at the court's discretion, for frivolous action, *id.* at 32,394, SOURCE BOOK at 163; and amendment No. 2392 awarded reasonable attorneys' fees as part of the costs awarded a prevailing defendant, other than the United States, when the plaintiff acted in bad faith in bringing certain actions, *id.* at 32,394-95, SOURCE BOOK at 165-66.

cases were in view during the debates over and passage of the Civil Rights Attorney's Fee Act.

Instead, the only idea that had any traction was the idea of adding attorney's fees in proceedings involving the Internal Revenue Service. Thus, an amendment to the original bill, proposed by Senator Goldwater, providing certain remedies in the case of a taxpayer being audited for a second time, was adopted.[63] Since Senator Kennedy's substitute was eventually passed in lieu of the original bill, Senator Goldwater's amendment came to naught. Of course, Senator Allen's much simpler amendment addressing IRS proceedings eventually became part of the final bill.[64] As mentioned previously, this was what he "traded" for ending the filibuster.[65]

However, Senator Goldwater's amendment was debated. In this context, Senator Muskie (D, ME) made a point, also raised by other Senators during the debate, that the Civil Rights Attorney's Fees Awards Act was narrow, applying to civil rights only.[66]

Only one amendment was offered by anyone supporting the bill. Senator Bumpers introduced an amendment, which was never voted upon, that would have allowed prevailing defendants to be awarded attorneys' fees without having to show that the lawsuit had been brought "in bad faith, frivolously, vexatiously, or for the purpose of harassing such defendant."[67] Senator Bumpers thought it necessary to add this provision because the Judiciary Committee Report had stated that defendant attorneys' fees would be awarded only when such motivations could be shown.[68] The most important implication for instant purposes is Senator Bumpers' statement that he believed that the courts would interpret the new legislation consistently with the Report.[69]

Thus, in summary, what little can be gleaned by examining the many proffered amendments comports completely with the introductory comments, the Judiciary committee report and the floor debate that occurred up to and including the time at which Senator Kennedy offered his substitute.

Finally, the floor debate viewed as a whole is also instructive. That portion not dedicated to dealing with the amendments discussed above is remarkable for its consistent theme—this bill is about civil rights only. Statements similar to those already quoted in this article were made repeatedly.[70] In fact very few of the remarks shed any additional insight since the majority of them were so redundant.

One of the few additional insights can be gleaned from comments by Senator Long (D, LA) who was worried about the "slippery slope." However, even his "slippery slope" was

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[63] *Id.* at 32,175-76, SOURCE BOOK at 131-32.

[64] *Id.* at 33,311, 33,315, SOURCE BOOK at 194, 204.

[65] *See supra* note 49 and accompanying text.

[66] Senator Muskie was concerned that the bill would die in the House if it was broadened by Senator Goldwater's IRS amendment, so he introduced a letter addressed to Senator Kennedy from the Chairman of the House Judiciary Committee stating, among other things, that "S. 2278 presently is a very narrow bill intended to enable private enforcement of civil rights acts." 122 CONG. REC. 32,184 (1976), *reprinted in* SOURCE BOOK at 136-37.

[67] *Id.* at 31,792, SOURCE BOOK at 64.

[68] *Id.* at 31,792, SOURCE BOOK at 63-64 (quoting Report, *supra* note 34).

[69] *See* 122 CONG. REC. 31,792 (1976), *reprinted in* SOURCE BOOK at 64. The Report stated that "[s]imilar standards [requiring proof of bad faith] have been followed not only in the Civil Rights Act of 1964, but in other statutes providing for attorneys' fees. *Id.* So, even though the plain language of S. 2278 provided for awarding attorneys' fees to the prevailing party without explicitly mentioning any "bad faith" exceptions, cannons of statutory construction presume that a new statute is enacted in light of previous judicial decisions or the judicial construction of previous statutes regarding the same subject. 73 AM JUR. 2D *Statutes* § 79 (2001) (citations omitted).

[70] *See id.* at 31,832, SOURCE BOOK at 74-75 (Hathaway); *id.* at 32,185, 33,313-14, SOURCE BOOK at 138, 199-200 (Tunney); *id.* at 33,314, SOURCE BOOK at 200-02 (Kennedy); *id.* at 33,314, SOURCE BOOK at 202-03 (Abourezk).

limited to discrimination cases: "When you start out with this, you cannot decline to pay the lawyer's fee for those who sue because of sex discrimination, because of disability discrimination, because of any type of discrimination whatever, with respect to those who have a meritorious lawsuit."[71]

Another insightful exchange occurred between Senators Helms and Kennedy:

> Mr. Helms. . . . . As author of the provision adding title IX to the bill, does the Senator anticipate that it will apply to cases where the question of abortion is involved?
>
> Mr. Kennedy. I believe the answer to that would be "No."
>
> Mr. Helms. In other words, the Senator is saying that even in an employment case where a woman is dismissed for having an abortion: and while there is an allegation of a constitutional right, her suit also alleges sex discrimination since only women have abortions. The answer is "No"?
>
> Mr. Kennedy. Title IX cases are brought solely to remedy discrimination on the basis of sex.
>
> Mr. Helms. So the Senator does not intend that this provision apply in cases where abortion is an issue?
>
> Mr. Kennedy. I do not see the point the Senator is making, quite frankly. I do not see the relevancy of the argument. The question of abortion would not generally arise under title IX . . . .

From there, Senator Kennedy's response was based upon the legislative history of title IX.[72]

However, the instructive point here is that Senator Kennedy *could* have responded that the constitutional right to an abortion was already implicated under § 1983 without the inclusion of title IX. Such an answer would have indicated a belief that constitutional rights other than those protecting civil rights were intended to be covered by the bill. While Senator Kennedy's choice of answer could have been motivated by any number of reasons, it is at least worth noting that it was consistent with his own prior statements and those of many other Senators that the bill was only intended to reach civil rights.

Finally, after the Allen amendment adding fees for IRS actions was adopted, Senator Kennedy yet again emphasized that there had been one original purpose of the bill and that Senator Allen's amendment was the sole deviation from that purpose:

> I welcome the Allen amendment. While the original purpose of this bill was to authorize awards of fees in court actions brought to enforce our civil rights laws, there is no question that there are numerous other situations where fees are justified.
>
> One such situation is indeed where taxpayers suffer harassment from the Internal Revenue Service. . . .
>
> . . . .
>
> It should be clear, then, that a provision authorizing fee awards in tax

[71] *Id.* at 32,187, SOURCE BOOK at 140.
[72] *Id.* at 32,396, SOURCE BOOK at 169.

> cases has a fundamentally different purpose from one authorizing awards in lawsuits brought by private citizens to enforce the protections of our civil rights laws. In enacting the basic civil rights attorney's fees awards bill, Congress clearly intends to facilitate and to encourage the bringing of actions to enforce the protections of the civil rights laws. By authorizing awards of fees to prevailing defendants in cases brought under the Internal Revenue Code, however, Congress merely intends to protect citizens from becoming victims of frivolous or otherwise unwarranted lawsuits.[73]

Senator Kennedy also gave examples of the type of cases in which attorney's fees had been awarded prior to *Alyeska*. He cited cases in which a Black veteran had been denied burial in a local cemetery, Blacks had been kept off of juries, a Black man had been harassed by the police, doctors rendering assistance to Blacks had been denied privileges at a local hospital, a highway was put through a black rather than a white neighborhood, blacks were charged higher rents in a housing project, housing projects were segregated, one housing project advertised "whites only," officials accepted Social Security Act funds and failed to provide services, and mental patients were forced into unpaid labor against their will.[74] Senator Kennedy's reference to the cases involving Social Security funds and highway construction was of great significance to the Supreme Court majority in *Thiboutot*,[75] and we shall return to this fact shortly.

Thus, the record is clear—the entire debate in the Senate centered on guaranteeing attorneys' fees in the civil rights context—whether statutorily or constitutionally based.

Next I turn to the record from the House of Representatives. The House debate was much shorter than the Senate debate—obviously the House was feeling time pressure.[76] Indeed, no amendments were offered.[77] A motion to re-commit was easily defeated by a vote of 104 to 268,[78] and the bill quickly passed by a vote of 306 to 68.[79]

Furthermore, much of the same sentiment—that the bill was all about civil rights—was repeated in the House.[80] So for example, Representative Kastenmaier noted, "We held 3 days of hearings, and determined, consistent with the Justice Department suggestions, that our initial approach to the problem would be to respond with narrowly drawn legislation: such as, to authorize attorney's fees in those specific situations where private enforcement of civil and constitutional rights was anticipated and to be supported."[81] Representative Kastenmaier went on to give examples of the types of cases that would be covered. Interestingly he chose four of

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[73] *Id.* at 33,312-13, SOURCE BOOK at 196-98.
[74] *Id.* at 33,314, SOURCE BOOK at 201.
[75] The Court identified the cases *Bond v. Stanton*, 528 F.2d 688 (7th Cir. 1976), regarding Social Security funds, and *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D.Cal. 1972), regarding highway construction, as "an example of the cases 'enforc[ing] the rights promised by Congress or the Constitution' which the Act [§ 1988] would embrace." Maine v. Thiboutot, 448 U.S. 1, 10 (1980) (quoting Senator Kennedy, 122 CONG. REC. 33,314 (1976) [SOURCE BOOK at 202]).
[76] 122 CONG. REC. 35,115 (1976), *reprinted in* SOURCE BOOK at 238 (statements by Representatives Rousselot and Anderson respectively, indicating that "the hour is late" and they were "in the last day of [the] session.").
[77] *See* SOURCE BOOK app. C (listing no amendments in the summary table); *see generally id.* at 35,114-18, 35,121-30, SOURCE BOOK at 235-278 (record of the House debate).
[78] 122 CONG. REC. 35,129 (1976), *reprinted in* SOURCE BOOK at 272.
[79] *Id.* at 35,130, SOURCE BOOK at 276.
[80] *See generally id.* at 35,114-16, 35,122, 35,124, 35,126-28, SOURCE BOOK at 236-39, 252-53, 259-60, 263-69.
[81] *Id.* at 35,126, SOURCE BOOK at 263.

the same cases that Senator Kennedy had given, but did *not* include the Social Security case.[82] Similarly, Representative Fish gave examples of the type of cases that would be impacted. All of them involved civil rights, including the three that he specifically stated were filed under § 1983.[83]

However, a few additional insights can be gained here too.[84] First, the House was much more explicit that the legislation was in direct response to the financial impact of the *Alyeska* case on the public interest movement. For example, in the Report of the House Judiciary Committee, one reads the following:

> In the hearings conducted by the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, the testimony indicated that civil rights litigants were suffering very severe hardships because of the *Alyeska* decision. Thousands of dollars in fees were automatically lost in the immediate wake of the decision. Representatives of the Lawyers Committee for Civil Rights Under Law, the Council for Public Interest Law, the American Bar Association Special Committee on Public Interest Practice, and witnesses in the field testified to the devastating impact of the case on litigation in the civil rights area. Surveys disclosed that such plaintiffs were the hardest hit by the decision. The Committee also received evidence that private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so. Because of the compelling need demonstrated by the testimony, the Committee decided to report a bill allowing fees to prevailing parties in certain civil rights cases.
>
> It should be noted that the United States Code presently contains over fifty provisions for attorney fees in a variety of statutes. In the past few years, the Congress has approved such allowances in the areas of antitrust, equal credit, freedom of information, voting rights, and consumer product safety. Although the recently enacted civil rights statutes contain provisions permitting the award of counsel fees, a number of the older statutes do not. It is to these provisions that much of the testimony was directed.[85]

Thus, from a different angle—that of the financial impact on the public interest law movement—one can clearly see that the House was aware that *Alyeska's* impact went beyond the issue of civil rights, but that Congress intended to limit its response to that category of cases.

Another insight can be gained from the House Report. Under a section entitled "Scope of the Bill," the Report notes that the "affected sections of Title 42 generally prohibit denial of civil and constitutional rights in a variety of areas . . . ."[86] It goes on to address each section individually.[87] In its description of § 1983, the Report notes that § 1983 is utilized to challenge

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[82] *Id.* at 35,126, SOURCE BOOK at 263-64. *See also supra* note 74 and accompanying text (statements of Kennedy).
[83] *Id.* at 35,126, SOURCE BOOK at 265. *See also Id.* at 35,127, SOURCE BOOK at 267 (Holtzman regarding inclusion of title IX).
[84] Some of these insights, however, are not germane to my testimony, e.g., whether the bill creates new private rights of action. *Id.* at 35,124, SOURCE BOOK at 259.
[85] H.R. REP. NO. 94-1558, at 2-3 (1976), *reprinted in* SOURCE BOOK at 210-211 (citations omitted). The same discussion took place in the Senate.
[86] *Id.* at 4, SOURCE BOOK at 212.
[87] *Id.* at 4-5, SOURCE BOOK at 212-213.

"official discrimination, such as racial segregation imposed by law,"[88] and cites *Brown v. Board of Education*.[89] The report also notes that § 1983 is used in non-racial situations. The examples include poll taxes, unconstitutional searches, political affiliation discrimination, and unlawful terms and conditions of confinement.[90] Each of these, while not facially aimed at racial discrimination, have historically been especially problematic in minority populations. So, for example, each of the cases cited involved practices (such as the poll tax) that were historically targeted at Blacks, dealt with Black plaintiffs and explicitly connected the case facts to the history of § 1983, analogized the plaintiffs to Blacks, or dealt with basic liberty interests of other targeted groups (the mentally ill).[91]

The House debate also highlighted the fact that references to constitutional rights were references to those constitutional rights that are related to civil rights, not references to any and every constitutional right. For example, Representative Seiberling stated:

> If the law does not authorize the awarding of attorneys' fees in meritorious civil rights cases, many potential plaintiffs will be deterred from bringing deserving cases to remedy violations of the Constitution . . . .
>
> Mr. Speaker, neither the Constitution nor the civil rights laws are self-executing. Instead, they both rely on public or governmental and on private enforcement. The government obviously does not have the resources to investigate and prosecute all possible violations of the Constitution, so a great burden falls directly on the victims to enforce their own rights. Our laws should facilitate that private enforcement and should—within reasonable limits—encourage potential civil rights plaintiffs to bring meritorious cases.[92]

Thus, the record is clear once again. The House Report and debate are in complete accord with the Senate Report and debate: the Civil Rights Attorney's Fees Awards Act of 1976 is about exactly what its title indicates—civil rights.

However, we must remember that the Supreme Court in *Thiboutot* did not think so. The entire point of the long examination of the legislative history just conducted was to set the stage for a fair evaluation of the views of the *Thiboutot* majority and the *Thiboutot* minority. The majority latched onto Representative Drinan's statement that "[u]nder applicable judicial decisions, § 1983 authorizes suits against State and local officials based upon Federal statutory as well as constitutional rights. For example, Blue against Craig, 505 F.2d 830 (4th Cir. 1974)."[93] Noting that *Blue* involved a claim that "North Carolina's Medicaid plan was inconsistent with the [Social Security Act],"[94] the *Thiboutot* Court used Drinan's citation of *Blue* as authority for the proposition that *all* statutory rights are covered by § 1983.

However, this assertion cannot be sustained based upon Representative Drinan's citation

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[88] *Id.* at 4, SOURCE BOOK at 212.
[89] 347 U.S. 483 (1954).
[90] H.R. REP. NO. 94-1558, at 5, SOURCE BOOK at 213 (citing *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) (poll taxes); *Monroe v. Pape*, 365 U.S. 167 (1961) (unconstitutional search); *Elrod v. Burns*, 427 U.S. 347 (1976) (employment discrimination); and *O'Conner v. Donaldson*, 422 U.S. 563 (1975) (institutional confinement)).
[91] *See* cases cited at *id.*
[92] 122 CONG. REC. 35,128 (1976), *reprinted in* SOURCE BOOK at 269-270.
[93] 448 U.S. 1, 10 (1980) (quoting Representative Drinan, 122 CONG. REC. 35,122 (1976) [SOURCE BOOK at 253]).
[94] *Id.* at 10 n.8.

of *Blue*. First, Drinan cited *Blue* for a simple proposition, namely that § 1983 allows for suits based upon statutory rights. He never even indicated that *Blue* involved anything other than civil rights. Drinan's remarks give no indication as to whether he knew the case was about Medicaid and the Social Security Act.

Even assuming for the sake of argument that Drinan did know what *Blue* was about, the *Thiboutot* Court's assertion cannot stand. The *Blue* court itself pointed out that the case before it could be categorized as an equal protection case since the plaintiffs were representative of a class that claimed to be deprived of a federal right solely on the basis of membership in that class.[95] This characterization of *Blue* brings it squarely under the civil rights rubric.

Having eliminated Drinan's citation of *Blue* as a valid reason for claiming that §§ 1988 and 1983 are applicable outside the civil rights context, we are left with the Court's use of Senator Kennedy's list of cases.[96] As mentioned earlier, the Court pointed out Kennedy's mention of a Social Security case and a case in which a highway was constructed through a Black neighborhood.[97]

Even this is a flimsy reed upon which to rest the Court's argument. First of all, the Court postured the highway case as one involving the Department of Transportation Act of 1966 and related statutes.[98] However, as we have seen above, Senator Kennedy saw this case as another type of racial discrimination. Thus, this case, too, is validly included under the civil rights rubric.

That leaves the Social Security Act case, *Bond v. Stanton*,[99] to be explained. Several possible reasons for Senator Kennedy's use of this case present themselves. First, this case involved welfare benefits and several of the plaintiffs were welfare rights advocacy groups.[100] In the minds of many, the battle for welfare rights was part and parcel of the civil rights movement.[101] A second possible reason, although one that from the context of Senator Kennedy's comments is not as likely, is that this case was used as an example of attorney's fees being granted on the basis of bad faith. This was the basis of the fee award in the case and bad faith fees had been discussed both in the Senate Report[102] and debate.[103]

Of course, the possibility exists that Senator Kennedy mentioned the case for neither of these reasons. If that is true, it is one lone comment about a non-civil rights case that would benefit from enactment of the Civil Right Attorney's Fees Act.

Based on this examination of the legislative history of the Act, we can now decide whether the *Thiboutot* majority or minority was correct in its reading of the legislative intent.

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[95] 505 F.2d 830, 844-45 (4th Cir. 1974).
[96] 448 U.S. at 10.
[97] *See supra* note 74 and accompanying text.
[98] 448 U.S. at 10.
[99] 528 F.2d 688 (7th Cir. 1976).
[100] Plaintiff groups included New Day Welfare Rights Organization, Gary AFDC Mothers' Organization Welfare Rights Organization, and East Chicago Welfare Rights Organization. *Id.* at 688.
[101] Ruling in favor of welfare recipients on the authority of *Van Lare v. Hurley*, 421 U.S. 338 (1975), the Fifth Circuit "reasoned that statutory rights concerning food and shelter [from the Social Security Act] are 'rights of an essentially personal nature,' [citation omitted]; that 42 U.S.C. § 1983 provides a remedy which may be invoked to protect such rights; and that § 1983 is an act of Congress providing for the protection of civil rights within the meaning of that jurisdictional grant." Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979).
[102] S. REP. NO. 94-1011, at 5 (1976), *reprinted in* SOURCE BOOK at 11.
[103] *E.g.*, 122 CONG. REC. 31,792 (1976), *reprinted in* SOURCE BOOK at 63-64 (Bumpers); *id.* at 31,832, SOURCE BOOK at 75 (Abourezk/Hathaway exchange); *id.* at 31,833, SOURCE BOOK at 77 (Helms, regarding amendment 473); *id.* at 32,185, SOURCE BOOK at 139 (Tunney).

The majority held that § 1988 applies to *any* § 1983 action.[104] In the face of everything else in the legislative history of the bill, the *Thiboutot* minority, not the majority, is surely correct. As the minority wrote, "The few references to [non-civil rights] statutory claims cited by the Court fall far short of demonstrating that Congress considered or intended the consequences of the Court's interpretation of § 1983."[105]

I have spent so much time looking at *Thiboutot's* use of the Act's legislative history because of what it said about whether §§ 1983 and 1988 should be limited to the civil rights context. Ironically, the battle in *Thiboutot* was over the phrase "and laws," something not at issue in an Establishment Clause case. Thus, I can pass over the 1874 amendment of § 1983 to include that phrase.[106] I pause long enough to note that the debate over the legislative intent of this amendment, and the variations of language in the jurisdictional counter-parts have been discussed in *Thiboutot*[107] and *Chapman v. Houston Welfare Rights Organization*[108] as well as in the literature[109]

The point, to reiterate, is not that this Congress is bound by the intent of the Congress that enacted § 1988. That has not been the reason for retracing all this history. Rather the point is that the Supreme Court majority, as pointed out by the majority, got it wrong in *Thiboutot*. Thus, by enacting PERA, this Congress could undo the Supreme Court's mistake and return to the original purpose of § 1988.

Having demonstrated that § 1988 should only apply to civil rights cases, we must now ascertain what properly falls under that rubric. While I have already touched upon this issue tangentially, I will now examine the specific intended coverage of § 1983.

THE KU KLUX ACT OF 1871 (42 U.S.C. § 1983) WAS DESIGNED TO PROTECT "RIGHTS PRIVILEGES AND IMMUNITIES" ONLY

Thus, I come next to the original enactment of § 1983. It is one of the surviving provisions of the Ku Klux Act of 1871.[110] Section 1983 started out as § 1 of that act. As numerous courts and commentators have documented, § 1 was one of the least debated provisions.[111] However, for our purposes, we are interested in determining what "rights, privileges, and immunities" means and for that we can examine the debate over the entire act.

I note first that the bill was entitled "A Bill to enforce the provisions of the Fourteenth

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[104] 448 U.S. 1, 9 (1980).

[105] *Id.* at 25 n.14 (Powell, J., dissenting).

[106] Amended by § 1979 of the Revised Statutes. Revised Statutes of the United States, Title XXIV, § 1979, 18 pt.1 Stat. 347 (1873-74). Even less important are the subsequent amendments of 1979 and 1996. The 1979 amendment related to Acts of Congress exclusively applicable to the District of Columbia. Act of Dec. 29, 1979, Pub. L. No. 96-170, § 1, 93 Stat. 1284. The 1996 amendment provided immunity for judicial officers under certain circumstances, Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, Title III, sec. 309(c), 110 Stat. 3847, 3853.

[107] *See generally* 448 U.S. at 6-8.

[108] *See generally* 441 U.S.600, 608-20 (1979).

[109] *See, e.g.*, George Rutherglen, *Custom and Usage as Action Under Color of State Law: An Essay on the Forgotten Terms of Section 1983*, 89 VA. L. REV. 925, 947-49 (2003); Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 401-08 (1982). *See generally* Todd E. Pettys, *The Intended Relationship Between Administrative Regulations and Section 1983's "Laws"*, 67 GEO. WASH. L. REV. 51 (1998).

[110] Act of Apr. 20, 1871, ch. 22, 17 Stat. 13. Also known as Ku Klux Klan Act of 1871 and Civil Rights Act of 1871. U.S.C.A. POPULAR NAME TABLE (West 2004).

[111] *E.g.*, 441 U.S. at 610, 617 n.34; Adickes v. S.H. Kress & Co., 398 U.S. 144, 164-65 (1970); *Developments in the Law— Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1155 (1977).

Amendment to the Constitution of the United States, and for other purposes."[112] Immediately after Representative Shellabarger (R, OH) reported the bill on behalf of the Select Committee, Representative Stoughton (R, MI) spoke to set the stage.[113] He started with the activity of the Ku Klux Klan in North Carolina.[114] He noted "murders, whippings, intimidation, and violence."[115] He also discussed the Klan's ability to protect its members from conviction for their crimes because other members would commit perjury as witnesses or refuse to vote to convict when serving on juries.[116] Representative Stoughton's remarks were powerful portrayals of the evils of the Klan, made vivid by reading testimony of the witnesses who had appeared before the Senate committee.[117] He read testimony from Blacks who had been victims of violence[118] and he read testimony from Whites who knew the inner workings of the Klan,[119] as well as of judges who knew of incidents of perjury.[120] Near the end of his remarks, he summarized the need for the act:

> When thousands of murders and outrages have been committed in the southern States and not a single offender brought to justice, when the State courts are notoriously powerless to protect life, person, and property, and when violence and lawlessness are universally prevalent, the denial of the equal protection of the laws is too clear to admit of question or controversy. Full force and effect is therefore given to § five [of the Fourteenth Amendment], which declares that "Congress shall have power to enforce by appropriate legislation the provisions of this article."[121]

If we look at Representative Stoughton's remarks in juxtaposition to those of the next speaker, Representative George Morgan (D, OH), we see the tenor of the entire debate. Representative Morgan disagreed strenuously with Representative Stoughton that the Fourteenth Amendment provided a valid constitutional basis for the many of the sections of the bill. In particular, he objected to the third and fourth sections, which authorized the use of military force by the President to deal with the Klan.[122] While other speakers discussed various sections,[123] the points raised were entirely the same: the outrages of the Klan and the constitutionality *vel non* of the act. Again, for our purposes, we are interested in what light the legislative history sheds on the term "rights, privileges, and immunities" and I turn now to that.

Various comments are helpful in determining what the representatives and senators understood the phrase to encompass. The first of these is a statement by Representative

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[112] CONG. GLOBE, 42nd Cong., 1st Sess. 317 (1871).
[113] *Id.* at 319-22.
[114] *Id.* at 320.
[115] *Id.*
[116] *Id.*
[117] *See generally*, *id.* at 320-21.
[118] *Id.* at 321.
[119] *Id.* at 320-21.
[120] *Id.* at 320.
[121] *Id.* at 322.
[122] *Id.* at 331-32.
[123] For example, over the next few days of debate, the following representatives spoke in opposition to the bill while commenting on specific sections: Whitthorne, sections one through five, *id.* at 337-38; Beck, sections three and four, *id.* at 351-52; Blair, sections two through four, *id.* at app.71-74; and Swann, sections one through three, *id.* at 361. In response, Representatives Kelly, *id.* at 338-41, and Bingham, *id.* at app.81-86, spoke generally in support of the bill.

Benjamin Butler (R, MA), addressing an earlier attempt by Congress to protect rights, privileges, and immunities: "The bill further provided that the wrongs committed against the citizens of the United States, for the purpose of depriving such citizens of enjoyment of life, liberty, and property, guaranteed to him by the Constitution, be made crimes against the laws of the United States and cognizable by its courts. The bill further provided that every citizen should have remedy in the Federal courts against the party depriving him of such rights, immunities, and privileges . . . ."[124] We see here an equating of "rights, privileges, and immunities" with life, liberty, and property.

Other articulations followed. First, I return to the statement of Representative John Coburn (R, IN), which was one of my quartet of quotations at the outset of this testimony:

> Affirmative action or legislation is not the only method of a denial of protection by a State, State action not being always legislative action. A State may by positive enactment cut off from some the right to vote, to testify or to ask for redress of wrongs in court, to own or inherit or acquire property, to do business, to go freely from place to place, to bear arms, and many other such things. This positive denial of protection is no more flagrant or odious or dangerous than to allow certain persons to be outraged as to their property, safety, liberty, or life; than to overlook offenders in such cases; than to utterly disregard the sufferer and his prosecutor, and treat the one as a nonentity and the other as a good citizen. How much worse is it for a State to enact that certain citizens shall not vote, than allow outlaws by violence, unpunished, to prevent them from voting? How much more effectual is the denial of justice in a State where the black man cannot testify, than in a State where his testimony is utterly disregarded when given on behalf of his race? How much more oppressive is the passage of a law that they shall not bear arms than the practical seizure of all arms from the hands of the colored men? A systematic failure to make arrests, to put on trial, to convict, or to punish offenders against the rights of a great class of citizens is a denial of equal protection in the eye of reason and the law, and justifies, yes, loudly demands, the active interference of the only power that can give it. If, in addition to all this, the State should fail to ask the aid of the General Government in putting down the existing outlawry, would not a more complete and perfect case of denial of protection be made out? Indeed, it would be difficult to conceive of a more glaring instance of the denial of protection.
>
> It may be safely said, then, that there is a denial of the equal protection of the law by many of these States. It is therefore the plain duty of Congress to enforce by appropriate legislation the rights secured by this clause of the fourteenth amendment of the Constitution.[125]

This quotation, typical of many others, reminds us that we must never stray far from the historical context of Klan abuses if we want to understand what § 1983 was intended to do. Here, we also see a close connection between the concepts of equal protection and of rights, privileges, and immunities. Moreover, we also see some specific rights mentioned, *i.e.*, "the right[s] to vote, to testify or to ask for redress of wrongs in court, to own or inherit or acquire

[124] *Id.* at 449.
[125] *Id.* at 459.

property, to do business, to go freely from place to place, to bear arms."[126]

A few helpful comments can also be found in the Senate debates. Senator John Edmunds (R, VT) passed quickly over § 1, showing that in that chamber, too, it was not overly controversial:

> The first § is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights bill, which have since become a part of the Constitution.[127]

It is also clear that the opponents of the bill understood what the phrase "rights, privileges, and immunities" meant to the advocates of the bill. For example, Senator John Stockton (D, NJ) summarized the view to which he objected:

> It is insisted that when the fourteenth amendment declares that "all persons born or naturalized in the United States shall be citizens of the United States" the privileges of that citizenship attach to every individual, and the United States Government is bound to protect them. These privileges are alleged to be such as are asserted in the Declaration of Independence, namely, "the enjoyment of life and liberty, with the right to acquire and possess property."[128]

We also note with particular interest, an exchange between Senators Lyman Trumbull (R, IL), Edmunds, and Matthew Carpenter (R, WI):

Senator Trumbull started out by stating his belief that the Privileges and Immunities Clause of the Fourteenth Amendment simply reiterated the Privileges and Immunities Clause of the "old Constitution."[129] He was challenged on that point by Senator Edmunds who understood the original Clause to protect the citizens of each state *qua* citizens of states when they traveled to states not their own.[130] He understood the new Clause, on the other hand, to extend "universal citizenship" to United States citizens *qua* United States citizens.[131]

However, he added, "but we have not advanced one step by that admission. The fourteenth amendment does not define the privileges and immunities of a citizen of the United States any more than the Constitution originally did."[132] Later in this exchange, Trumbull would get no more specific than to say that the states, not the national government, were to defend citizens in their individual rights of person and property; and that the rights, privileges, and immunities of national citizenship were national in character.[133] To this tautology he added nothing more helpful than that they would be the kind of rights that the national government

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[126] *Id.*

[127] *Id.* at 568. That is not to say it attracted no attention. There was some debate over the meaning of "citizens of the United States" and "privileges and immunities." *See infra* notes 119-31 and accompanying text as well as other passages in the CONG. GLOBE surrounding those cited..

[128] *Id.* at 573.

[129] *Id.* at 576.

[130] *Id.*

[131] *Id.*

[132] CONG. GLOBE, 42nd Cong., 1st Sess. 576 (1871).

[133] *Id.* at 577.

would protect from foreign aggression.[134]

However, during the debate, an excursus occurred that adds some insight if one is careful not to confuse Senator Trumbull's terminology with the terminology used by others quoted in the Civil Rights Attorney's Fees Awards Act debate. Senator Carpenter had used an illustration involving voting rights.[135] Senator Trumbull replied that "[t]he words 'privileges and immunities' . . . have nothing to do with voting. They revere to civil rights. His illustration about the right to vote has no application. Women do not vote."[136] After a brief response by Senator Carpenter acknowledging the point, Senator Trumbull added, "the 'privileges and immunities' referred to in the Constitution are of a civil character, applying to civil rights, and not to political rights, and were never so understood."[137]

It is clear that Senator Trumbull was using the term in a very narrow sense. The following black letter summary will help dispel any confusion over the two uses and allow us to concentrate on the import of Senator Trumbull's comment:

> It has been said that political rights are included within the more comprehensive term "civil rights," but that they are differentiated in that a political right is a right exercisable in the administration of government, or a right to participate, directly or indirectly, in the establishment or management of government, while civil rights have no relation to the establishment or management of government. Political rights have also been distinguished on the ground that a civil right is a right accorded to every member of a distinct community or nation, which is not necessarily true with regard to political rights.[138]

Even in Trumbull's day there was a dispute as to whether suffrage was a civil or a political right.[139] All of this may give some small insight into what "privileges and immunities" meant to the drafters of the Ku Klux Act and some insight into why the word "rights" was added to § 1983. Certainly many of the speakers addressed rights that Senator Trumbull would not have considered "civil."

Finally, a few remarks can be found that may seem to bear most directly upon the Establishment Clause issue. For example, in the context of answering a question as to whether obstructing justice would apply to obstructing justice in a state court, Senator Edmunds replied,

> We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one getting an indictment in the State courts against men for burning down his barn; but if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . . then this § could reach it.[140]

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[134] *Id.*
[135] *Id.* at 576.
[136] *Id.*
[137] *Id.*
[138] 15 AM. JUR. 2D *Civil Rights* § 2 (2000) (citations omitted).
[139] ANTIEAU, *supra* note 147, at 22-30, 52-54.
[140] CONG. GLOBE, 42nd Cong., 1st Sess. 567 (1871).

This is a direct mention of religion that, assuming *arguendo*, is a correct understanding of the reach of the Act, has nothing to do with preventing an establishment of religion.

Finally, there is a direct reference to the First Amendment. Senator Stockton, just prior to his comments quoted earlier, disparaged the arguments of his opponents in the following words:

> [T]he construction of the fourteenth amendment necessary to make this bill constitutional is simply this: that as the amendment provided that no State should deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws, therefore Congress can, whenever it pleases, interfere with all these rights, restrict and deny them in despite of all the express reservations and prohibitions contained in the amendments, articles one, four, five, nine, and ten; . . . Nay, more: you claim the power to subordinate the whole Bill of Rights to the absolute and uncontrolled will of one man [the President] . . . .[141]

This ambiguous remark at least mentions the First Amendment. However, there is no way to determine whether the Establishment Clause is even in view here. For that we will have to look at the Fourteenth Amendment itself and judicial interpretations of it.

Before doing so however, I note that the legislative history of the Ku Klux Act does show that there were some additional views of what "rights, privileges, and immunities" meant. They track almost identically the various views of what the term "privileges and immunities" means in the Fourteenth Amendment.[142] I will not delineate these variations here since I will do so in the next section immediately below where they are more important. Suffice it to say, however, that none of these include anything like "freedom from establishment of religion." The discussion below of the Fourteenth Amendment's definition of "privileges and immunities" will provide support for this assertion.

THE FRAMERS AND RATIFIERS OF THE FOURTEENTH AMENDMENT DID NOT BELIEVE THAT THE ESTABLISHMENT CLAUSE CONTAINED ANY PRIVILEGES OR IMMUNITIES

In turning to the Fourteenth Amendment, we need not avail ourselves of as lengthy nor as many quotations. It is well documented that all of the views represented during the debate over the Ku Klux Act were also expressed during the debates over the Fourteenth Amendment. So for example, the view that the Privileges and Immunities Clause meant the same thing in the Fourteenth Amendment as it did in Article Four was represented by Senator Bingham.[143] This view was very closely linked to some of the others, such as the view that privileges and immunities are synonymous with natural or fundamental rights, *i.e.*, with those rights "which belong, of right to the citizens of all free governments," such as "the enjoyment of life and liberty, with the right to acquire and possess property of every kind and to pursue and obtain happiness and safety."[144] This latter view is derived from Justice Bushrod Washington's opinion as Circuit Justice in

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[141] *Id.* at 572.
[142] *See generally* the entire debate in the CONG. GLOBE.
[143] ANTIEAU, *supra* note 147, at 53, 56.
[144] *Id.* at 56.

Corfield v. Coryell,[145] in which he interpreted the meaning of the Privileges and Immunities Clause of Article IV. Clearly, this subsumes the Declaration of Independence approach.

Similarly, and to return to our last quotation from the Ku Klux Act debates from the prior section of my testimony, many Senators and Congressmen did make statements during the debates over the Fourteenth Amendment that the privileges and immunities protected by the Clause were those contained in the first eight amendments. Of particular importance are the views of Congressman John Bingham of Ohio, a principal drafter and manager of the Amendment.[146] He flatly stated that "the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States."[147] Numerous others echoed this sentiment including Senator Jacob Howard (R, MI), Senator Allen Thurman (D, OH), Representative Thad Stevens (R, PA), and Representative Henry Dawes (R, MA).[148] The phraseology of Senator Jacob Howard of Michigan, the amendment's main manager on the Senate side, is particularly noteworthy. According to him, privileges and immunities included fundamental rights and "the personal rights guaranteed and secured by the first eight Amendments to the Constitution."[149]

Since the First Amendment, by definition, is one of the first eight amendments, this at last brings us squarely to the question: Since the framers of the Civil Rights Attorney's Fees Awards Act and the Ku Klux Act ignored the Establishment Clause, is there anything in the history of the Fourteenth Amendment that indicates that its framers did or did not believe that the Establishment Clause implicates any *personal* rights?

A complete answer is two-fold. It recognizes that the framers of the Fourteenth Amendment did believe that the *free exercise* of religion was fundamental, *i.e.*, was among the privileges and immunities to be protected. It also recognizes the "right to be free from Establishment" was *not*.

Chester Antieau, one of the great § 1983 experts[150] has collected writings and statements from various Congressmen during the debates over the Civil Rights Bill of 1866 (which served as the model for the Fourteenth Amendment and which the Fourteenth Amendment was designed to "constitutionalize"[151]) and from Congressmen looking back on the passage of the Fourteenth Amendment. These statements clearly demonstrate that the free exercise of religion was intended to be covered by the term privileges and immunities. Antieau cites Representative Ralph Buckland's statement that the Southern States regularly denied religious liberty to Blacks and that the federal government therefore needed to protect it.[152]

By contrast, Antieau could find no evidence of any Senator or Representative mentioning "freedom from establishment."[153] There is more here than a mere argument

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[145] 6 F. Cas. 546, 551-52 (1823).
[146] *Id.* at 85.
[147] *Id.* at 85-86.
[148] *Id.* at 86-87.
[149] *Id.* at 86.
[150] His book, *Federal Civil Rights Acts: Civil Practice*, was one of the earliest treatises on § 1983. This work is now continued by Rodney Smolla in a two volume treatise entitled *Federal Civil Rights Acts*.
[151] CHESTER JAMES ANTIEAU, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 7 (1997).
[152] *Id.* at 91.
[153] *Id.* at 109

from silence. At least three important commentators, Senator Howard, Representative Dawes, and Fourteenth Amendment scholar Horace Flack all made exhaustive lists of the rights intended to be included under the Privileges and Immunities Clause. None of these lists mentions the Establishment Clause.[154]

Additionally, Antieau examined other evidence of the practice of the states that ratified the Fourteenth Amendment and determined that it is highly unlikely that they believed that the Fourteenth Amendment included freedom from establishment as a privilege or immunity.[155] This evidence includes state statutes, constitutions, and court decisions. Some states still had vestiges of true establishment. For example, both New Hampshire and Massachusetts still provided constitutional preferences for Protestant Christianity.[156] Incidentally, but importantly, this same evidence indicates that the view of privileges and immunities encompassing those rights "which belong, of right to the citizens of all free governments,"[157] cannot embrace the Establishment Clause. Just as some states still had vestiges of state establishment, so many others had had explicit establishment earlier in their histories. Surely neither Justice Washington who coined the *Corfield* articulation discussed above nor the framers of the Fourteenth Amendment would have considered these states to be un-free governments.

In summary, those references to the first eight amendments of the Bill of Rights were concerned with "personal rights." The drafters of the Fourteenth Amendment saw the personal right of religious liberty as being protected by the Free Exercise Clause. The Establishment Clause was simply not implicated.

Because no view of the privileges and immunities clause saw the Establishment Clause as creating such privileges or immunities, we need not decide which of the views of the Privileges and Immunities Clause expressed in the *Slaughter House Cases* is correct.

In the *Slaughter-House Cases*, Justice Miller, writing for the majority believed that the privileges and immunities protected by the Clause were of national citizenship as had been stated by Senator Trumbull.[158] Justice Field adopted the fundamental rights approach,[159] as did Justice Bradley.[160] These two justices disagreed only as to the degree of abridgment to which these rights were subject.[161] Finally, Justice Swayne emphasized that the protections applied to all persons, not just Blacks.[162]

Thus, we see that the legislative history of the Fourteenth Amendment shows definitively what the legislative histories of §§ 1983 and 1988 strongly hinted at: The Establishment Clause contains no personal rights and therefore was not intended to be covered by language addressing rights, privileges or immunities. This is true f the Fourteenth Amendment and is therefore true of § 1983 and is therefore also true of § 1988.

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[154] *Id.*
[155] *Id.* at 109-12. *See also id.* at 282-84 (discussing the Establishment Clause under Equal Protection).
[156] *Id.* at 110.
[157] *Corfield*, 6 F. Cas. at 551.
[158] 83 U.S. (16 Wall.) 36, 74-79 (1873).
[159] 83 U.S. (16 Wall.) at 97 (Field, J., dissenting).
[160] *Id.* at 114-22 (Bradley, J., dissenting).
[161] *Compare* 83 U.S. (16 Wall.) at 97-111 (Field, J., dissenting), *with* 83 U.S. (16 Wall.) at 114-22 (Bradley, J., dissenting).
[162] *Id.* at 129 (Swayne, J., dissenting). *See also id.* at 123 (Bradley, J., dissenting).

Based upon this realization, I will end my testimony with some practical comments about PERA

PRACTICAL CONSIDERATIONS CONCERNING THE APPROPRIATENESS OF AND NEED FOR PERA

One could argue that since the United States Supreme Court has incorporated the Establishment Clause against the states that this testimony has been much ado about nothing. However, this would be to miss the point. The point of this testimony has not been that the Establishment Clause has not been nor should not be incorporated against the states. Obviously, the incorporation of the Establishment Clause became a *fiat accompli* in *Everson*[163] if not *Cantwell.*[164] Certainly there have been those who have argued against the current Due Process Incorporation Doctrine.[165] However, given the history recounted in this article, the case can be, and has been, made that Congress intended to incorporate the first eight articles of the Bill of Rights through the Privileges and Immunities Clause rather than through the Due Process Clause.[166]

However, under any of these scenarios, the Establishment Clause should not be covered by §§ 1988 and 1983. First, should the incorporation doctrine be rejected, then under the analysis contained in this testimony, it is beyond peradventure that a putative violation of the Establishment Clause does not implicate the privileges and immunities as that phrase was used by the drafters of § 1988, § 1983, or the Fourteenth Amendment. Similarly, if one embraces incorporation through the Privileges and Immunities Clause rather than through the Due Process Clause, the analysis described above demonstrates that the Establishment Clause does not contain any privileges or immunities. Rather the Privileges and Immunities Clause was designed to protect *personal* rights. This certainly makes sense in that it is worded as a limitation on the power of government.

Thus, since the incorporation doctrine is no barrier (nor even a rebuttal) to anything I have said, I will end my testimony by pointing out the appropriateness, and some might even say, the need for the passage of PERA. Until recently there seemed to be an inherent sense that Establishment Clause claims should be brought quite simply, "under the Establishment Clause," i.e. not under 1983 and its jurisdictional counterpart. After all 28 U.S.C. 1331 confers jurisdiction on the federal district courts for all cases involving a federal question. This certainly includes putative Establishment Clause violations. Thus, plaintiffs could still have their day in court but without the element of blackmail that I have discussed.

Why then this sudden use of § 1983 to bring Establishment Clause claims? The answer is almost certainly the availability of § 1988 fees, or as I put it, the blackmail factor. Justice Powell suggested the answer in his *Thiboutot* dissent: "[i]ngenous

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[163] 330 U.S. 1 (1947).

[164] 310 U.S. 296 (1940).

[165] *E.g.*, MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 2 (1986); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 22 (1980); TRIBE, *supra* note 147, §7-5 at 1317-20.

[166] *E.g.*, CHESTER JAMES ANTIEAU, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 59, 85-88 (1997); 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1119 (1953); 1 LAURANCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §7-2, at 1089-1118 (3d ed. 2000).; Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House Cases, 109 YALE L.J. 643, 647 (2000).

pleaders may find ways to recover attorney's fees in almost any suit against a state defendant."[167] This was one of the main complaints of the opponents of the act which became § 1988, who sarcastically wanted to dub it "The Attorney's Relief Act."[168]

Certainly, numerous commentators have documented the astronomical increase in § 1983 cases since the passage of the Civil Rights Attorney's Fees Awards Act of 1976.[169] However, in Establishment Clause cases, the problem is especially severe and unique. As I mentioned at the outset of my testimony, I can personally verify that potential governmental defendants will often give up without going to court even when they believe that their locality has not, in fact, violated the Establishment Clause. This Congress could level the playing field by enacting PERA. Doing so would not open the floodgates to rogue governmental bodies trampling upon the Constitution. For any real violations of the Establishment Clause, the federal courts will be open for business as usual.

Again, I thank the subcommittee for the opportunity to submit this testimony.

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[167] 448 U.S. 1, 24 (1980).

[168] 122 CONG. REC. 31,489, 31,850 (1976), *reprinted in* SOURCE BOOK at 62, 89 (statements of Senators Long and Allen).

[169] *See, e.g.*, Sheldon H. Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 IOWA L. REV. 1, 33 (1982) (suggesting § 1988 is responsible for at least some of the increase); 1 MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 1.01(B) (4th ed. 2003) (listing § 1988 as one of five reasons for the increase).

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WITH REGIONAL OFFICES THROUGHOUT THE UNITED STATES

August 8, 2006

The Honorable Sam Brownback
United States Senate
Via E-mail

Dear Chairman Brownback:

I am delighted to be able to submit the accompanying written testimony regarding Senate Bill 3696, Veterans' Memorials, Boy Scouts, Publics Seals, and Other Public Expressions of Religion Protection Act of 2006 (PERA) to the Senate Judiciary Subcommittee on the Constitution.

By way of introduction, I am Steven W. Fitschen, President and Executive Director of the National Legal Foundation, and Research Professor of Law at Regent University School of Law. The National Legal Foundation is a public interest law firm, which among other things, defends various governmental defendants when they are sued for allegedly violating the Establishment Clause. Also, as Research Professor of Law, one of my areas of expertise is Establishment Clause jurisprudence.

In neither of these capacities do I endorse legislation. However, I do from time-to-time render opinions on the constitutionality of or necessity for various pieces of legislation. I have testified before the Alaska and Colorado legislatures.

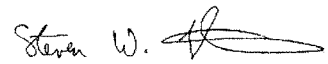
In the case of PERA, my testimony, at bottom, makes the case that the Establishment Clause was never intended to be covered by either 42 U.S.C. 1988 or 42 U.S.C. 1983. Thus, should this Congress pass the House version of PERA, it would not be doing anything radical, but would simply be restoring §§ 1983 and 1988 to their intended boundaries. Should it pass the Senate version, it would be partially doing so.

Along the way, it would be removing the ability of plaintiffs to "blackmail" governmental entities—especially small ones—with the threat of attorneys fee awards. As I discuss in my testimony, even when governmental entities are fully persuaded that they have not violated the Establishment Clause, they will often acquiesce to the demands of would-be plaintiffs out of fear of attorneys fees should they eventually lose.

As I note at the end of my testimony, PERA would not prevent anyone from suing a governmental entity for an Establishment Clause violation. The federal courts will remain open for business as usual. All that will happen is that the "blackmailing" factor will be removed.

Thank you again for the opportunity of submitting this testimony.

Sincerely,



Steven W. Fitschen
President

STATEMENT OF
REES LLOYD, VICE COMMANDER
DISTRICT 21
DEPARTMENT OF CALIFORNIA
THE AMERICAN LEGION

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS,
AND PROPERTY RIGHTS
COMMITTEE ON JUDICIARY
UNITED STATES SENATE

ON

S. 3696, VETERANS MEMORIALS, BOY SCOUTS,, PUBLIC SEALS AND OTHER PUBLIC EXPRESSIONS OF RELIGION ACT OF 2006 ("PERA")

AUGUST 2, 2006

STATEMENT OF
REES LLOYD, COMMANDER
DISTRICT 21, DEPARTMENT OF CALIFORNIA
THE AMERICAN LEGION
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND PROPERTY RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ON
S. 3696, VETERANS MEMORIALS, BOY SCOUTS, PUBLIC SEALS AND OTHER PUBLIC EXPRESSIONS OF RELIGION ACT OF 2006 ("PERA')

AUGUST 2, 2006

Mr. Chairman and Honorable Members of the Subcommittee:

It is my great honor to appear before you today to offer testimony in support of passage of S. 3696, Veterans Memorials, Boy Scouts, Public Seals and Other Public Expressions of Religion Act of 2006 ("PERA"), on behalf of The American Legion, the largest wartime veterans' organization in the world with 2.7 million members.

I preface my testimony by stating that I do not appear before you as an inveterate hater of the American Civil Liberties Union (ACLU) or related organizations bringing Establishment Clause litigation and seeking and receiving taxpayer-paid attorney fees therefore, although I believe that PERA must be passed to stop the exploitation of the law for attorney fee profits in such cases.

I have been a civil rights attorney for some 25 years. I was an ACLU of Southern California staff attorney for approximately two years immediately after graduating from law school and passing the California Bar, and had been on a fellowship with the ACLU while in law school. I have devoted my professional career to the defense of civil and workers rights. Among other things, I was for some two decades, and until the day of his death and beyond, a volunteer attorney for the late Cesar Chavez, the founder and president of the United Farm Workers of America, AFL-CIO, whom we honor in California today for his great contributions to civil

rights. Cesar Chavez was, indeed, a great American. He mentored me when I was an independent trucker engaged in a nationwide strike during the so-called Arab Oil Embargo. It was Cesar Chavez who urged me to go to law school and his recommendation that secured my admission. It is a little known fact that Cesar Chavez was also a veteran, serving four years in the U.S. Navy when his country called. He was, in his humility and self-sacrifice, the greatest man I ever knew, or will know, and I will always walk in his shadow.

I state this not for self-aggrandizement, but, rather, to indicate to you that I speak to you from the heart, and based on a lifelong commitment to the defense of civil rights, from participation in Resurrection City in the Poor People's Campaign of Dr. Martin Luther King in 1968, to the present moment, in which I am privileged to participate in a great cause, the cause of veterans, the cause of the defense of American values by The American Legion Family of Legion, Auxiliary, and Sons of the American Legion, altogether involving some 4 million members.

Neither The American Legion, nor I as its representative in these proceedings, believe that passage of PERA is a partisan issue, a conservative or liberal issue, a Republican or Democrat issue, or an ideological one. The American Legion believes it is an American issue, a civil rights issue that transcends all partisan, party, or ideological allegiances.

PERA is narrowly drawn to impact only on Establishment Clause cases, and no other civil rights claims. Arguments have been raised that this, somehow, creates an Equal Protection violation. It is respectfully suggested that this is an argument without merit; the law makes distinctions in myriad instances, including as to what kind of civil wrongs can result in attorney fee transfers by court orders.

Further, Establishment Clause cases are the only claims of which I am aware that are allowed to proceed without any showing that the plaintiff has suffered any economic, physical, or mental damage, or been deprived of the exercise of any right, but is merely offended at the sight of a symbol which has a religious aspect. In all other categories of claims of which I am aware, mere "taking offense" is not even cognizable for a claim or cause or action. Thus, the distinction made in PERA is a rational one, and preserves attorney fee transfers in cases in which an actual economic, physical, or mental injury, or deprivation of right, other than mere offense, is suffered.

Concisely stated: The American Legion believes that passage of the S. 3696, PERA, is essential for the protection of civil rights for all Americans and not limited to special interests, and for the preservation of the purpose and integrity of the attorney fee provisions of the Civil Rights Act, 42 U.S. Code Section 1988, the Equal Access to Justice Act (EAJA), and all other Federal statutes which were benevolently intended to benefit the poor and advance civil rights, but are now resulting in the opposite; are resulting in unintended financial enrichment; and are trammeling and throttling the exercise of First Amendment rights to freedom of speech, to petition for redress of grievances to the judicial and legislative branches.

In particular, but without limitation, The American Legion believes this reform legislation is absolutely necessary if we are to be able to preserve and protect our veterans' memorials, and, indeed, all public displays of symbols of our American heritage which have a religious aspect, from litigative attacks under the Establishment of Religion Clause of the First Amendment by special interests, epitomized by, but not limited to, the ACLU, the primary source of such Establishment Clause litigation, and the primary recipient of literally millions of dollars of court-ordered, taxpayer-paid attorney fees from such litigation – even though the ACLU in fact has no actual attorney fees.

As a former ACLU attorney, I know to a certainty that the ACLU's litigation is carried out by staff attorneys, or by pro bono attorneys who are in fact precluded from receiving fees under the ACLU's own policies. Notwithstanding, the ACLU regularly seeks, and receives, attorney fees in Establishment Clause cases at market rate, usually $350 an hour in California. Although the courts know that ACLU clients in fact incur no attorney fee obligation, and that ACLU incurs no fee obligation to volunteer cooperating attorneys, as far as is known, no judge has simply said "no" to ACLU attorney fee requests, even though there is no evidence that any attorney fees were incurred. Thus, benevolently intended fee provisions are being used as a bludgeon against public entities to surrender to ACLU's demands, and being used to obtain profits in the millions. (See, examples cited below, and in **The American Legion Magazine** reports submitted as attachments hereto.)

Further, it must be emphasized that there is nothing in the law today to bar declared enemies of America, including without limitation terrorists who we are warned are in fact in our midst, from following the precedents being set by the ACLU and others to bring lawsuits to destroy or desecrate our veterans' memorials, or other public displays of symbols of our American history

and heritage if they contain a religious aspect, and then to exploit Federal law, including the Civil Rights Attorney Fees Act, 42 U.S. Code Section 1988, and the Equal Access to Justice Act (EAJA), to demand that the courts award them taxpayer-paid attorney fees for such Establishment Clause litigation attacks.

Frankly stated, if S. 3696, PERA, is not passed there is nothing in the law to prevent such an abuse and exploitation by terrorists or their sympathizers.

The American Legion urges this reality to be considered in acting on PERA.

The threat of imposition of such fees is having other, and very real, consequences: Benevolently intended attorney fee statutes designed to advance First Amendment rights, including the right to petition for redress, are now being exploited for financial profit in Establishment Clause litigation, to effectively prevent The American Legion and others from meaningful participation in such Establishment Clause litigation in the exercise of the right to petition. Simply stated, as an attorney, acting under the Code of Professional Responsibility, I must advise The American Legion and others I represent based on what the law is, not what I would like it to be. Without PERA, I necessarily have to advise The American Legion that if the organization does seek to intervene in lawsuits against veterans' memorials as a party, it risks having a court order it to pay the attorney fees of the ACLU.

Thus, the very threat of imposition of attorney fees is having a chilling affect on the exercise of fundamental First Amendment rights to petition for redress in the Judicial Branch.

Further, the threat of imposition of attorney fees in Establishment Clause controversies is effectively depriving Americans of the right of speech and to petition elected bodies for redress because those elected bodies at the local level cannot in fact consider contrary views and deliberate because they so fear imposition of attorney fees in such matters by the courts that they believe they have no deliberative choice as they must protect taxpayer funds which are needed for essential local services. In short, their minds are made up before the first objection of a citizen is heard, nullifying effective exercise of the freedom of speech and to petition for redress before local elected bodies.

Thus, the citizen's right to petition for redress, the right to be heard, and the very deliberative process of our representative democracy, are being distorted and denied by the threat of, and actual imposition of, attorney fees on taxpayers in Establishment Clause litigation.

The threat of imposition of attorney fees is very real, and manifestly is being used as a bludgeon by the ACLU and others to compel states and local subdivisions to surrender to their demands to secularly cleanse the public sphere, including at veterans memorials.

Although most Americans remain unaware of it – and are outraged when they learn of it – Courts are awarding taxpayer-paid attorney fees to the ACLU and others literally in the millions of dollars annually, against towns, school boards, cities, counties, states, which extorts surrender by those elected agencies in Establishment Clause *in terrorem* litigation. It is *in terrorem* litigation because the very threat of judge-ordered taxpayer-paid attorney fees intimidates elected bodies into submission to ACLU demands, and chills the exercise of the First Amendment right of third parties, like The American Legion, who desire to intervene in such cases as parties in order to fully participate and apprise the judiciary of their views on the importance of protecting our veterans' memorials or other public display of symbols of our American heritage.

All across the nation, lawsuits are being brought under the Establishment Clause to remove or destroy symbols of our American heritage from the public sphere if they have a religious aspect, principally the Christian Cross, but also the Star of David, both of which are present in the hundreds of thousands in our 22 National Cemeteries, from Arlington in the East to Riverside National Cemetery in California, and across the sea at American cemeteries in Europe, including Normandy Beach, where there are more than 9,000 raised Crosses and Stars of David.

There are countless veterans' memorials which have stood for years, decades, even longer, erected by grateful Americans in small towns, cities, counties, states, and considered by most Americans as sacred places as their manifest purpose is to honor, and call to the remembrance of succeeding generations, those Americans who served and sacrificed in defense of our American freedom.

Today, all of these veterans' memorials are threatened by dangerous precedents being set in Establishment Clause lawsuits brought by individuals and special interest organizations, epitomized by the ACLU, who are offended by veterans memorials because they contain a Cross or other religious symbol, or a prayer, as in the Mojave Desert Veterans Memorial case *(Buono vs. Norton)*, and the Mt. Soledad National War Memorial litigation in San Diego, which has become a focus of national controversy in light of the fact that, on the one hand, a Federal judge has ordered the City of San Diego to tear down the cross which has stood at the memorial for more than half a century or he will fine the taxpayers $5,000 a day; and, on the other hand, a

California Superior Court Judge overturned a special election in which 76 per cent of the voters voted to transfer the Mt. Soledad National War Memorial to the Federal government.

On July 3, 2006, the U.S. Supreme Court, by Justice Kennedy, issued a stay order against enforcement of the lower court order, followed by a stay order *pendent elite* issued on July 7, 2006, shielding the Mt. Soledad National War Memorial until final decision on appeals in the Ninth Circuit Court of Appeal. But for the stay order issued by the Supreme Court by Justice Kennedy as Circuit Justice on emergency petition filed first by the San Diegans for the Mt. Soledad National War Memorial, joined by The American Legion as amicus curiae, and second by the City of San Diego, the Mt. Soledad Memorial would have already suffered desecration by amputation because the Ninth Circuit itself had issued an expedited appeal hearing – but had denied a stay order. Thus, the Cross-at the site would have been destroyed on August 1, before the expedited hearing, which the Ninth Circuit set for October.

In the Mojave Desert Veterans Memorial Case, a solitary cross, erected on a rock outcrop 11 miles off the road in the desert by veterans in 1934 to honor World War I veterans, has been declared to be an unconstitutional violation of the Establishment Clause because in 1994 it was incorporated into the Mojave Desert Preserve. Although Congress passed legislation originally sponsored by Rep. Jerry Lewis, my Representative in California, to transfer the one-acre Mojave Desert Veterans Memorial to private parties, veterans, in exchange for five acres of private land, the Federal judge, on motion of the ACLU, nullified the act of Congress, finding its action violates the Establishment Clause, and ordered the Executive Branch to tear down the Cross. That case is on appeal. So far, the ACLU has reaped $63,000 in attorney fees to destroy that veterans' memorial.

These veterans' memorials – and all veterans' memorials -- deserve to be defended, and The American Legion is ready and able to do so. But the threat of imposition of attorney fees creates a bar to intervention in these cases with full party status. Private non-profit organizations, like The American Legion that have fiduciary obligations to their members, cannot effectively exercise the right to petition for redress in Establishment Clause cases because of the risk that devastating attorney fees may be imposed on them.

The enormity of the threat of imposition of fees by courts should not be discounted. For but a few examples:

- In its Establishment Clause lawsuit against San Diego to drive the Boy Scouts out of Balboa Park, the ACLU received some $950,000 in attorney fees when the City settled rather than risk even more attorney fees being awarded in the litigation.
- In the Ten Commandments Case in Alabama, the ACLU and sister organizations received $500,000 in attorney fees.
- In Washington State, the ACLU received $108,000 from the Portland School board in a case brought for an atheist to prevent the Boy Scouts from recruiting in the schools on non-class time.
- In Illinois, the ACLU brought suit against the Chicago Schools to drive the Boy Scouts out of the schools, and the Department of Defense to drive the Boy Scouts off military bases as sponsored troops. The Chicago schools quickly kicked out the Boy Scouts and settled $90,000 on the ACLU to avoid even larger court-awarded fees. The DoD entered a partial settlement, and the case continued, resulting in a Federal judge finding that the DoD aid to the Boy Scout Jamboree, supported by every U.S. President since its inception, is in fact a violation of the Establishment of Religion Clause. ACLU is seeking attorney fees under the Equal Access to Justice Act in that case.
- In Nebraska, a Federal judge overturned a referendum in which 70 percent of the voters voted to define marriage as a union of a human male and female, and imposed attorney fees of some $156,000.
- In Los Angeles County, the Board of Supervisors voted 3-to-2 to remove a tiny cross from the County Seal when the ACLU threatened to sue over it (but not over the Roman Goddess Pomona whose figure dominated the Seal). The County will spend approximately $1 million to remove the cross from all flags, seals, badges, etc. The rationale for the three who voted to surrender to the ACLU: The threat of an even greater amount ordered in attorney fees to the ACLU if the County fought and lost.
- The City Council of Redlands voted, unwillingly, to remove the cross from its City Seal when the ACLU threatened lawsuit. The sole reason given for the vote: The fear of a court-awarded attorney fees to the ACLU being imposed on limited taxpayer-funds needed for city services. Redlands cannot afford to change all of the seals as L.A. County is doing. Therefore, among other things, Redlands is calling in all employees who have badges,

police, fire, emergency services, et al., and drilling a hole through the Cross-on the badges to comply with ACLU's demands.

- In the Mojave Desert WWI Veterans Memorials case, the ACLU pleaded for fees under both the Civil Rights Act, 42 U.S.C. Section 1988, and EAJA, and ultimately received some $63,000 in attorney fees under the EAJA.

A recent case exemplifies, I believe, the abuse and exploitation of the Civil Rights Act attorney fee provisions for pure profit by the ACLU, and the ACLU's use of the Civil Rights Act to terrorize local elected bodies.

That case is the now famous "Dover Intelligent Design Case." There, the ACLU sued the Dover school board after it voted to include information pertaining to the Intelligent Design theory along with Darwinian theory in science classes.

The ACLU was represented by a cooperating, pro bono law firm.

Whatever one thinks of the intelligent design theory or the merits of the case, the attorney fee outcome should be carefully considered. The judge ruled that the teaching of Intelligent Design theory violates the Establishment Clause. The court then awarded the ACLU $2-million in attorney fees to be paid by the school board from taxpayer-funds needed for the schools.

The court imposed this massive attorney fee award on the taxpayers and schools even though the pro bono law firm representing the ACLU declared that in fact it waived all attorney fees. Thus, the $2 million is pure profit for the ACLU, and pure punishment upon the School Board that dared to defy the ACLU's demands.

The ACLU added to this set of facts the following: The ACLU announced to the media after its victory over the school board that it was only going to demand that the school board pay it $1 million instead of $2 million. The ACLU stated it was doing so because the school board members who had voted for the teaching of Intelligent Design theory had been removed from the school board in elections and replaced by school board members acceptable to the ACLU.

Thus, the ACLU announced it would not "punish" the school board by demanding the full $2 million.

However, it publicly warned that it would not be so benevolent in the future if any other school board did not comply with ACLU's demands.

I respectfully suggest there could not be better evidence of the need for S. 3696 PERA, nor better evidence that the ACLU is exploiting the Civil Rights Act for profit and using its attorney fee provisions as a club to "punish," in ACLU's own words, elected local agencies, than the very public statements of the ACLU in the Dover Intelligent Design Case.

As one who was active in what was once called the Civil Rights Movement, and one who in that movement supported and fought for the attorney fee provisions of the Civil Rights Act and EAJA, and as a former ACLU attorney, I am personally appalled and ashamed of such disgraceful abuse of the Civil Rights Act for political and economic gain. People fought, and some died, in the Civil Rights Movement for these laws to benefit the poor and make real the promise of our American freedoms. What is happening today is a shameful.

The Legislative branch should end this abuse.

The American Legion is strongly in support of passage of PERA, S. 3696, as an absolutely necessary reform of the law to preserve and protect our civil and constitutional rights, and to protect the integrity of the Civil Rights Act, EAJA, and all related acts.

At The American Legion National Convention in 2004, more than 4,000 delegates voted unanimously for Resolution 326, Preservation of Mojave Desert Memorial, which I wrote and which calls on Congress to amend the Civil Rights Act, 42 USC Section 1988 to eliminate the authority of judges to award attorney fees to the ACLU, or anyone else, in Establishment Clause cases. (See attachment.) At that time, Past National Commander Thomas P. Cadmus of Michigan called on "all Legionnaires, and all Americans, to stand up to the ACLU and defend our American values."

At The American Legion National Convention in 2005, delegates unanimously voted to adopt Resolution 139, to amend the Equal Access to Justice Act, and all related Federal statutes, in the same way as the Civil Rights Act to eliminate the courts' power to impose attorney fees in Establishment Clause cases when Federal entities are the defendants, as in the Boy Scouts Jamboree case. (See, Attachments.)

The American Legion's current National Commander, Thomas Bock, the primary spokesman for The American Legion in all matters, including PERA, vowed upon his election at the 2005 National Convention that The American Legion would stand and fight to defend our veterans' memorials, our American values generally, and to support passage of PERA against the terrorizing litigation attacks of the ACLU and others.

In 2006, under National Commander Bock's leadership, The American Legion published **In the Footsteps of the Founders**, explaining why PERA is needed. It was sent to all 15,000 American Legion Posts along with additional material on DVD.

In his recent call for defense of the Mt. Soledad National War Memorial, Commander Bock stated: "*What is next? Will the ACLU target the 9,387 crosses and Stars of David honoring World War II heroes killed during the invasion of Normandy? The Public Expression of Religion Act may be the only way to stop this assault.*"

The American Legion does mean to stand and fight to defend our veterans' memorials against Establishment Clause litigation assaults. But we need a level playing field – and that means the end to one-sided risks of attorney fee awards to the ACLU, or others, but not against the ACLU or others, because, under decisional law, the fees do not go to the "prevailing party." That is, when the ACLU loses, it is shielded from fee transfer unless it can be shown the suit was legally frivolous because the filing of a lawsuit against a governmental entity is itself a First Amendment right.

With regard to Commander Bock's reference to the American Cemetery at Normandy Beach, may I close with a personal observation that, I believe, reflects what is really at stake, and how much defense of veteran's memorials means to us.

I am proud to be a member of Memorial Honor Detail, Team 12, Riverside Post 79, at Riverside National Cemetery, the home of the U.S. National Medal of Honor Memorial, and the U.S. National POW/MIA Memorial, the centerpiece of which is a dramatic sculpture of a prisoner of war by artist and Legionnaire Lewis Lee Millett, Jr., a veteran who waived the entire $100,000 artist's commission so the funds could be used to complete the memorial surrounding the sculpture. The entire $700,000 total cost of the U.S. National POW/MIA Memorial was raised by private donations, mostly veterans, and not taxpayer funds.

We fear that that sculpture in the National POW/MIA Memorial may become a target of an Establishment Clause lawsuit because artist, veteran, Legionnaire Lee Millett, Jr., engraved the POW's Prayer at the base: "I look not to the ground, for I have no shame. I look not to the horizon, for they never came. I look to God, I look to God..."

There are more than 80,000 gravesites at Riverside National Cemetery now, almost all with a Cross-or Star of David or other religious symbol. We fear for them, too. The ACLU has said it would not sue the grave markers because that is a matter of "family choice." That,

constitutionally, is utterly specious: If the religious symbol is unconstitutional under the Establishment Clause because it is on Federal ground, as the ACLU otherwise insists, no person can "choose" to commit an unconstitutional act. Further, who would have dreamed the ACLU would file a lawsuit against the solitary cross honoring WWI veterans in the middle of the Mojave Desert to which one has to drive to be offended?

MHD Team 12, Riverside Post 79, is the first volunteer team to perform more than 1,200 military honors services for our fallen comrades.

The Captain and founder of Team 12 is Robert Castillo, who is a Native American who has served in many Legion offices in California and has led practically all 1,200 MHD Team 12 services at RNC, carrying the American Flag to lead the processions.

Robert Castillo, as a teenager, participated as a member of the United States Navy in the D-Day landing at Normandy Beach on June 6, 1944. He fought on both Omaha and Utah beaches. His ship was sunk. He was terribly wounded and received a Purple Heart among other medals.

On the anniversary of D-Day, June 6, 2006, Robert Castillo, who is affectionately known as "Uncle Bobby" by Legionnaires throughout California, led MHD Team 12 through six military honors services, in heat that reached 100 degrees. He never wavered in those services; he has never wavered in service to America as a teenager on D-Day, nor any day since, as he continues to serve America in The American Legion.

He asked me to convey to this Committee and Congress, his support for PERA, and his common-sense view that I believe reflects the view of almost all the 2.7 million members of The American Legion:

"*How can they give our tax money to the ACLU to sue our veterans memorials? I don't understand it. It's wrong. They shouldn't be allowed to do this. Are they going to sue our cemetery at Normandy Beach, and then take our money for doing it? We can't let them do that. My buddies are buried there.*"

If you heed no other voice, I would appeal to you to hear the voice of Legionnaire Robert Castillo, and reform the law by passing S. 3696, PERA. Do not allow the law to be exploited for profit in attacks under the Establishment Clause against our veterans' memorials and cemeteries. Give us the level playing field needed to allow us to defend the memorials, and gravesites, of our fallen American heroes.

I thank you for allowing me to testify on behalf of The American Legion.

LAW OFFICES OF
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January 19, 2006

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JAN 2 3 2006

Re: MT. SOLEDAD CROSS

Dear Mr. LiMandri and Mr. Ottilie:

As you may have heard, Judge Cowett ordered the City to pay approximately $275,000 in attorney's fees for this last, rather futile attempt to save the Cross by transferring it to the Federal Government. I believe this order gives us some guidance as to the exposure of your clients for fees on appeal.

Judge Cowett ruled that Mr. Paulson was clearly entitled to CCP 1021.5 fees in this case. I do not think that ruling was ever in doubt as Mr. Paulson meets all the criteria for such an award and the case law dictates that it would be an abuse of discretion NOT to award such fees in this case (see *City of Sacramento v. Drew*, *supra*, 207 Cal.App. 3d at 1297, n. 3; see also *Hull v. Rossi* (1993) 13 Cal.App.4th 1763).

Please advise your clients that if they choose to pursue this appeal, they will in all likelihood be forced to pay Mr. Paulson's fees. Those fees may well be in excess of $300,000. If calculation of the fees for the appellate work is remanded to Judge Cowett, I assume she will award the same enhancement of the fees (x2) that she ordered for the work done in trial court. There will also be a request by Mr. Paulson for an award of damages under the "frivolous appeal" statute (see CCP section 907). You should also advise your clients, perhaps by copy of this letter, that any fees award is "joint and several" among and

between them meaning for example, if $300,000 were awarded, that entire amount could be collected against any one of them. Also, the full amount of the judgment for any fees awarded can be recorded against all of them.

I am hoping this letter will cause your clients to re-think their position in this matter. I am sure you have advised your clients that as appellants, they have a tremendous uphill battle in any appeal since the vast majority of lower court decisions are affirmed, not reversed. While I do not wish to engage in a debate with you about the merits of this case, let me just say that it certainly seems to me (and to every attorney and constitutional scholar I have discussed it with) to be a "slam dunk". If the case were given to ten different San Diego Superior Court judges, I am confident all ten would rule the proposed transfer of the cross unconstitutional.

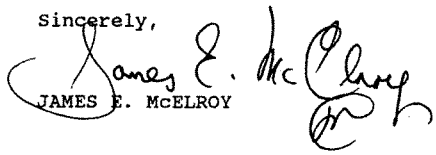
I recognize that you are both fine lawyers and certainly capable of setting your personal beliefs aside in order to appropriately advise your clients of the unlikelihood of prevailing on appeal and of the risks posed by losing the appeal. Obviously, transferring a religious symbol that the courts have unequivocally ruled is unconstitutional because it is on public land to a different public entity where it will remain on the same public land, is not likely to solve the constitutional problem and definitely will not solve the problem when the purpose of the transfer is so obviously and transparently to "save the cross". As experienced and accomplished as you both are, I am sure when you read Judge Cowett's 35 page order, citing every case that is even marginally on point, you recognize the futility in attempting to overturn well established constitutional principals. I hope you would share with your clients Judge Cowett's quote from the Mendelson case, "In fact, no federal case has ever found the display of a Latin cross on public land... to be constitutional" which cites seven cases that predate Buono and Paulson. So there are now at least nine federal cases that have addressed the issue and they have all held that Latin crosses on public property are unconstitutional. There is not one federal case that holds that the permanent placement of a Latin cross on public property is constitutional. I am sure that you both recognize that the chance that your clients will prevail on appeal is <u>extremely</u> remote. I do not think any reasonable lawyer could read Judge Cowett's decision and suggest to his or her client that they are likely to prevail on appeal.

All of this, of course, assumes you have standing to file an appeal, an issue which I intend to vigorously dispute. However I do think the easiest way for you and your clients to analyze this is to ask yourselves, even if we did have standing, what is the likelihood we could overturn the trial court decision. Your clients should give some thought to the frivolous appeal sanctions as they relate to their status as non parties. This case has been going on, in a very public fashion, for fifteen years and the Dewhursts and Mr. Steele apparently did not feel at any time that they were parties to this action. As for the rest of your clients, they were all officers and founders of the SDMSM. Mr. LiMandri attended the first meeting of the organization and then appeared in court several times on their behalf over a period of several months and never once suggested to the court that his clients were necessary or indispensable parties. In fact, he made representations on the record to the contrary. Mr. Thalheimer and Mr. Shelby are certainly not going to contend that they did not know Mr. LiMandri was representing them or their organization in court during the litigation. This may lead the court to question the sincerity of the assertion when the attorney making it has failed to raise it with the court until <u>after</u> the adverse decision.

In any event, while I understand that we probably do not see these things in exactly the same light, I am confident that attorneys of your caliber certainly understand that it is not likely that your clients will prevail on this appeal and that a substantial attorney's fees award against your clients is a very likely possibility. Please discuss these issues with your clients and advise whether or not they are prepared to dismiss the appeal. If the appeal is dismissed by the end of the month (January 31st), Mr. Paulson will agree to waive all fees and frivolous appeal sanctions.

Thank you for your prompt attention to this matter.

Sincerely,



JAMES E. McELROY

cc: Philip Paulson
Charles Berwanger, Esq.

Religious Freedom Coalition
717 Second Street NE ✞ Washington, DC 20002
(202) 543-0300 Fax (202) 543-8447

July 28, 2006

The Honorable Sam Brownback
United States Senate
Washington, DC 20515

Dear Senator Brownback,

On behalf of the thousands of families represented by the Religious Freedom Coalition, I would like to thank you for introducing the *Veterans' Memorials, Boy Scouts, Public Seals and Other Public Expressions of Religion Act of 2006 (PERA).* This is a very much needed piece of legislation which would go far toward restoring the freedom of speech and of religion which American citizens were guaranteed in the Constitution. Those freedoms have been under severe assault for years by activist judges and avaricious lawyers.

The lawsuits brought against schools, cities and state agencies concerning issues of religious speech are well known. A judge was sued for hanging the Ten Commandments on the wall of his courtroom. A school principal was sued because he allowed a student to pray over the loudspeaker for two fellow students who had just died in a car wreck. A town council was sued because of "religious content" in the city seal. The list goes on and on. Although I and members of the RFC believe such lawsuits are outrageous, we know that in our republic citizens do have the right to come before the courts with complaints. And this legislation would not hamper that right to bring lawsuits. It would simply protect public officials from personal liability and remove some of the coercive power now held by lawyers motivated by personal gain.

The prospect of financial gain for lawyers and financial bankruptcy for losing defendants has served to corrupt the judicial process and to effectively stifle constitutionally guaranteed free speech. ACLU lawyers and others have actually threatened public officials with the prospect that if they are sued and lose, they may be found personally liable for court costs and attorneys' fees amounting to many thousands of dollars. Even worse, although public officials are protected from liability for money damages in their official capacity, no such protection exists for them as individuals. These threats may or may not be credible, depending on the particular judge, but few officials want to take the risk. So, they give up, they bow to the demands of the ACLU, and the First Amendment is trampled in the dust.

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It is despicable to threaten people with loss of their entire life savings or with being driven into debt, not because of any criminal act or intent but just because they have exercised their free speech rights. It is extortion, not justice.

I have been personally involved with several religious liberty cases in my capacity as chairman of the Religious Freedom Coalition. For example, I helped the schools of Pontotoc County, Mississippi in their battle against the ACLU after they were sued for three "religious activities" permitted in their schools. The schools won two out of the three charges in court, but lost the third. The ACLU, out of spite and greed, asked for and won a judgment of $278,000.00 for payment of attorneys' fees and "expenses." The citizens of Pontotoc, one of the poorest and least populated counties in the nation, struggled to come up with the money. Public officials know that if an award like this were leveled against them as individuals, the result would be devastating.

I commend you for your valiant effort to end this climate of fear and to bolster the constitutional protections of free religious expression which the Founders meant for Americans to have. I hope this legislation, (S. 3696), will have the many cosponsors which it rightfully deserves.

Yours sincerely,

A

William J. Murray
Chairman

TESTIMONY

OF

MELISSA ROGERS,

VISITING PROFESSOR OF RELIGION AND PUBLIC POLICY

WAKE FOREST UNIVERSITY DIVINITY SCHOOL

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

OF THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

REGARDING

"PAYING YOUR OWN WAY: CREATING A FAIR STANDARD FOR ATTORNEY'S FEES AWARDS IN ESTABLISHMENT CLAUSE CASES"

WEDNESDAY, AUGUST 2, 2006

I. Introduction

Thank you, Mr. Chairman, Senator Feingold, and Members of the Subcommittee, for this opportunity to speak with you about the "Veterans' Memorials, Boy Scouts, Public Seals, and other Public Expressions of Religion Protection Act of 2006" (S. 3696)(referred to hereinafter as "PERA").[1] I am Melissa Rogers, and I currently serve as a visiting professor of religion and public policy at Wake Forest University Divinity School.[2]

I formerly served as the executive director of the Pew Forum on Religion and Public Life, an organization supported by The Pew Charitable Trusts that is dedicated to exploring the way in which religion shapes American institutions and ideas. As that former title would suggest, I wholeheartedly support the right of religious individuals, organizations, and ideas to play an active role in the public square.[3] The U.S. Supreme Court wisely has recognized that "[t]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[4] Of course, this reference to "private speech" is not to speech "in private." Instead, it

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[1] I understand that the Subcommittee allows witnesses to supplement their testimony after the hearing. I would like to reserve my right to take advantage of that opportunity.
[2] My faculty biography is posted at http://www.wfu.edu/divinity/faculty-rogers.html.
[3] *See generally* Melissa Rogers, Testimony before the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Property Rights regarding religious expression and the public square (June 8, 2004).
[4] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000).

describes religious expression attributable to individuals and organizations rather than to the government.

Previous to my time with the Pew Forum, I served as general counsel to the Baptist Joint Committee on Religious Liberty. In that capacity, I had the privilege of helping lead a remarkable coalition that included Methodists, Mormons, and Muslims, as well as organizations ranging from the ACLU and Americans United for Separation of Church and State to the National Association of Evangelicals and Prison Fellowship. This coalition urged Congress to pass the Religious Land Use and Institutionalized Persons Act (RLUIPA), which was enacted in 2000.[5] RLUIPA provides heightened protection for the fundamental right of religious exercise in land use matters and situations in which persons are residing in or confined to governmental institutions. Apropos of this hearing, one of RLUIPA's provisions amended 42 U.S.C. Section 1988 to allow the court to award reasonable attorney's fees to prevailing parties in these matters.[6]

During my service at the Baptist Joint Committee, I also contributed to *amicus curiae* briefs on behalf of the prevailing parties in *Santa Fe Indep. Sch. Dist. v. Doe*[7] and *Good News Club v. Milford Central Sch. Dist.*,[8] among other cases heard by the U.S. Supreme Court.

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[5] 42 U.S.C. Section 2000cc *et seq.*
[6] *Id.*
[7] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).
[8] Good News Club v. Milford Central Sch. Dist., 533 U.S. 98 (2001).

I speak today not for any of the institutions with which I have been or am now affiliated, but as an attorney, a religious person who supports a vital role for faith in the public square, and someone who has been deeply involved in issues at the intersection of religion and public affairs for many years.

II. PERA Singles Out Establishment Clause Claims for Disfavored Treatment

The defining characteristic of PERA is that it would single out claims made under the Establishment Clause of the First Amendment for disfavored treatment. This bill does not address all constitutional claims or even all constitutional claims related to church-state issues. Instead, it selectively targets the Establishment Clause for poor treatment. PERA would carve out an exception from the general rule of 42 U.S.C. Section 1988 which provides for an award of attorney's fees to the prevailing parties who have sued to protect their constitutional rights. Under PERA, courts would be prohibited from awarding attorney's fees to parties who prevail on their Establishment Clause claims. PERA also would amend 42 U.S.C. Section 1983 to limit relief to injunctive and declaratory relief in cases arising under the Establishment Clause.[9]

[9] *See* 42 U.S.C. Section 1983.

As a general matter, this legislation would set a dangerous precedent, whereby Congress picks and chooses among constitutional provisions, singling some out for disfavor. Today, it is the Establishment Clause. Tomorrow, it could be the right to bear arms[10] or the right to just compensation when private property is taken for public use.[11]

More specifically, this legislation is troubling because it would discourage compliance with parts of the Constitution and undermine religious freedom. As Congress recognized in the 1976 Civil Rights Attorney's Fees Award Act, the ability of prevailing parties to receive an award of attorney's fees helps ensure that private attorneys will be willing to take these cases.[12] By barring attorney fees and damages to prevailing parties in Establishment Clause claims, PERA would discourage these claims, and thus discourage compliance with parts of the Constitution. The following sections address these issues in greater detail.

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[10] Second Amendment to the U.S. Constitution.
[11] Fifth Amendment to the U.S. Constitution.
[12] *See generally* S. Rep. No. 94-1011 (1976) on the Civil Rights Attorney's Fees Awards Act of 1976 *reprinted in* 1976 U.S.C.C.A.N 5908. The Senate report includes the following statement:

> There are very few provisions in our Federal laws which are self-executing. Enforcement of the laws depends on governmental action and, in some cases, on private action through the courts. If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

Id. at 6.

A. PERA Disfavors the Establishment Clause, the Primary Guardian Against Religious Discrimination and a Critical Source of Protection for Voluntarism and Religious Autonomy

PERA disfavors the Establishment Clause, the primary guardian against religious discrimination by the government and a critical source of protection for voluntarism and religious autonomy, among other constitutional values. The following describes PERA's impact on the specified constitutional values.

1. PERA Would Disfavor and Undermine the State's Obligation to Treat All Faiths Equally

PERA would disfavor and undermine the key constitutional obligation of the state to treat all faiths equally. As the U.S. Supreme Court has said, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[13] Simply put, the Establishment Clause is our primary guardian against religious discrimination by the government. This bill would undermine that commitment.

PERA would disfavor claims that challenge blatant governmental favoritism for one or more religion(s) over others, including a claim targeting a state's proclamation that Christianity is the official religion of

[13] Larson v. Valente, 456 U.S. 228, 244 (1982).

the state or a claim challenging a city's policy of awarding social service grants only to organizations of certain faiths.

Case law reflects the fact that blatant governmental favoritism for one faith sometimes manifests itself in our public elementary and secondary schools, a setting which the Supreme Court has said calls for particular vigilance in the enforcement of the Establishment Clause.[14] For example, in the case of *Doe v. Santa Fe*, which ultimately was heard by the U. S. Supreme Court,[15] a lower court took note of a number of troubling incidents linked to that case. The following is the court's description of one such incident:

> In April 1993, while plaintiff Jane Doe II was attending her seventh grade Texas History class, her teacher, David Wilson, handed out fliers advertising a Baptist religious revival. Jane Doe II asked if non-Baptists were invited to attend, prompting Wilson to inquire about her religious affiliation. On hearing that she was an adherent of the Church of Jesus Christ of Latter Day Saints (Mormon), Wilson launched into a diatribe about the non-Christian, cult-like nature of Mormonism, and its general evils. Wilson's comments inspired further discussion among Jane Doe II's classmates, some of whom reportedly noted that "he sure does make it sound evil," and "gee, . . . it's kind of like the KKK, isn't it?" Jane Doe II was understandably upset by this incident, and two days later, her mother, Jane Doe I, complained to [the school].

In this case, the school corrected this situation after hearing the complaint. But if future Establishment Clause claims are based on

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[14] Lee v. Weisman, 505 U.S. 577, 592 (1992)(recognizing "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.")

[15] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

blatant governmental discrimination against some faiths and PERA is the law of the land, such claims would be disfavored.

Let me mention another public secondary school case. Elizabeth Hansen was a senior at Ann Arbor Pioneer High School and a member of the Pioneers for Christ student organization.[16] Pioneer High School has a tradition of holding a "Diversity Week" that includes activities such as a general assembly program, panel discussions, and activities involving food and music.

In 2002, the Pioneer High School Student Council decided to hold a panel discussion on homosexuality and religion as part of these activities. It invited various adult religious leaders from the Ann Arbor community to participate in this panel discussion. All of the clergy who were selected to appear on the panel took the view that religious beliefs and homosexual conduct are not inconsistent.

Hansen sought to invite an adult member of the clergy of her choosing, or of the Pioneers for Christ's choosing, to participate on this panel. She testified that "she wanted her representative [on the panel] to convey the message that the Bible teaches that homosexuality is a sin."[17] To make a long story short, her attempts to include such a clergy leader on the panel were rejected. Hansen sued the school for declaratory and injunctive relief and damages, claiming its conduct in this and other matters violated the First Amendment's Free Speech, Free Exercise, and

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[16] Hansen v. Ann Arbor Public Schools, 293 F. Supp. 2d 780 (E. D. Mich. 2003).
[17] *Id.* at n.10.

Establishment Clause and the Equal Protection Clause of the Fourteenth Amendment.

With regard to Hansen's Establishment Clause claim, the court found that the school was "quite candid in admitting that the panel was created to convey only one religious view regarding the issue of homosexuality." According to the court, "[a]ny contrary or differing religious view was deemed 'negative,' and summarily excluded from the panel." Thus, the court found that it was clear that "the principal effect of the panel was to suggest preference for a particular religious view" in violation of the Establishment Clause.[18]

The court also found violations of Free Speech and Equal Protection Clauses in this case. It noted, however, that the Establishment Clause aspects of the case made it especially troubling. The court wrote:

> This case presents the ironic, and unfortunate, paradox of a public high school celebrating "diversity" by refusing to permit the presentation to students of an "unwelcomed" viewpoint on the topic of homosexuality and religion, while actively promoting the competing view. This practice of "one-way diversity," unsettling in itself, was rendered still more troubling – both constitutionally and ethically – by the fact that the approved viewpoint was, in one manifestation, presented to students as religious doctrine by six clerics (some in full garb) quoting from religious scripture.[19]

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[18] *Id.* at 805.
[19] *Id.* at 780.

In this case, the court ordered the school district to pay $100,000 in legal fees to the Thomas More Law Center, the firm that represented Hansen.[20]

None of these kinds of claims should be disfavored by the law. Each represents a case in which the government has overstepped it bounds into the religious realm and dishonored its obligation to treat all faiths equally.

Particularly at a time when our country is striving to take a principled stand for religious freedom abroad, asking countries with majority Muslim populations to give equal dignity and respect to non-Muslim faiths, it does not serve our country well to back away from our commitment to equal religious liberty for all at home.

2. PERA Would Disfavor and Undermine Voluntarism and Religious Autonomy

Some seem to support PERA because they believe that only the Free Exercise Clause protects religious autonomy and vitality. They are wrong. The Establishment Clause also is a source of protection for these values.

For example, the Establishment Clause has been interpreted to protect the right of people to choose faith or reject it free from

[20] Kim Kozlowski, "*Thomas More Cases Range from Defending Intelligent Design to Opposing Same-Sex Marriage*, Detroit News, December 4, 2005.

government pressure.[21] In short, decisions in matters of faith should be the product of one's volition, not state influence. At the founding of our country, my Baptists ancestors supported this principle in part because they recognized that governmental pressure on religious matters creates a stumbling block in the way of the formation of voluntary commitments to God. As Baptist preacher Isaac Backus recognized, "religion is ever a matter between God and individuals . . . ."[22]

Moreover, it has been recognized by many people of faith that government support for a particular religion not only undermines other faiths, atheism, and agnosticism, it also harms the faith that is favored or funded by the state. As Baptist preacher John Leland said in 1804, "[e]xperience, the best teacher, has informed us that the fondness of magistrates to foster Christianity, has done it more harm that all the persecutions ever did."[23]

What sorts of harms worried these Baptists? Isaac Backus believed, for example, that state financial support for religion shifted religious people's focus from God to government. Another group of Virginia Baptists worried about the rules and regulation that would

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[21] *See, e.g.*, Abingdon Township v. Schempp, 374 U.S. 203 (1963); Lee v. Weisman, 505 U.S. 577 (1992).
[22] Isaac Backus, *A Door Opened for Christian Liberty* (1783) in Isaac Backus on Church, State, and Calvinism, Pamphlets (1754-1789) at 432 (William G. McLoughlin ed., 1968).
[23] John Leland, *The Government of Christ A Christocracy* (1804) *reprinted in* The Writings of the Late Elder John Leland (L.F. Greene, ed. 1845) at 278,

follow government funds.[24] John Leland deplored the way in which state establishment of religion sapped the established religion's integrity and vitality.[25] The times and circumstances have changed, but these risks endure.

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[24] A memorial drafted by an association of Baptist ministers and delegates and published in 1777 opposed the Virginia establishment and explained some of the ways in which state financial support of religion leads to state intrusion in religious matters:

> If, therefore, the State provides a Support for the Preachers of the Gospel, and they receive it in Consideration for their Services, they must certainly when the Preach act as Officers of the State, and ought to be Accountable thereto for their Conduct. . . . The Consequence of this is, that those whom the State employs in its Service, it has the right to *regulate* and *dictate to*; it may judge and determine *who* shall preach; *when* and *where* they shall preach; and *what* they must preach. . . .

Lyman H. Butterfield, *Elder John Leland, Jeffersonian Itinerant*, 62 Proc. of the Am. Antiquarian Soc'y 160, 175 (1952)(quoting from a memorial included in The Papers of Thomas Jefferson 660-61 (Julian P. Boyd ed. Princeton 1950).

A similar petition was written by the Baptist General Committee of Virginia (BGAV) in 1785 in response to Patrick Henry's proposal in the Virginia House of Delegates to provide assessments for the teaching of religion, the bill that occasioned James Madison's famous work, *A Memorial Against Religious Assessments*. The BGAV declaration read in part:

> That it is believed to be repugnant to the spirit of the gospel for the legislature thus to proceed in matters of religion; that the holy author of our religion needs no such compulsive measures for the promotion of his cause; that the gospel wants not the feeble arm of man for its support; that it has made and will again through divine power make its way against all opposition; and that should the legislature assume the right of taxing the people for the support of the gospel it will be destructive to religious liberty.

Catherine Cookson, *Regulating Religion: The Courts and the Free Exercise Clause* at 84 (Oxford Univ. Press 2001).

[25] Leland charged that Virginia's state-supported Anglican preachers "not only plead for theatrical amusements, and what they call civil mirth, but their preaching is dry and barren, containing little else but morality." Leland explained: "The great doctrines of universal depravity, redemption by the blood of Christ, regeneration, faith, repentance and self-denial, are but seldom preached by them, and, when they meddle with them, it is in such a superficial manner, as if they were nothing but things of course." Lyman H. Butterfield, *Elder John Leland, Jeffersonian Itinerant*, 62 Proc. of the Am. Antiquarian Soc'y 160, 171 (1952)(quoting from *The Writings of John Leland, including Some Events in His Life, Written by Himself*, edited by L.F. Greene at 108-09).

Conversely, when the government refuses to fund religious activities due to Establishment Clause concerns, for example, it helps ensure that religion is essentially self-supporting and self-governing. This, in turn, assists in the avoidance of a corrosive dependence of religion on the government. This dependence would warp and weaken faith by tending to dry up tithes and gifts for religious ministries and make ministries less apt to criticize the governmental policies lest they lose state funds.

The Establishment Clause also has been interpreted to provide various means of protection for religious bodies to control their internal affairs. The Supreme Court has noted, for example, that " 'pervasive [government] monitoring' " for 'the subtle or overt presence of religious matter' is a central danger against which we have held the Establishment Clause guards."[26] In the same vein, the Establishment Clause is understood to help undergird concepts such as the ministerial exception, which places the relationship between clergy and religious groups beyond the reach of civil authorities.[27]

In short, both the Free Exercise and the Establishment Clauses are sources of protection for religious autonomy and vitality. Congress should not weaken claims made under either clause.

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[26] Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 694 (1989).
[27] *See, e.g.*, Rayburn v. General Conf. of Seventh-day Adventists, 772 F.2d 1164, 1169-70 (4th Cir. 1985).

3. PERA Would Tamper with the Family of Provisions that, Working Together, Create Religious Freedom

PERA would tamper with the family of constitutional provisions and other laws that, working together, create the uniquely American concept of religious freedom. Disfavoring a particular member in that family of religious liberty, as this bill would do, would distort and weaken that freedom as a whole.

On a number of occasions, the Supreme Court in general and various justices in particular have recognized the inter-connectedness of the various constitutional provisions that protect religious freedom. It has been said, for example, that the Establishment Clause is "a coguarantor, with the Free Exercise Clause, of religious liberty."[28] Or, as Justice Frankfurter wrote in 1947, the Establishment and Free Exercise Clauses are "correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom. "[29] More recently, the Court has said:

> The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference. James Madison, the principal author of

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[28] Abingdon Township v. Schempp, 374 U.S. 203, 256 (1963)(J. Brennan concurring).
[29] Everson v. Board of Educ., 330 U.S. 1, 40 (1947)(J. Frankfurter, dissenting).

> the Bill of Rights, did not rest his opposition to a religious establishment on the sole ground of its effect on the minority. A principal ground for his view was: "Experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation."[30]

As these passages indicate, the Free Exercise, Establishment, and Free Exercise Clauses (among other constitutional and statutory provisions) construct a web of mutually supportive rights that essentially keeps the government out of religious matters. [31] This provides freedom for citizens and groups to advance their religion as they see fit, rather than as the government sees fit.

As described above, disfavoring one strand of this freedom obviously would undermine the values that that particular strand protects. But it also would destabilize the concept of religious freedom as a whole. In other words, one cannot make a surgical strike at one strand of religious freedom. There will be collateral damage on related concepts and religious freedom overall. PERA would destabilize religious freedom in ways we cannot predict.

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[30] Lee v. Weisman, 505 U.S. 570, 589-90 (1992).

[31] This web of religious freedom also is supported by other constitutional provisions such as the "no religious test" clause of Article VI and the Equal Protection Clause and by statutes such as the Religious Freedom Restoration Act, 42 U.S.C. Section 2000bb *et seq.*, and RLUIPA.

B. Special Concerns Regarding Compliance with the Establishment Clause

People often take great personal risks when they file certain types of Establishment Clause lawsuits. As scores of cases indicate, some Establishment Clause claimants risk ostracism.

I mentioned earlier the case of *Santa Fe Indep. Sch. Dist. v. Doe*, in which plaintiffs sued a Texas school district for implementing a policy that encouraged school-sponsored prayer at public high school football games.[32] The plaintiffs in this case were "two sets of current and former students and their respective mothers."[33] As the Court noted, "[o]ne family is Mormon and the other is Catholic."[34] They sued anonymously because they feared a backlash from their community. Their fears were realized.

Indeed, the trial court judge in this case found that even "many [school] officials apparently neither agreed with nor particularly respected" the plaintiffs' decision to sue anonymously. The conduct of the school officials was so menacing and unrepentant, the judge issued the following order:

> Attempts by [school] administrators, teachers, and other employees "overtly or covertly to ferret out the identities of the Plaintiffs . . . by means of bogus petitions, questionnaires, individual interrogation, or downright 'snooping'" eventually prompted the district court to threaten to visit upon them "THE HARSHEST POSSIBLE

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[32] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).
[33] *Id.* at 294.
[34] *Id.*

> CONTEMPT SANCTIONS" and/or "CRIMINAL LIABILITY" if [school officials did] not cease their investigations.

Similarly, the newspapers this weekend carried an important story about the Dobrich family who used to live in the small town of Georgetown, Delaware.[35] For years, the story reports, Mrs. Dobrich and her daughter, Samantha, "listened to Christian prayers at public school potlucks, award dinners and parent-teacher group meetings. . . " But at her daughter's high school graduation in June 2004, "a minister's prayer proclaiming Jesus as the only way to the truth nudged Mrs. Dobrich to act." The Supreme Court has ruled that public schools may not invite clergy to lead prayers at these ceremonies,[36] yet the school apparently engaged in this practice without hesitation or apology.

The article describes Mrs. Dobrich's attempt to address the situation with the relevant school authorities:

> Mrs. Dobrich asked the Indian River district school to consider prayers that were more generic and, she said, less exclusionary. As news of her request spread, many local Christians saw it as an effort to limit their free exercise of religion, residents said. Anger spilled on to talk radio, in letters to the editor and at school board meetings attended by hundreds of people carrying signs praising Jesus.
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> "What people here are saying is, 'Stop interfering with our traditions, stop interfering with our faith and leave our country the way we knew it to be,' " said Dan Gaffney, a host at WGMD, a talk

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[35] *See* Neela Banerjee, *Families Challenging Religious Influence in Delaware Schools,* The New York Times (July 29, 2006), which may be found at http://www.nytimes.com/2006/07/29/us/29delaware.html?_r=1&oref=slogin.
[36] Lee v. Weisman, 505 U.S. 570 (1992).

> radio station in Rehoboth, and a supporter of prayer in the school district.
>
> After receiving several threats, Mrs. Dobrich took her son, Alex, to Wilmington in the fall of 2004, planning to stay until the controversy blew over. It never has.
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> The Dobriches eventually sued the Indian River School District, challenging what they asserted was the pervasiveness of religion in the schools and seeking financial damages. They have been joined by "the Does," a family still in the school district who has remained anonymous because of the response against the Dobriches.
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> Meanwhile, a Muslim family in another school district here in Sussex County has filed suit, alleging proselytizing in the schools and the harassment of their daughters.
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> The move to Wilmington, the Dobriches said, wrecked them financially, leading them to sell their house and their daughter to drop out of Columbia University.

When Mrs. Dobrich attended a school board meeting on these issues in August 2004, hundreds of people showed up, according to the story. She asked the board to draw up policies that would comply with the Constitution. Here is an excerpt from the story addressing some of the attendees' reaction to her request:

> People booed and rattled signs that read "Jesus Saves," she recalled. Her son had written a short statement, but he felt so intimidated that his sister read it for him. In his statement, Alex, who was 11 then, said: "I feel bad when kids in my class call me 'Jew boy.' I do not want to move away from the house I have lived in forever."
>
> Later, another speaker turned to Mrs. Dobrich and said, according to several witnesses, "If you want people to stop calling him 'Jew boy,' you tell him to give his heart to Jesus."
>
> Immediately afterward, the Dobriches got threatening phone calls. Samantha had enrolled in Columbia, and Mrs. Dobrich decided to go to Wilmington temporarily.

> But the controversy simmered, keeping Mrs. Dobrich and Alex away. The cost of renting an apartment in Wilmington led the Dobriches to sell their home here. Mrs. Dobrich's husband, Marco, a school bus driver and transportation coordinator, makes about $30,000 a year and has stayed in town to care for Mrs. Dobrich's ailing parents. Mr. Dobrich declined to comment. Samantha left Columbia because of the financial strain.

According to the story, "[t]he Dobrich and Doe legal complaint portrays a district in which children were given special privileges for being in Bible club, Bibles were distributed in 2003 at an elementary school, Christian prayer was routine at school functions and teachers evangelized." The legal complaint seeks compensatory or nominal damages for "past unconstitutional practices and policies" and for pecuniary loss the Dobriches and Does have allegedly suffered. It also seeks declaratory and injunctive relief to prevent a range of "school-sponsored religious exercises at public functions." In addition, plaintiffs seek their attorneys' fees in the case under 42 U.S.C. Section 1988.[37]

If the allegations in the complaint are true, they represent a case of stubborn resistance to Establishment Clause principles, not to mention grossly un-Christian behavior. Let me pause here for a moment to emphasize that students in public schools have the right to practice their faiths, but the school must not promote or endorse religion.[38] The legal

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[37] Plaintiff's First Amended Complaint in Dobrich v. Indian River Sch. Dist., CA No. 05-120 (JJF)(D. Del. June 2, 2006). A copy of the Dobrich complaint may be found at www.jewsonfirst.org/06b/indianriver.pdf

[38] *See Religion in the Public Schools: A Joint Statement of Current Law*, which may be found at http://archive.aclu.org/issues/religion/relig7.html. President Clinton noted that his administration borrowed from this statement to create a similar statement on this subject entitled, *Religious Expression in Public Schools*, which was released by The

problem in situations such as this is not religion expression per se, but school-sponsorship of it. Again, if these allegations are true, then this and other Establishment Clause principles have been ignored with impunity in this case, at least until Mrs. Dobrich began her courageous attempt to try to bring the school's conduct in line with the Constitution. In response, the Dobrich family apparently has been subject of ostracism.

As these stories suggest, one can understand that it would only be the unusual person who would challenge the majority on these matters.[39] If attorneys were not able to recover fees for their work on such cases, that would make enforcement of the law even more rare.

Whether one agrees or disagrees with the law in this area, we all should be able to agree that the rule of law must prevail.[40] In these

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White House on May 30, 1998, and sent to every school district in the nation. This statement on religious expression may be found at www.ed.gov/Speeches/08-1995/religion.html.

[39] As the U.S. Supreme Court has recognized, the Bill of Rights is a counter-majoritarian document:

> 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.

West Virginia St. Bd. of Ed. v. Barnette, 319 U.S. 624, 638 (1943).

[40] In a statement addressed to the Indian River School Board at a meeting in July 2004, Mrs. Dobrich spoke eloquently about this principle. She said:

> You as elected officials of this community have not only an opportunity, but an obligation to follow the law. It is your duty to develop standards for teachers, coaches, and administrators to follow. Put into place policies that will ensure

cases, the ability of prevailing parties to receive an award of attorney fees serves an important role in increasing the odds that it will. If such fee awards were unavailable, the Establishment Clause would be violated much more often with impunity. In this way, PERA would frustrate the rule of law.

C. There is No Evidence of a Principled Justification for Treating Establishment Clause Claims Differently as PERA Does

Some have suggested that PERA's different treatment of Establishment Clause claims is justified because Establishment Clause jurisprudence is uniquely unpredictable or confusing. That suggestion is incorrect.

It first should be said that many aspects of Establishment Clause law are perfectly clear. For example, under the Establishment Clause, the state may not prefer one religious denomination or one religion over another;[41] prescribe or sponsor prayers in public elementary and

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> [at] all school events, the law [will be] upheld. Make me proud to be a graduate of the Indian River School District.

Plaintiff's First Amended Complaint in Dobrich v. Indian River Sch. Dist., CA No. 05-120 (JJF)(D. Del. June 2, 2006) at 19.

[41] Larson v. Valente, 456 U.S. 228, 244 (1982)("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.")

secondary schools;[42] refuse to teach certain materials in the public schools simply because they contradict particular religious teachings;[43] or delegate governmental powers to religious groups.[44]

While Establishment Clause claims do sometimes present complex issues, that is hardly an unusual aspect of constitutional jurisprudence. For example, consider one of the most criticized tests in Establishment Clause jurisprudence, the endorsement test which requires "judicial interpretation of social facts."[45] As Professor Alan Brownstein has noted, "the endorsement standard is no different than a host of commonly utilized constitutional constructs that also involve 'judicial interpretation of social facts.' "[46] A "small set of possible examples" of such constructs include:

> the reasonably prudent person in tort law; expectations of privacy in Fourth Amendment doctrine; justified investment-based expectations and economically viable uses in Taking Clauses cases; fighting words, clear and present dangers, offensive speech in free speech doctrine; stigmatic messages in equal protection cases; and important or compelling state interests in the standards of review that extend throughout the constitutional protection of fundamental rights. . . . These mixed fact and law conclusions in various degrees describe cultural understandings (or perceptions) derived from social behavior that are assigned specific and significant legal consequences in particular cases.[47]

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[42] Engel v. Vitale, 370 U.S. 421 (1962); Abingdon Township v. Schempp, 374 U.S. 203 (1963).
[43] Epperson v. Arkansas, 393 U.S. 97 (1968).
[44] Larkin v. Grendel's Den, 459 U.S. 116 (1982).
[45] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 315 (2000)(quoting Lynch v. Donnelly, 465 U.S. 668, 693-94 (1984)(J. O'Connor, concurring)).
[46] Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment*, 32 McGeorge L. Rev. 837, 850 (2001).
[47] *Id.*

It simply isn't the case that Establishment Clause jurisprudence generally or the endorsement test specifically is uniquely unpredictable or confusing. As Professor Brownstein says, "[w]hat is disturbing about some of the criticisms of the endorsement test is the suggestion that there is something uniquely unfathomable about this principle."[48]

Moreover, this argument in favor of PERA raises a question. How does Congress propose to determine when some area of the law becomes sufficiently complex to deny awards of attorneys' fees to prevailing parties or to limit their relief? This would seem to be an invitation to mischief, with legislators being tempted to say that certain claims they disfavor touch on areas of the law that are distinctly confusing or unpredictable.

We also need to remember that clarity and predictability are not always a virtue. To take an extreme example, the U.S. Supreme Court could hand down a unanimous opinion establishing Christianity as the official religion of our country, to be preferred and favored in law and policy. That would be quite clear, but it would do great violence to our constitutional values and our democracy.

At bottom, PERA is an attempt to undermine the Establishment Clause by discouraging enforcement of it. There is something deeply disturbing about the notion that Congress would weaken certain

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[48] *Id.* Professor Brownstein notes that he doesn't mean to suggest that there aren't "important questions to be raised about how the Court identifies an endorsement for constitutional purposes." But he emphasizes that "many criticisms directed at the endorsement test are equally applicable to a host of constitutional standards." *Id.*

constitutional provisions because it does not support some of the principles embedded in it or the results those provisions have commanded in particular cases. That would be conduct unworthy of a body sworn to protect and defend the Constitution.

III. Conclusion

PERA would single out claims made under the Establishment Clause of the First Amendment for disfavored treatment. This would set a dangerous precedent, whereby Congress picks and chooses among constitutional rights, undermining some of them. It also would discourage compliance with parts of the Constitution and harm religious freedom. For these and other reasons, I respectfully urge the members of the Subcommittee to reject this bill.

TESTIMONY OF

Attorney Mathew D. Staver
Founder and Chairman of Liberty Counsel
Interim Dean and Professor of Law of Liberty University School of Law
Before Senate Judiciary Subcommittee on the Constitution,
Civil Rights and Property Rights
August 2, 2006

Mr. Chairman, members of the committee, thank you for inviting me. My name is Mathew Staver.[1] I am the Founder and Chairman of Liberty Counsel[2] and the Interim Dean and Professor of Law of Liberty University School of Law.[3]

I have come today to address whether federal statutes 42 U.S.C. §§ 1983 and 1988 should be amended to exclude claims arising under the Establishment Clause of the First Amendment to the United States Constitution. Sections 1983 and 1988 are designed to encourage plaintiffs who suffer deprivation of their civil or constitutional rights to vindicate

1 A detailed curriculum vitae is available upon request. In reference to the relevant issue before this Committee, my specialty is constitutional litigation. I have earned B.A., M.A. and J.D. degrees, an honorary LL.D. degree, am an AV rated attorney and Board certified by the Florida Bar in Appellate Practice. I have written ten books, most of which deal with constitutional law, including a recent 572 page book devoted exclusively to constitutional law. In reference to 42 U.S.C. § 1983 and 42 U.S.C. § 1988, the sections under consideration before this Committee, I have conducted numerous continuing education credit courses for attorneys and law professors. I have also been called to testify in federal court regarding 42 U.S.C. § 1988, and have been recognized by federal courts as an expert on Section 1988 attorney's fees. I have written numerous briefs before the United States Supreme Court and presented oral argument before the High Court twice as lead counsel.

2 Liberty Counsel is a nonprofit litigation, education and policy organization founded in 1989. Liberty Counsel has offices in Florida and Virginia and has hundreds of affiliate attorneys in all 50 states. Liberty Counsel specializes in constitutional law.

3 Liberty University School of Law was founded in 2004 and received provisional accreditation by the American Bar Association on February 13, 2006.

those rights in a court of law. Sections 1983 and 1988 are particularly suited for those cases in which the plaintiffs are ill-financed and where the law is relatively predictable. However, in Establishment Clause cases, many, if not most, of the plaintiffs are represented by public interest law firms which will finance the case whether or not a fee shifting statute exists.

Establishment Clause jurisprudence is the most unpredictable and confusing area of law. There have been and remain sharp disagreements between the Justices of the United States Supreme Court and lower court judges over the meaning and application of the Establishment Clause. In an area of law where there are conflicting court decisions for every conceivable proposition, it makes little sense to award attorney's fees and costs to plaintiffs with diametrically opposed positions. While conflicting court opinions will inevitably occur in any area of law, it is particularly troubling when conflicting opinions are the rule rather than the exception to the rule. By providing a fee shifting statute in such a confused area of law, the plaintiff often uses the threat of attorney fees to force government officials to a desired result, whether or not that result is the right one. It is my considered opinion that Establishment Clause claims should be excluded from Section 1988.

To better understand the problem, let me first begin by reviewing the background of 42 U.S.C. §§ 1983 and 1988 and then addressing the current state of Establishment Clause jurisprudence.

I. BACKGROUND OF RELEVANT FEE SHIFTING STATUTES.

A. 42 U.S.C. § 1983.

Originally called the Ku Klux Klan Act of 1871, 42 U.S.C. § 1983, states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. [4]

Section 1983 was enacted to "create a right of action in federal court against local government officials who deprive citizens of their constitutional rights by failing to enforce the law, or by unfair and unequal

4 42 U.S.C. § 1983 (1996).

enforcement."[5] Representative Shellabarger, the Chairman of the House Select Committee, which drafted the Ku Klux Klan Act, said that the statute was "confined to giving a civil action for such wrongs against citizenship as are done under color of State laws which abridge these rights."[6] The U.S. Supreme Court in *Monroe v. Pape*, held that Section 1983 served three purposes: (1) "to override certain kinds of state laws, (2) to provide a remedy where state law was inadequate, and (3) to afford a federal remedy where the state remedy, while adequate in theory, was not available in practice."[7] Section 1983 served as the vehicle of vindication for the deprivation of another's statutory or constitutional rights. [8]

The Members of the 96th Congress that enacted Section 1983 did not directly address the question of damages, but "the principle that damages are designed to compensate persons for injuries caused by the deprivation of rights hardly could have been foreign to the many lawyers in Congress in 1871."[9] The Court implicitly has recognized the applicability of this principle to actions under Section 1983 by stating that damages are available

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5 H.R. Rep. No. 96-548 (1979).

6 *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 164 (1970).

7 *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961).

8 H.R. Rep. No. 96-548.

9 *Carey v. Piphus*, 435 U.S. 247, 255 (1978).

under that section for actions found to have been violative of constitutional rights and to have caused compensable injury.[10] Section 1983 has led to the derogation of the American Rule[11] for damages, by allowing the prevailing party to recover not only damages, but attorney's fees as well.

B. 42 U.S.C. § 1988.

One of the exceptions to the American Rule is 42 U.S.C. § 1988(b), which states:

> In any action or proceeding to enforce a provision of sections 1981[[12]], 1981a[[13]], 1982,[[14]] 1983, 1985[[15]], and 1986[[16]] of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. §

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10 *Id.*

11 BLACK'S LAW DICTIONARY (8th ed. 2004). The American rule is the general policy that all litigants, even the prevailing one, must bear their own attorney's fees; *see also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260-262 (1975) (holding that prevailing parties in federal litigation may not recover their attorney's fees unless Congress has expressly authorized a fee-shifting statute pertinent to the case at bar.).

12 Equal rights under the law: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

13 Provides damages in cases of intentional discrimination in employment.

14 Property rights of citizens:"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

15 Provides a cause of action for conspiracy to interfere with civil rights.

16 Provides a cause of action for neglect to prevent violations of 42 U.S.C § 1985.

> 2000d et seq.], or section 13981[[17]] of this title, 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction. [8]

Section 1988, known as "The Civil Rights Attorney's Fees Awards Act of 1976," made fee awards an essential remedy for private citizens who had the opportunity to assert their civil rights.[19] The remedy of attorney's fees is appropriate in the area of civil rights.[20] "If successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts."[21] Whether Section 1988 is appropriate in the context of Establishment Clause claims is an entirely different question. I think it is not appropriate, as I will continue to explain.

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17 Provides that "All persons within the United States shall have the right to be free from crimes of violence motivated by gender..."

18 42 U.S.C § 1988(b) (2000).

19 S. Rep. No. 94-1011 (1976).

20 *Id.*

21 *Id.*

C. Equal Access to Justice Act

Before continuing further, I need to point out another exception to the American Rule is the Equal Access to Justice Act (EAJA).[22] Under the EAJA, "courts may award reasonable attorney's fees to parties that have successfully litigated against the federal government in an action in which the government's position was not substantially justified."[23] Even if Section 1988 was amended to eliminate the award of attorney's fees, which I believe it should be, the EAJA remains a viable loophole to such a revision. Thus, I would urge this Committee to also consider similarly amending the EAJA to exclude from its purview Establishment Clause claims.

II. THE ESTABLISHMENT CLAUSE EXCEPTION TO STANDING RULES.

Section 1983's focus on civil rights claims has been expanded to cover constitutional claims, including Establishment Clause cases under the First Amendment. These claims are typically brought by public interest organizations, already financed by public, charitable support. These public

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22 The Equal Access to Justice Act provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees ... incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (1994).

23 John W. Finley, III, *Unjust Access to the Equal Access to Justice Act: A Proposal to Close the Act's Eligibility Loophole for Members of Trade, Associations*, 53 J. URB. & CONTEMP. L. 243, 245 (1998).

interest organizations will continue to take Establishment Clause cases without regard to such fee-shifting provisions. In fact, a good argument can be made that some frivolous claims will be eliminated by removing the threat of attorney's fees.

Plaintiffs bringing claims pursuant to the Establishment Clause or other Constitutional provisions must meet all three prongs of the "standing" test in *Lujan v. Defenders of Wildlife*.[24] "First, the plaintiff must have suffered an injury in fact- an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision."[25] Simply put, the plaintiff must suffer a (1) direct and concrete injury, (2) which injury can be traced to the complained of action, and (3) which injury will be redressed by the litigation. This three-prong test

24 *Ganulin v. United States*, 71 F. Supp. 2d 824 (S.D. Ohio 1999).

25 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

helps to protect Article III courts, by ensuring that they are not giving advisory opinions, but rather are hearing only cases and controversies.[26]

Despite the *Lujan* test, lower federal courts have relaxed the standing requirements in Establishment Clause cases and have carved out exceptions to the normal standing rules that apply in every other area of litigation. In ruling on standing, the Supreme Court has held that "it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated."[27] In *McGowan v. Maryland*, the Court held that the standing requirements will vary in First Amendment religion cases depending upon whether the party raises an Establishment Clause claim or a claim under the Free Exercise Clause.[28]

The Sixth Circuit Court of Appeals has noted that First Amendment Establishment Clause plaintiffs do not bear a heavy burden, and the standing inquiry in such cases can be tailored to reflect the type of injury Establishment Clause plaintiffs are likely to suffer.[29] In *Briggs*, the court

26 *Flast v. Cohen*, 392 U.S. 82, 96 (1968). The Article III prohibition against advisory opinions reflects the complementary constitutional considerations expressed by the justiciability doctrine: Federal judicial power is limited to those disputes which confine federal courts to a rule consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.

27 *Id.* at 102.

28 *McGowan v. State of Maryland*, 366 U.S. 420, 429- 30 (1961).

29 *Briggs v. Ohio Elections Com'n*, 61 F.3d 487, 492 (6th Cir. 1995).

held that there is not a heavy burden to demonstrate "a claim of specific present objective harm or a threat of specific future harm."[30] "While it is clear that abstract injury is not enough to establish standing, it is equally clear that mere offense to individual values of an abstract or esoteric nature can provide the basis for standing."[31] In cases involving the Establishment Clause, the courts have lessened the standing requirements laid out in *Lujan* to seemingly fictitious injuries. In most lower federal courts, a plaintiff can bring an Establishment Clause challenge simply because the litigant claims that he or she is offended by the religious imagery or alleged religious action.[32] This exception to the general rules of standing has opened the floodgates of litigation. In no other area of law may a plaintiff bring a lawsuit based on mere offense.

III. CONFUSING AND CHANGING INTERPRETATIONS OF THE ESTABLISHMENT CLAUSE.

In addition to the exception to the standing rules for Establishment Clause cases, there are confusing and changing interpretations of the Establishment Clause itself. The Supreme Court currently uses several tests, some of which actually conflict with one another, and sometimes the High

30 *Id.* at 492.

31 *Id.*

32 *See* Laveta Casdorph, *The Constitution and Reconstitution of the Standing Doctrine*, 30 ST. MARY'S L.J. 471, 491-92 (1999) (noting that the "standing doctrine shifted" to allow plaintiffs much broader access to challenge governmental acts under the Establishment Clause).

Court forgoes using any test at all. Thus, litigants, government officials and judges are left to guess at the meaning of the Establishment Clause. If the Justices of the Supreme Court are conflicted over the meaning of the Establishment Clause, then it is particularly inappropriate to punish government officials with the threat of attorney's fees and costs for a mere misstep in this constitutional mine field.

A. Overview of the Supreme Court's Various Tests.

1. The Lemon Test.

The Court in *Lemon v. Kurtzman* applied a three-part test for deciding Establishment Clause cases.[33] "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."[34]

In *Lynch v. Donnelly*[35] and *County of Allegheny v. ACLU*,[36] the *Lemon* test was refined into an "endorsement" test and narrowed to the purpose and effects prongs. The purpose test focuses on the subjective intent of the government speaker and the effects on the objective meaning of the

33 *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

34 *Id.* at 612-13.

35 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).

36 *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

statement to a reasonable observer.[37] The purpose prong asks "whether government's actual purpose is to endorse or disapprove of religion," and the effects prong asks "whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval" of religion.[38]

2. The Marsh Test.

In *Marsh v. Chambers*,[39] the Supreme Court did not use a specific test, but rather examined the Establishment Clause from an historical perspective. After chronicling history back to the debates on the Constitution and Bill of Rights, the Court held that legislative prayers were permissible since the same statesmen, on the same day they agreed on the language of the First Amendment, authorized Congress to pay a chaplain to open each session with prayer.[40] Contemporaneous actions taken by those who framed the First Amendment are "weighty evidence" of its intent.[41] "*Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise

37 *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

38 *Id.* The entanglement prong has been subsumed into the effects prong and is concerned with "institutional" entanglement. The "political divisiveness" inquiry only applied to school funding cases, but has been discarded by cases post *Aguilar v. Felton*, 473 U.S. 402 (1985). *See Lynch*, 465 U.S. at 687-89 (O'Connor, J., concurring); *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 n.7 (2002); *Mitchell v. Helms*, 530 U.S. 793, 825-26 (2000) (plurality).

39 *Marsh v. Chambers*, 463 U.S. 783 (1983).

40 *Id.* at 786-91.

41 *Id.* at 790.

broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings."[42] In many cases the outcome of the litigation will be entirely different depending on whether the Court applies the *Marsh* test instead of the *Lemon* test. There is almost no guidance when one is applicable and the other is not.

3. The Lee or Coercion Test.

The Court in *Lee v. Weisman* used yet another approach for Establishment Clause cases - a coercion test.[43] The Court held that "government may not coerce anyone to support or participate in religion or its exercise" or to act in a way that establishes a state religion, or tends to do so. The Court found that public school officials compelled young students to participate in "an overt religious exercise."[44] Justices of this Court have indicated at various times that coercion is part of the Free Exercise Clause but not the Establishment Clause, have discussed coercion as though it is part of the Establishment

42 *County of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in part, dissenting in part).

43 *Lee v. Weisman*, 505 U.S. 577 (1992).

44 *Id.* at 587-88.

Clause, or have stated that coercion alone is insufficient.[45] Even within one test, the United States Supreme Court is conflicted and confused as to its application.

4. A New Test and No Test.

Justice O'Connor proposed a new test for Establishment Clause cases in *Elk Grove Unified School District v. Newdow*.[46] Justice Thomas has written that the Establishment Clause does not apply to the states, and thus restricts only the federal, not state, government. [7]4

The final option for analysis of Establishment Clause cases is to use no test at all. This classic case was presented in 2005 with the two decisions by the High Court on the Ten Commandments. In the Kentucky case, the Supreme Court used a modified *Lemon* test, but in the Texas case, argued and decided the same day, the Court used no test at all.

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45 Not part of Establishment Clause: *Lee*, 505 U.S. at 604 (Blackmun, J., concurring); *Id.* at 619 (Souter, J., concurring); *County of Allegheny*, 492 U.S. at 597 n.47; *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 221 (1963)(apparently rejecting coercion but then discussing "indirect coercion"); *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (same); Discussing coercion: *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2320 (2004) (Rehnquist, C.J., concurring) (distinguishing between compulsion in *West Virginia Bd. o f Ed* v. *Barnette*, 319 U.S. 624 (1943) and coercion in *Lee*); *Id.* at 2327 (O'Connor, J., concurring); *Id.* at 2328-31 (Thomas, J., concurring); *Good News* Club v. Milford Cent. Sch., 533 U.S. 98, 121 (2001) (Scalia, J., concurring); *Mitchell* v. *Helms*, 530 U.S. 793, 870-71 (2000) (Souter, J., dissenting); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 719 (1994)(O'Connor, J., concurring in part); *Bd. of Ed. of Westside of Cmty. Sch. v. Mergens by & through her next Friend, Mergens, et al.*, 496 U.S. 226, 261 (1990) (Kennedy, J., concurring in part); *County of Allegheny*, 492 U.S. at 657-63 (Kennedy, J., concurring in part, dissenting in part);*Wallace* v. *Jaffree*, 472 U.S. 38, 60 (1985); *Zorach v. Clauson*, 343 U.S. 306, 311-14 (1952); *Id.* at 321 (Frankfurter, J., dissenting); Coercion insufficient by itself: *County of Allegheny*, 492 U.S. at 627-28 (O'Connor, J., concurring in part).

46 *Newdow*, 124 S. Ct. at 2322 (2004) (O'Connor, J., concurring).

47 *Id.* at 2328. (Thomas, J., concurring) ("The Establishment Clause is a federalism provision, which, for this reason, resists incorporation.").

IV. EXAMPLES OF CONFUSING AND CONFLICTING ESTABLISHMENT CLAUSE JURISPRUDENCE.

That the Establishment Clause test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), has caused "hopeless confusion" is no surprise, as many members of the Supreme Court have voiced opposition to its continued use.[48] *Lemon* is not solely to blame for the infamous three-part test because it merely stated what the Court had previously done.[49] Nevertheless, the chaos caused by *Lemon* led Justice Kennedy to state: "Substantial revision of our Establishment Clause doctrine may be in order...."[50]

The Supreme Court acknowledged that there is no "rigid caliper" or "single test" and that *Lemon* was only meant as a "guideline."[51] Yet, the "guideline" continues to overshadow Establishment Clause jurisprudence. *Lemon* has fractured the Court and caused scholars and litigators to wonder

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48 *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting)("checkered history"); *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1253 (2000)(Scalia, J., dissenting from denial of certiorari)(would grant certiorari to "inter the *Lemon* test"); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 751 (1994)(Scalia, J., dissenting)("meaningless"); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (Scalia, J., concurring)("stalks our Establishment Clause jurisprudence"); *Wallace v. Jaffree*, 472 U.S. 38, 67 (1985)(O'Connor, J., concurring)("should be reexamined and refined"); *Id.* at 91 (White, J., dissenting); *Id.* at 110-11 (Rehnquist, J., dissenting)(*Lemon* has spawned "unworkable plurality opinions," "consistent unpredictability" and "unprincipled results"); *Committee for Public Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (Stevens, J., dissenting)(requires "sisyphean task" to apply the test).

49 The purpose and effects of a government activity were first mentioned in *McGowan v. Maryland*, 366 U.S. 420, 443, 445 (1961), *Schempp*, 374 U.S. at 222, and *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968). The entanglement prong was first announced in *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970).

50 *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989)(Kennedy, J., concurring in part, dissenting in part).

51 *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2322 (O'Connor, J., concurring); *Mitchell v. Helms*, 530 U.S. 793, 885 (2000)(Souter, J., dissenting); *Santa Fe*, 530 U.S. at 319 (Rehnquist, C.J., dissenting); *Wallace*, 472 U.S. at 86 (Burger, C.J., dissenting); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984).

if there is any hope for consistency. There are as many conflicting decisions on virtually identical fact patterns as there are judges to decide them.

For almost every federal district court opinion stating one proposition, one can find another federal district court holding exactly the opposite. Many of these cases have not been appealed through the appellate level, and most have not made their way to the United States Supreme Court. Consequently, many of the federal district court cases still remain and have never been clarified. Because the Supreme Court has developed such an unworkable test, it has opened the floodgates to Establishment Clause litigation. Courts have gone in all directions applying the *Lemon* test, and litigants have often been frustrated when they first enter the federal district court and are unable to take the case any higher to have it clarified or possibly overturned. To illustrate this point, I will overview a number of conflicting decisions considering the same issue. In most cases only the federal district court cases have been cited simply to illustrate the confusion among those courts. While the propositions stated below may not be the final ruling of the court, as the case may have been appealed to a higher judicial body, the cases are cited to illustrate the religious liberty quagmire.[52]

52 The cases cited between footnotes 52 and 113 are mostly citations to the federal district courts. These cases are not shepardized and may have been overruled by either a circuit court of appeals or the United States Supreme Court. The cases are listed only as examples of the confusion caused by the *Lemon* test and therefore may not represent the final holding or established law.

In the area of release time, courts have allowed students to go off school premises for religious instruction[53] so long as the instruction did not take place near the school building.[54] Some courts have ruled it is unconstitutional for students to hand carry attendance slips from the parochial instruction back to the public school.[55] Other courts have ruled that elective credit cannot be given for the parochial course.[56] Some courts have ruled that public school intercoms were permitted in seminary classrooms and public schools could maintain mailboxes for seminary instructors.[57] Schools have been forced to defend the recognition of religious observances[58] and the prohibition of school dances.[59]

A parochial school child can participate in a public school band course,[60] but cannot participate in an all-county band.[61] If a parochial school

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53 *Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981); *Smith v. Smith*, 523 F.2d 121 (4th Cir. 1975); *State v. Thompson*, 225 N.W.2d 678 (Wis. 1975).

4 *Doe v. Shenandoah County School Board*, 737 F. Supp. 913 (W.D. Va. 1990).
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5 *Lanner*, 662 F.2d at 1349; *Thompson*, 225 N.W.2d at 678.
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6 *Lanner*, 662 F.2d 1349; *See Minnesota Federation of Teachers v. Nelson*, 740 F. Supp. 694 (D. Minn. 1990).
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7 *Id.*
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58 *See Florey v. Sioux Falls School District 49-5*, 619 F.2d 1311 (8th Cir. 1980). *See also Student Members of Playcrafters v. Board of Education*, 424 A.2d 1192 (N.J. 1981) (School board forced to defend policy of prohibiting extracurricular activities on Friday, Saturday, and Sunday).

9 *See Clayton v. Place*, 884 F.2d 376 (8th Cir. 1989).
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0 *Snyder v. Charlotte Public School District*, 365 N.W.2d 151 (1985).
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1 *Thomas v. Allegheny County Board of Education*, 51 Md. App. 312, 443 A.2d 622 (1982).
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child needs remedial services, the district may be allowed to fund services at the student's school,[62] but such provision may be void on its face,[63] or funds may be allowed only if services are performed at "neutral sites."[64]

Public funds may be used to lease classroom space from a church related school, but only if public school children are shielded from religious influence.[65] Public schools may[66] or may not[67] lease classroom space in parochial schools. Private school students or religious organizations may[68] or may not[69] be permitted to utilize public school facilities. Financial

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62 *See Walker v. San Francisco Unified School District*, 741 F. Supp. 1386 (N.D. Cal. 1990), *reh'g denied*, 62 F.3d 300 (9th Cir. 1995); *Thomas v. Schmidt*, 397 F. Supp. 203 (D.R.I. 1975).

3 *Wamble v. Bell*, 598 F. Supp. 1356 (W.D. Mo. 1984); *Viss v. Pittenger*, 345 F. Supp. 1349 (E.D. Pa. 1972).

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64 *Felton v. Secretary*, 739 F.2d 48 (2d Cir. 1984); *Pulido v. Cavasos*, 728 F. Supp. 574 (W.D. Mo. 1989); *Filler v. Port Washington University Free School District*, 436 F. Supp. 1231 (E.D.N.Y. 1977); *Wolman v. Essex*, 417 F. Supp. 1113 (S.D. Ohio 1976).

5 *Thomas v. Schmidt*, 397 F. Supp. 203 (D.R.I. 1975).

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66 *Spacco v. Bridgewater School Department*, 722 F. Supp. 834 (D. Mass. 1989); *Americans United for Separation of Church & State v. Paire*, 359 F. Supp. 505 (D.N.H. 1973); *Americans United for Separation of Church & State v. Paire*, 348 F. Supp. 506 (D.N.H. 1972); *Citizens to Advance Public Education v. Porter*, 237 N.W.2d 232 (Mich. 1976) (shared time secular education program).

67 *See Americans United for Separation of Church & State v. School District of Grand Rapids*, 546 F. Supp. 1071 (W.D. Mich 1982); *Americans United for Separation of Church & State v. Porter*, 485 F. Supp. 432 (W.D. Mich. 1980); *Americans United for Separation of Church & State v. Board of Education*, 369 F. Supp. 1059 (E.D. Ky. 1974).

68 *Gregoire v. Centennial School District*, 907 F.2d 1366 (3d Cir. 1990); *Parents Association of P.S. 16 v. Quinones*, 803 F.2d 1235 (2d Cir. 1986); *Country Hills Christian Church v. Unified School District*, 560 F. Supp. 1207 (D. Kan. 1983); *Resnick v. East Brunswick Township Board of Education*, 389 A.2d 944 (N.J. 1978); *cf. Chess v. Widmar*, 635 F.2d 1310 (8th Cir. 1980) (University must allow recognized student organizations to use school facilities for religious purposes).

69 *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982); *Lamb's Chapel v. Center Moriches School District*, 736 F. Supp. 1247 (E.D.N.Y. 1990); *Resnick v. East Brunswick Township Board of Education*, 343 A.2d 127 (N.J. 1975); *cf. Wallace v. Washoe County School Board*, 701 F. Supp. 187 (D. Nev. 1988); *Ford v. Manuel*, 629 F. Supp. 771 (N.D. Ohio 1985).

assistance programs for needy students attending private schools have failed the *Lemon* test.[70] Some courts have disqualified private college students from receiving government tuition grants,[71] while other courts have allowed such grants.[72] Some plans have been upheld only when the use of the funds is restricted.[73] Students may receive grants to study philosophy or religion in public schools, but not theology in pervasively sectarian schools failing a 36-prong test.[74] However, Veteran's Administration, and some handicap tuition assistance programs, have generally been held valid for recipients attending sectarian schools.[75]

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70 *Wolman v. Essex*, 342 F. Supp. 399 (S.D. Ohio 1972); *People v. Howlett*, 305 N.E.2d 129 (Ill. 1973); *Weiss v. Bruno*, 509 P.2d 973 (1973), *contra Barrera v. Wheeler*, 475 F.2d 1338 (8th Cir. 1973).

71 *See d'Errico v. Lesmeister*, 570 F. Supp. 158 (D.N.D. 1983); *Smith v. Board of Governors*, 429 F. Supp. 871 (D.N.C. 1977); *Americans United for Separation of Church & State v. Dunn*, 384 F. Supp. 714 (M.D. Tenn. 1974); *Americans United for Separation of Church & State v. Bubb*, 379 F. Supp. 872 (D. Kan. 1974); *Opinion of the Justices*, 280 So. 2d 547 (Ala. 1973); *State v. Swanson*, 219 N.W.2d 727 (Neb. 1974). *But cf. Durham v. McLeod*, 192 S.E.2d 202 (S.C. 1972) (loans constitutional).

72 *See Americans United for Separation of Church & State v. Blanton*, 433 F. Supp. 97 (M.D. Tenn. 1977); *Lendall v. Cook*, 432 F. Supp. 971 (D. Ark. 1977); *Americans United for Separation of Church & State v. Rogers*, 538 S.W.2d 711 (Mo. 1976); *Cecrle v. Illinois Educational Facilities Authority*, 288 N.E.2d 399 (Ill. 1972).

73 *See Walker*, 741 F. Supp. at 1386; *Lendall*, 432 F. Supp at 971; *Smith v. Board of Governors*, 429 F. Supp. 871 (D.N.C. 1977); *Americans United for Separation of Church & State Fund, Inc. v. State*, 648 P.2d 1072 (Colo. 1982).

74 *See Minnesota Federation of Teachers v. Nelson*, 740 F. Supp 694 (D. Minn. 1990); *But cf. In Re Dickerson*, 474 A.2d 30 (N.J. 1983) (testamentary scholarships for ministry students at public institute constitutional).

75 *Witters v. Washington Department of Service of the Blind*, 474 U.S. 481 (1986); *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974).

Some courts have ruled that the state may provide bus transportation to private school children,[76] but in Rhode Island, the enabling statute was stricken three times.[77] Public funds cannot be used to provide textbooks to private school students in some states,[78] but in others, it is acceptable for the state to reimburse parochial schools for textbook expenditures.[79] Decisions have limited the provision of educational materials to sectarian schools.[80] In some cases states may not reimburse a sectarian school for costs incurred performing state-mandated tasks, such as testing and record-keeping,[81] but in other cases it is permissible.[82]

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76 *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980) (provision valid but not severable); *Cromwell Property Owners Association v. Toffolon*, 495 F. Supp. 915 (D. Conn. 1979); *Board of Education v. Bakalis*, 299 N.E.2d 737 (1973); *State v. School District*, 320 N.W.2d 472 (Neb. 1982); *Springfield School District v. Department of Education*, 397 A.2d 1154 (Pa. 1979); *cf. Americans United for Separation of Church & State v. Benton*, 413 F. Supp. 955 (S.D. Iowa 1975) (no cross-district transport).

77 *Members of Jamestown School Committee v. Schmidt*, 699 F.2d 1 (1st Cir. 1983); *Members of Jamestown School Committee v. Schmidt*, 525 F. Supp. 1045 (D.R.I. 1981); *Members of Jamestown School Committee v. Schmidt*, 427 F. Supp. 1338 (D.R.I. 1977).

78 *California Teachers Association v. Riles*, 632 P.2d 953 (Cal. 1981); *Mallory v. Barrera*, 544 S.W.2d 556 (Mo. 1976); *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974); *contra Elbe v. Yankton Independent School District No. 1*, 714 F.2d 848 (8th Cir. 1983); *Wolman v. Essex*, 417 F. Supp. 1113 (S.D. Ohio 1976); *Cunningham v. Lutjeharms*, 437 N.W.2d 806 (Neb. 1989).

79 *Americans United for Separation of Church & State v. Paire*, 359 F. Supp. 505 (D.N.H. 1973); *Pennsylvania Department of Education v. The First School*, 348 A.2d 458 (Pa. 1975).

80 *Americans United for Separation of Church & State v. Oakey*, 339 F. Supp. 545 (D. Vt. 1972); *but see Wolman v. Essex*, 417 F. Supp. 1113 (S.D. Ohio 1976).

1 *Committee for Public Education & Religious Liberty v. Levitt*, 342 F. Supp. 439 (S.D.N.Y. 1972).

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82 *Committee for Public Education & Religious Liberty v. Levitt*, 461 F. Supp. 1123 (S.D.N.Y. 1978); *Thomas v. Schmidt*, 397 F. Supp. 203 (D.R.I. 1975).

State regulation of private schools regarding compulsory attendance,[83] teacher certification,[84] and curriculum[85] have been upheld. State employees may not teach or provide remedial services in private schools,[86] but may visit classrooms to observe both secular and religious teaching, suggest teacher replacements, and review accreditation.[87] However, student teachers may not receive credit for teaching at parochial schools.[88]

State inquiry into a religious organization's operating costs violates the Establishment Clause,[89] unless requested by the Internal Revenue Service.[90] The state may enforce compliance with minimum wage laws,[91] the

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83 *Fellowship Baptist Church v. Benton*, 815 F.2d 485 (8th Cir. 1987); *Attorney General v. Bailey*, 436 N.E.2d 139 (Mass. 1982); *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980).

84 *Fellowship Baptist Church*, 815 F.2d at 486; *but cf. Bangor Baptist Church v. State*, 549 F. Supp. 1208 (D. Me. 1982); *Johnson v. Charles City Community Schools Board of Education*, 368 N.W.2d 74 (1985); *Sheridan Road Baptist Church v. Department of Education*, 348 N.W.2d 263 (Mich. 1984); *State v. Faith Baptist Church*, 301 N.W.2d 571 (Neb. 1981). *cf. State v. Anderson*, 427 N.W.2d 316 (N.D. 1988) (home schooling parents violated teacher certification requirements).

85 *New Life Baptist Church Academy v. East Longmeadow*, 885 F.2d 952 (1st Cir. 1989); *Sheridan Road Baptist Church v. Department of Education*, 348 N.W. 2d 263 (Mich. 1984); *State v. Faith Baptist Church*, 301 N.W.2d 571 (Neb. 1981); *cf. New Jersey State Board of Higher Education v. Board of Directors*, 448 A.2d 988 (N.J. 1982) (prohibiting conferring of degree by unlicensed institution applied to a sectarian college whose religious doctrine precluded state licensure).

86 *Pulido v. Cavazos*, 728 F. Supp. 574 (W.D. Mo. 1989); *Wamble*, 598 F. Supp 1356; *Americans United for Separation of Church & State v. Porter*, 485 F. Supp. 432 (W.D. Mich. 1980); *Americans United for Separation of Church & State v. Board of Education*, 369 F. Supp 1059 (E.D. Ky. 1974); *but see Walker*, 741 F. Supp. at 1386.

7 *New Life Baptist Church Academy v. East Longmeadow*, 885 F.2d 952 (1st Cir. 1989).

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8 *Stark v. St. Cloud State University*, 802 F.2d 1046 (8th Cir. 1986).

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89 *Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979); *Fernandez v. Lima*, 465 F. Supp. 493 (N.D. Tex. 1979). *See also Heritage Village Church & Missionary Fellowship v. State*, 263 A.2d 726 (N.C. 1980) (act requiring only certain religious groups to file information is unconstitutional).

90 *United States v. Freedom Church*, 613 F.2d 1316 (1st Cir. 1979); *Lutheran Social Service v. United States*, 583 F. Supp. 1298 (D. Minn. 1984); *cf. Hernandez v. Commissioner*, 819 F.2d 1212 (1st Cir. 1987); *St. Bartholomew's Church v. City of New York*, 728 F. Supp. 958 (S.D.N.Y. 1989) (state inquiry into church

Fair Labor Standards Act,[92] and force participation in FICA and FUTA,[93] despite an organization's religious beliefs to the contrary. The National Labor Relations Board may not be applicable to parochial schools,[94] but a state labor board may have jurisdiction.[95] Sectarian schools are prohibited from utilizing CETA workers.[96] Civil rights statutes have not been enforced against religious organizations,[97] but courts have split as to whether the

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records does not violate entanglement prong).

91 *Archbishop of Roman Catholic Apostolic Archdiocese v. Guardiola*, 628 F. Supp. 1173 (D.P.R. 1985); *Donovan v. Shenandoah Baptist Church*, 573 F. Supp. 320 (W.D. Va. 1983).

92 *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990); *E.E.O.C. v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986); *Ninth & O St. Baptist Church v. E.E.O.C.*, 616 F. Supp. 1231 (W.D. Ky. 1985); *Russell v. Belmont College*, 554 F. Supp. 667 (M.D. Tenn. 1982).

93 *South Ridge Baptist Church v. Industrial Commission*, 911 F.2d 1203 (6th Cir. 1990) (church included within workers' compensation system); *Bethel Baptist Church v. United States*, 822 F.2d 1334 (3d Cir. 1987); *Young Life v. Division of Employment & Training*, 650 P.2d 515 (Colo. 1982) (religious organization subject to unemployment tax); *Baltimore Lutheran High School Association v. Employment Security Administration*, 490 A.2d 701 (Md. 1985) (school subject to unemployment tax); *Contra Grace Lutheran Church v. North Dakota Employment Security Bureau*, 294 N.W. 767 (N.D. 1980) (church not subject to unemployment tax); *The Christian Jew Foundation v. State*, 353 S.W.2d 607 (Tex. 1983) (organization exempt from unemployment tax); *Community Lutheran School v. Iowa Department of Job Service*, 326 N.W.2d 286 (Iowa 1982) (school exempt from unemployment tax).

94 *Universidad v. N.L.R.B.*, 793 F.2d 383 (1st Cir. 1985); *see also N.L.R.B. v. Salvation Army*, 763 F.2d 1 (1st Cir. 1985); *N.L.R.B. v. Bishop Ford Central Catholic High School*, 623 F.2d 818 (2d Cir. 1980), *Catholic Bishop v. N.L.R.B.*, 559 F.2d 1112 (2d Cir. 1977); *McCormick v. Hirsh*, 460 F. Supp. 1337 (M D Pa. 1978); *contra N.L.R.B. v. St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981); *Grutka v. Barbour*, 549 F.2d 5 (7th Cir. 1977).

95 *Goldsborough Christian Schools, Inc. v. United States*, 436 F. Supp. 1314 (E.D.N.C. 1977); *cf. Catholic High School Association v. Culvert*, 753 F.2d 1161 (2d Cir. 1985).

96 *Decker v. O'Donnell*, 663 F.2d 598 (7th Cir. 1980) (CETA created entanglement); *see also Decker v. Department of Labor*, 473 F. Supp. 770 (E.D. Wis. 1979).

97 *Dayton Christian Schools v. Ohio Civil Rights Commission*, 766 F.2d 932 (6th Cir. 1985); *Cochran v. St. Louis Preparatory Seminary*, 717 F. Supp. 1413 (E.D. Mo. 1989); *Maguire v. Marquette University*, 627 F. Supp. 1499 (E.D. Wis. 1986); *E.E.O.C. v. Southwestern Baptist Theological Seminary*, 485 F. Supp. 255 (N.D. Tex. 1980); *E.E.O.C. v. Mississippi College*, 451 F. Supp. 564 (S.D. Miss. 1978); *contra Dolter v. Wahlert High School*, 483 F. Supp. 266 (N.D. Iowa 1980); *McLeod v. Providence Christian School*, 408 N.W.2d 146 (Mich. 1987); *but see E.E.O.C. v. Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982).

"reasonable accommodation" requirement may be enforced against secular employees.[98] As a result, religious institutions have been forced to departmentalize between those employees who carry on the ministry and mission of the institution from other employees who perform routine tasks. Thus, while a religious institution may discriminate on the basis of religion in hiring and firing a school professor, it may not do the same to a secretary.

Two entanglement triangles arise in the provision of child care. First, the state may purchase child care services from religiously affiliated organizations[99] and may consider the religious preference of the parents for placement,[100] but the agency cannot impose its religious doctrine upon a child.[101] Second, religious child care facilities exempted from licensure may or may not be deemed to fail the *Lemon* test.[102] Church-run day care centers

98 *Protos v. Volkswagon of America, Inc.*, 797 F.2d 129 (3d Cir. 1986); *Nottleson v. Smith Steel Workers*, 643 F.2d 445 (7th Cir. 1981); *E.E.O.C. v. Jefferson Smurfit Corp.*, 724 F. Supp. 881 (M.D. Fla. 1989); *Gavin v. Peoples Natural Gas Co.*, 464 F. Supp. 622 (W.D. Pa. 1979); *Michigan Department of Civil Rights v. General Motors*, 317 N.W. 16 (Mich. 1982); *American Motors Corp. v. Department of Industry, Labor, & Human Relations*, 286 N.W.2d 847 (Wis. 1978).

99 *Wilder v. Bernstein*, 848 F.2d 1338 (2d Cir. 1988).

100 *Id.*, *cf. Dickens v. Ernesto*, 281 N.E.2d 153 (N.Y. 1982) (religious affiliation requirements in adoption proceeding constitutional); *Bonjour v. Bonjour*, 592 P.2d 1233 (Alaska 1979) (statute specifying religious needs of child upheld); *Zucco v. Garrett*, 501 N.E.2d 875 (Ill. 1986) (awarding custody based on religious practices is abuse of discretion).

101 *Arneth v. Gross*, 699 F. Supp. 450 (S.D.N.Y. 1988).

102 *Forest Hills Early Learning Center v. Lukhard*, 728 F.2d 230 (4th Cir. 1984); *Forte v. Colder*, 725 F. Supp. 488 (M.D. Fla. 1989); *see The Corpus Christi Baptist Church, Inc. v. Texas Department of Human Resources*, 481 F. Supp. 1101 (S.D. Tex. 1979); *Forest Hills Early Learning Center, Inc. v. Grace Baptist Church*, 846 F.2d 260 (4th Cir. 1988); *North Valley Baptist Church v. McMahon*, 696 F. Supp. 578 (E.D. Cal. 1988); *Cohen v. City of Des Plaines*, 742 F. Supp. 458 (N.D. Ill. 1990); *State v. Corpus Christi People's Baptist Church, Inc.*, 683 S.W.2d 692 (Tex. 1984); *State Department of Social Services v. Emmanuel-Baptist Pre-School*, 455 N.W.2d 1 (Mich. 1990); *Pre-School Owner's Association v. Department of Children & Family Services*, 518 N.E.2d 1018 (Ill. 1988); *Arkansas Day Care Association v. Clinton*, 577 F. Supp. 388 (E.D. Ark. 1983). *cf.*

are subject to zoning restrictions,[103] but a city may not exempt them from requirements imposed upon commercial operators.[104]

Courts are divided over whether the state may[105] or may not[106] erect a cross as a war memorial. Where a state exercised eminent domain over a cemetery, a court prohibited the state from erecting crosses and a statue of Jesus, but allowed the state to provide and erect religious markers chosen by the descendants.[107] Crosses placed on government property have generally been prohibited,[108] but crosses and religious symbols on official seals may or may not be permissible.[109]

State v. McDonald, 787 P.2d 466 (Okla. 1989) (religious affiliated "boy's ranch" subject to state licensing requirements).

103 *First Assembly of God v. City of Alexandria*, 739 F.2d 942 (4th Cir. 1984).

104 *Cohen v. City of Des Plaines*, 742 F. Supp. 458 (N.D. Ill. 1990); *cf. Arkansas Day Care Association*, 577 F. Supp. 388 (statute disparately treated religious facilities).

105 *Eugene Sand & Gravel, Inc. v. Eugene*, 558 P.2d 338 (1976).

106 *Jewish War Veterans v. United States*, 695 F. Supp. 3 (D.D.C. 1988).

107 *Birdine v. Moreland*, 579 F. Supp. 412 (N.D. Ga. 1983).

108 *Mendelsohn v. City of St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989); *Hewitt v. Joyner*, 705 F. Supp. 1443 (C.D. Cal. 1989); *ACLU v. Rabun County Chamber of Commerce, Inc.*, 510 F. Supp. 886 (N.D. Ga. 1981); *Fox v. City of Los Angeles*, 587 P.2d 663 (Cal. 1978).

109 *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987); *Friedman v. Board of City Commissioners*, 781 F.2d 777 (10th Cir. 1985); *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989); *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991); *Johnson v. Board of County Commissioners*, 528 F. Supp. 919 (D.N.M. 1981); *Murray v. City of Austin*, 744 F. Supp. 771 (W.D. Tex. 1990).

The Ten Commandments have been removed from schools,[110] but permitted to remain on other public property.[111] A legislature may designate a room for prayer and meditation, but religious decorations or use of the room may be prohibited.[112]

An order of then-Governor Ronald Reagan giving state employees a three hour paid holiday on Good Friday violated the Establishment Clause,[113] but a school district was permitted to designate Good Friday a paid holiday in conjunction with a Union Contract.[114]

In *Lamb's Chapel v. Center Moriches Union Free School District*,[115] Justice Scalia noted in his concurrence the fact that the Court sometimes decides to use a test and sometimes it does not

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again by frightening little children and school attorneys . . . . Its most recent burial, only last Term [in

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110 *Ring v. Grand Forks Public School District*, 483 F. Supp. 272 (D.N.D. 1980).

111 *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1972).

112 *Van Zandt v. Thompson*, 839 F.2d 1215 (7th Cir. 1988).

113 *Mandel v. Hodges*, 54 Cal. App. 3d 596 (1976).

114 *California School Employees Association v. Sequoia Union High School District*, 67 Cal. App. 3d 157 (1977); *cf. Cammack v. Waihee*, 673 F. Supp. 1524 (D. Haw. 1987) (state may declare Good Friday a legal holiday).

115 *Lamb's Chapel v. Center Moriches Union Free School*, 508 U.S. 384, 397 (1993) (Scalia, J., concurring).

> *Lee v. Weisman*[116]] was, to be sure, not fully six-feet under . . . . Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinion, personally driven pencils through the creature's heart . . . .
> The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish to do so, but we can demand it to return to the tomb at will . . . . When we wish to strike down a practice it forbids, we evoke it . . . . Sometimes we take a middle ground of course, calling its three prongs "no more than helpful sign posts." Such a docile and useful monster is worth keeping around, at least in a somnolent state: one never knows when one might need him.[117]

The decisions in both *McCreary County, Kentucky v. ACLU of Kentucky*[118] and *Van Orden v. Perry* further show the conflicting and confusing interpretations of the Establishment Clause. Both of these cases involved the Ten Commandments and were argued and delivered on the exact same day; however, the Court's analysis was not consistent. In *McCreary*, the Court used a modified *Lemon* test, focusing primarily on the purpose prong.[119] In *Van Orden*, the Court did not use the *Lemon* test at

116 The Court did not use the Lemon test, but instead used a newly-created "coercion" test.

117 *Lamb's Chapel*, 508 U.S. at 398-99 (Scalia, J., concurring in judgment)(citations omitted).

118 *McCreary County, Ky. v. ACLU of Ky.*, 125 S. Ct. 2722 (2005).

119 *ACLU of Ky. v. Mercer County, Ky.*, 432 F.3d 624, 636 (2005). The majority in that case certainly implies *Lemon's* continued vitality by conducting purpose analysis. The majority never explicitly reaffirms *Lemon* because the inquiry ended when the Court held the displays unconstitutional as having an impermissible purpose.

all.[120] On December 20, 2005, the Sixth Circuit Court of Appeals upheld the identical Ten Commandments display the Supreme Court had declared unconstitutional in the *McCreary County* case. In *ACLU of Kentucky v. Mercer County, Kentucky*, the federal court of appeals denoted that the different interpretations and applications of Establishment Clause have left lower court judges in "Establishment Clause purgatory."[121]

To add to the confusion, the Court has been inconsistent on when something is or is not a violation of the Establishment Clause. In *McCreary,* the Court held that the Ten Commandments display may be constitutional in one county, while unconstitutional in another.[122] The eyes that look to purpose belong to an " 'objective observer,' " one who takes account of the traditional external signs that show up in the " 'text, legislative history, and implementation of the statute,' " or comparable official act.[123] Therefore, the constitutionality of a Ten Commandments display would depend on a person's subjective understanding of its purpose, which could vary from county to county.

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120 *Id.* A plurality of the Court in *Van Orden* disregarded the Lemon test, noting that Lemon is not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. The plurality instead employed an analysis driven by both the nature of the monument and by our Nation's history.

121 Id.

122 *McCreary*, 125 S. Ct. at 2722.

123 *Id.* at 2734.

Similar to *McCreary* was *Van Orden*.[124] There, the constitutionality of a Ten Commandments display was dependent upon how long it had been present on the State Capitol grounds. "Acknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America. Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."[125]

Following suit, the circuit courts, like the Supreme Court, have bought into the confusing and changing interpretations of the Establishment Clause in the context of prayer at school board meetings. Prayers are frequently said at county, municipal and school board meetings, as well as other meetings of public officials. In many respects, these prayers are very similar to prayers preceding legislative sessions.

A federal court of appeals ruled that a resolution of the Board of St. Louis County in Minnesota which provided for an invocation at its public meetings was not a violation of the First Amendment Establishment Clause.[126] Under this policy, a board of commissioners invited local

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124 *Van Orden*, 125 S. Ct. at 2854.

125 *Id.* at 2862.

126 *Bogen v. Doty*, 598 F.2d 1110 (8th Cir. 1979).

clergymen to offer prayers prior to the commencement of each board meeting. The chairman of the board would generally announce the following: As is our practice, the Reverend John Doe will now give a prayer. The Court found that this practice was consistent with the First Amendment because the prayer had a "secular legislative purpose of setting a solemn tone for the transaction of governmental business" and assisted the maintenance of order and decorum.[127] The practice of opening these board meetings with prayers was not "an establishment of religion proscribed by the establishment clause of the First Amendment in any pragmatic, meaningful and realistic sense of that clause."[128] Similarly, the state Supreme Court of New Hampshire ruled that inviting local ministers to open town meetings with an invocation was not prohibited by the First Amendment Establishment Clause.[129]

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127 *Id.* at 1114-115.

128 *Id.* at 1115.

129 *Lincoln v. Page*, 241 A.2d 799 (N.H. 1968). Other courts have similarly ruled that prayers offered at the outset of public assemblies are constitutional. *See, e.g., Marsa v. Wernik*, 430 A.2d 888 (N.J.), *app. dismissed and cert. denied*, 454 U.S. 958 (1981) (prayer at the outset of borough council meeting constitutional); *Lincoln v. Page*, 341 A.2d 799 (N.H. 1968) (invocation at town meeting constitutional); *Colo v. Treasurer and Receiver General*, 392 N.E.2d 1195 (Mass. 1979) (salaries for legislative chaplains constitutional); *Snyder v. Murray City Corp.*, 902 F. Supp. 1444 (D. Utah 1995) (statements by a minister at outset of council meeting constitutional).

In a 2-to-1 decision, one federal appeals court ruled that prayer offered at the opening of a school board meeting is unconstitutional.[130] The Cleveland school board traditionally opened its deliberative session with prayer. Historically, the school board invited representatives of the protestant, Roman Catholic, Jewish and Muslim faiths. The federal district court upheld the practice, but two of the three appeals court judges voted to reverse the decision.[131]

A California federal court found that the Palo Verde Unified School District's practice of opening each meeting with prayer did not violate the Constitution.[132] In upholding the practice, the court relied on the Supreme Court's legislative prayer case in *Marsh*. The court noted that school board meetings, unlike classroom sessions, are composed primarily of adults. The "fact that at any given board meeting there may be children present in the audience, some of whom may participate in an awards session or address the board on a particular topic, does not change the nature or the function of the board meeting. A board meeting is a meeting of adults with official business

130 *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999).

131 *Coles v. Cleveland Bd. of Educ.*, 950 F. Supp. 1337 (N.D. Ohio 1996) (reasoning that prayers at school board meetings are no different than prayers at legislative meetings, thus finding that the Supreme Court decision in *Marsh* controls the outcome).

132 *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 11 F. Supp.2d. 1192 (C.D. Cal. 1998).

and policymaking functions."[133] Clearly, prayer can still play a role in public assemblies and meetings.

If the opinions of this Court give jurists "blurred" vision to "dimly" perceive permissible Establishment Clause lines, then they certainly will affect elected officials' vision of constitutionality, entitling them to some grace in trying to negotiate the territory.[134] In the constitutional minefield established by *Lemon*, where the line bends and curves, ebbs and flows, generating numerous pluralities, surely courts must allow government officials to correct their conduct. One misstep cannot forever haunt the future. The Third, Sixth, and Seventh Circuits have permitted government officials to modify the purposes for a Good Friday holiday, a display that began with only a crèche, and displays of the Ten Commandments.[135]

V. THE PUBLIC EXPRESSION OF RELIGION ACT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

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133 *Id.* at 1197.

134 *See, e.g., Mitchell*, 530 U.S. at 807; *Lynch*, 465 U.S. at 679; *Lemon*, 403 U.S. at 612.

135 *See Adland v. Russ*, 307 F.3d 471, 489-90 (6th Cir. 2002), *cert. denied*, 538 U.S. 999 (2003)(Ten Commandments); *Granzeier v. Middleton*, 173 F.3d 568, 573 (6th Cir. 1999)(Good Friday); *ACLU v. Schundler*, 168 F.3d 92 (3d Cir. 1999)(Creche); *Books*, 235 F.3d at 307-08 (Ten Commandments); *Metzl v. Leininger*, 57 F.3d 618, 623-24 (7th Cir. 1995)(Good Friday). *See also Freethought Society v. Chester County*, 334 F.3d 247 (3d Cir. 2003)(the current purpose of a Ten Commandments display is more relevant than the original purpose).

The purpose of S. 3696, the Veterans' Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Act of 2006 ("Act"), is to preserve the ability of litigants to seek injunctive relief against the Federal and State governments under the Establishment Clause. This purpose is neutral and serves a secular purpose. The object is to limit the exposure of government entities in an area of law that is extremely unclear. The Act does not violate the Establishment Clause of the First Amendment to the Constitution of the United States. The Act has a predominately secular purpose and does not have the primary effect of advancing or inhibiting religion.

The Supreme Court has held that a law must have a secular legislative purpose if it is to survive Establishment Clause review. *See Lemon v. Kurtzman.*[136] The government may not act "with the ostensible and predominant purpose of advancing religion."[137] This requirement "does not mean that the law's purpose must be unrelated to religion;" it means only that Congress may not "abandon[] neutrality and act[] with the intent of promoting a particular point of view in religious matters."[138]

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136 403 U.S. 602, 612 (1971).

137 *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 125 S.Ct. 2722, 2733 (2005).

138 *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987).

Although the Act addresses the subject of religion, its purpose is not to advance any particular religion, or to promote religion over nonreligion. Creating an environment that fosters lawful activity or speech, including religious speech, is a legitimate secular purpose.[139] In *Widmar*, a religious student group challenged a state university policy that allowed only secular student organizations to use campus facilities. The university attempted to defend its policy on the grounds that an "open forum" policy would offend the Establishment Clause. The Supreme Court dismissed that argument and held that an equal access policy, having the secular purpose of providing a forum for religious as well as secular speech, would be constitutional.[140]

Several federal courts have applied the *Widmar* rationale in other settings. In *Chabad-Lubavitch of Ga. v. Miller*,[141] a religious group wanted to place a Chanukah menorah in the rotunda of the Georgia capitol. Although Georgia had allowed other groups to use the rotunda for expressive activities, it refused to permit the menorah display. When the religious group filed suit, claiming that the state had violated its right of free speech, Georgia stated in its defense that it had a compelling state interest in avoiding the Establishment Clause violation that would result from the

139 *Widmar v. Vincent*, 454 U.S. 263, 271 (1981).

140 *Id.*

141 5 F.3d 1383 (11th Cir. 1993) (en banc).

display. Siting *en banc*, the Court of Appeals for the Eleventh Circuit held that neutral treatment of the menorah would "advance the secular purpose of providing an arena for its citizenry's exercise of the constitutional right to free speech."[142] Other courts have similarly found that government policies permitting religious displays in public parks have a valid secular purpose.[143]

Although the above-cited opinions address the issue of equal access to government property for religious speech, those cases are relevant to the constitutionality of this Act because they stand for the principle that government accommodations of religious speech serve a secular purpose. The Act accomplishes that purpose by eliminating the chill on speech that results from the threat of Establishment Clause suits. That the Act mentions only religious expression presents no constitutional concerns because Establishment Clause actions, with their lax standing requirements coupled with the potential for damages and attorney's fees, create an exposure for government entities that does not exist in other types of cases.

Just as the Act has a predominantly secular purpose, it does not have as its primary effect the advancement or inhibition of religion. When deciding whether legislation runs afoul of the Establishment Clause, courts

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142 *Id.* at 1389.

143 *McCreary v. Stone*, 739 F.2d 716, 726 (2d Cir. 1984); *Flamer v. City of White Plains, N.Y.*, 841 F.Supp. 1365, 1376-77 (S.D.N.Y. 1993).

consider "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of [religion]."[144]

Because the Act is still in its formative stages, there currently is little legislative history and no implementation for a reasonable observer to consider. The plain meaning of the text does not suggest that it primarily benefits or burdens religion. The type of speech the Act seeks to protect consists only of constitutionally protected expressions of religion. An objective reading of the Act's language reveals that its intent and effect is merely to free government actors from the shadow of potential liability for damages and fees in an area where free speech has been significantly chilled by frivolous lawsuits. No reasonable observer could conclude that the Act conveys the message to any religious group "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[145]

In sum, the Act passes constitutional muster because it has the predominately secular purpose of limiting government liability and fostering

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144 *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 73 (1985)) (O'Connor, J., concurring in judgment).

145 *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

free speech, and because the Act does not have the primary effect of advancing or inhibiting religion. S. 3696 presents no Establishment Clause problems.

VI. SECTION 1988 ATTORNEY'S FEES AWARDS ARE NOT APPROPRIATE IN ESTABLISHMENT CLAUSE JURISPRUDENCE.

After examining both Section 1983 and Section 1988, it is clear that neither, in its current state, is in line with the original legislative intent. Section 1983 was intended to serve as a means of vindication for civil rights violations. Opening up the floodgate for Establishment Clause cases by relaxing the rules for standing, combined with awarding attorneys fees under Section 1988, has spawned frivolous litigation and often results in government officials changing a course of action because of the threat of attorney's fees. The fee shifting statute is used to intimidate local government officials into action oftentimes not warranted under the Establishment Clause. Facing the threat of attorney's fees, local officials will do whatever a particular party demands. "'Private attorney generals' should not be deterred from bringing good faith actions to vindicate the fundamental rights involved by the prospect of having to pay their opponent's counsel fees should they lose."[146] The purpose of Sections 1983

146 S. Rep. No. 94-1011 (1976).

and 1988 is to provide access to the courts for those with civil rights claims. Because of the peculiar and unfortunate status of Establishment Clause jurisprudence, this Committee should exclude Establishment Clause claims from the purview of Sections 1983 and 1988.

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August 1, 2006

The Honorable Sam Brownback, Chairman
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Subcommittee on the Constitution, Civil Rights, and Property Rights
303 Hart Senate Office Building
Washington, D.C. 20510

RE: Support letter for S. 3696 ("PERA")

Dear Chairman Brownback and fellow members of the Subcommittee on the Constitution, Civil Rights and Property Rights:

Liberty Counsel is a nonprofit litigation, education, and policy organization dedicated to advancing religious freedom, the sanctity of human life and the traditional family. Established in 1989, Liberty Counsel is a national organization with offices in Florida and Virginia. Liberty Counsel has hundreds of affiliate attorneys in all fifty states.

Liberty Counsel supports the Veterans Memorials, Boy Scouts, Public Seals and Other Public Expressions of Religion Act of 2006 ("PERA"), because the Act will exclude Establishment Clause claims from the purview of 42 U.S.C. §§ 1983 and 1988. The Act will amend Sections 1983 and 1988 to limit fee shifting in the area of the Establishment Clause.

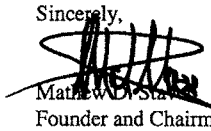
Establishment Clause jurisprudence is the most unpredictable and confusing area of law. There are confusing and changing interpretations of the law, a special exception to the general rule for standing, and sharp disagreements among the Justices of the United States Supreme Court over its application.

Additionally, a fee shifting statute in such a confusing area of the law often results in a plaintiff using the threat of attorney's fees to force government officials to a desired result, whether it is the right one or not. Also, cases arise in which clients have a valid defense to an alleged Establishment Clause violation, but have chosen to alter their behavior solely because of the threat

of attorney's fees, even though their actions are clearly consistent with the Establishment Clause. The purpose of 42 U.S.C. §§ 1983 and 1988 is to provide access to the courts for civil rights claims, particularly for underfinanced plaintiffs; however, a fee shifting statute in the area of Establishment Clause jurisprudence is antagonistic to this purpose.

For these reasons, Liberty Counsel believes that Establishment Clause claims should be excluded from Sections 1983 and 1988 and supports the passage of "PERA" to limit fee-shifting in this area of the law.

Sincerely,



Mathew D. Staver
Founder and Chairman

Anita L. Staver
President

TESTIMONY

of the

AMERICAN JEWISH CONGRESS

before the

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

of the

SENATE COMMITTEE ON THE JUDICIARY

concerning

S. 3696

VETERANS' MEMORIALS, BOY SCOUTS, PUBLIC SEALS AND OTHER PUBLIC EXPRESSIONS OF RELIGIOUS EXPRESSION

June 22, 2006

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TESTIMONY OF THE AMERICAN JEWISH CONGRESS
BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS
OF THE SENATE COMMITTEE ON THE JUDICIARY
CONCERNING

S. 3696

THE VETERANS' MEMORIALS, BOY SCOUTS, PUBLIC SEALS AND OTHER PUBLIC EXPRESSIONS OF RELIGION ACT OF 2005

JULY 26, 2006

On behalf of the American Jewish Congress, I want to thank you for providing it with an opportunity to submit its views on S. 3696, *The Veterans' Memorials, Boy Scouts Public Seals and Other Public Expressions of Religion Act of 2006.* ("PERA") We believe this bill to be exceedingly bad public policy. It is arguably unconstitutional as well, but this Committee need not reach that issue to determine that the bill should not pass. We urge you to give it the decent burial it deserves.

The bill has two sub-sections. The first bans all but injunctive and declaratory relief in cases arising under the Establishment Clause of the First Amendment. The second carves out an exception from the general rule of 42 U.S.C. § 1988 and the Equal Access to Justice Act, 28 U.S.C. 2412 (d) (1) (A), providing for an award of attorney's fees in cases in which plaintiffs bring successful actions to vindicate Establishment Clause. Under the EAJA, if the position of the United States is "substantially justified" no fees are awarded. Thus, PERA bars attorneys' fees against the federal government only in the unusual case in which the federal government's position is not "substantially justified".

Section 3 of the Act is, moreover, so broadly drafted ("Notwithstanding any provisions of law...") as to bar an award of attorneys' fees even if a government entity's

defense is frivolous within the meaning of F.R. Civ. P.R. 11, *Wallace v. Jaffee*, 472 U.S. 38 (1985) (defendant challenged incorporation of Establishment Clause and correctness of various Supreme Court decisions), or if party incurs fees in prosecuting a contempt motion to enforce an injunction already issued. In this regard, S. 3696 is far broader than its House counterpart which did not bar fees under Rule 11 or in contempt situations. (The authority to award attorney's fees in contempt cases has been well settled since *Parker v. U.S.*, 153 F.2d 66 (1st Cir. 1946). See also *Vuitton et Fils, S.A., v. Carousel Handbags*, 592 F.2d 126, 131 (2nd Cir.1979); *Borough of Slatington v. Ziegler*, 890 A.2d 8 (Pa. Commonwealth 2006) (collecting cases))

I. The Limits On Relief

Remedies

With regard to remedies, S. 3696 casts a broad net, albeit one narrower than its House counterpart, H.R. 3679. As it currently stands, S. 3696 simply bars any but injunctive and declaratory relief in cases brought under the Establishment Clause. Thus, even if a state or locality were to formally establish a state church, prefer one religion over another, *Larson v. Valente*, 456 U.S. 1 (1982), or coerce participation in religious exercises, *Lee v. Weissman,* 505 U.S. 587, 636-39 (1992) (Scalia, J., dissenting), all of which are well settled, core violations of the Establishment Clause, a plaintiff would be entitled to nothing but injunctive and declaratory relief, not actual or nominal damages, and not punitive damages.

When the *Prison Litigation Reform Act*, 42 U.S.C. § 1997 (PLRA), was enacted, there was a substantial debate whether Congress had the power to limit the remedies available to the federal courts to cure constitutional violations. We need not enter that

thicket. For present purposes, we acknowledge that Congress has substantial but not unlimited authority over remedies. Nevertheless, S.3696 is indefensible both as policy and constitutional law.

Because S.3696 does not address the universe of constitutional claims against local governments, it cannot be claimed that the bill addresses some generally applicable problem with regard to remedies arising in conjunction with constitutional claims.

The doctrines of qualified immunity, the 11th Amendment and sovereign immunity are already substantial bars to monetary relief. PERA, if it is to have any additional effect, would bar relief only in cases where plaintiffs prevailed and qualified immunity was unavailable, that is, in cases where officials violate a "clearly established" right. If S. 3696 is to be sustained, it must be because something unique to Establishment Clause claims justifies treating such claims less well than all other constitutional claims.

Just how draconian these restrictions are may be judged by comparing the proposed *Public Expression of Religion Act* with the *Prison Litigation Reform Act*, 42 U.S.C. § 1997e(e), which denies monetary damages to inmates in any civil action in which they allege a violation of rights, but suffer no physical injury. On its face, this language would seem to deny the possibility of relief in any prisoner case seeking to vindicate rights under either the Free Exercise or Establishment Clauses.

The courts have generally read this ban not to deny courts the power to issue declaratory judgments. See *e.g.*, *Thompson v. Carter*, 284 F.3d 411 (2d Cir. 2002). *Cf.* *Boxer v. Harris*, 437 F.3d 1107, 1111 (11th Cir. 2006) (collecting cases; noting issue is open in the Circuit). In the face of the statute's language, about half the circuits that have spoken on the subject award actual and punitive damages for violations of First

Amendment rights, refusing to allow these fundamental constitutional rights to be rendered nugatory by PLRA, *Allah v. al-Hafeez*, 226 F.3d 247 (3rd Cir. 2000); *Cannell v. Lightner*, 143 F.3d 1210 (9th Cir. 1998); *Calhoun v. DeTella*, 319 F.3d 936 (7th Cir. 2005). Contra *Searles v. Van Bebber*, 251 F.3d 869 (10th Cir. 2001). The Second and Eighth Circuits allow nominal and punitive damages as well as declaratory relief, but not compensatory (actual) damages, for First Amendment violations. *Thompson v. Carter*, *supra*; *Royal v. Kavtzky*, 375 F.3d 720 (8th Cir. 2004).

We are unable to conceive of any rationale, other than naked hostility toward the Establishment Clause as interpreted by the federal courts, that would justify denying to law-abiding citizens at least the same access to the panoply of judicial relief afforded convicted felons in First Amendment cases.

Consider what S. 3696 would mean in the real world. A student is compelled by a teacher to participate in prayer of a faith different than her own. This is a one-time event. The teacher acts on her own. No school policy authorizes such action. Suit is brought by the student against the teacher. Without question, the teacher's actions violate the Constitution.

By the time a court case is brought and is resolved, the school year will have ended. The student will no longer been assigned to the offending teacher. The likelihood of a further violation by this teacher directed at this student is so slight that it is doubtful that the student has standing to seek an injunction against further violations. Cf. *Los Angeles v. Lyons*, 461 U.S. 95 (1983); see *O'Connor v. Washburn University*, 416 F.3d 1216 (10th Cir. 2005).

This is a case where the only practical remedy is damages. Yet by its terms, S.3696 denies the courts the ability to give the student any damage remedy, even nominal damages. Declaratory relief may not be given where a violation is complete and not likely to be repeated. *O'Shea v. Littleton*, 414 U.S. 688 (1974). Indeed, there is a substantial likelihood that without the availability of a damage remedy, the entire matter is moot, *Arizonans for Official English v. Arizona*, 530 U.S. 43 (1997), and a court would be powerless to entertain the lawsuit and to provide even the psychic satisfaction of official vindication. (Of course, by denying a potential plaintiff attorney's fees, the PERA would make it highly unlikely that suit would be brought in these circumstances in the first place.

What possible justification can there be for denying damages in cases such as the one I posit? It is not to protect public officials in doubtful cases, because public officials are immune from damages except where the law was clearly settled at the time they violated it. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The bar on damage awards in this bill is only about violations of clearly settled law. The law is now pellucidly clear that officially coerced prayers are unconstitutional. *Lee v. Weisman*, 505 U.S. 587, 636-39 (1992) (Scalia, J., dissenting).

A violation of a clearly settled constitutional right ordinarily generates a right to nominal damages, *Carey v. Piphus*, 435 U.S. 247 (1978), at least where there is no claim of qualified immunity. See, e.g., *Brousseau v. Haugen*, 543 U.S. 194 (2004); *Saucier v. Katz*, 533 U.S. 194 (2001); *Anderson v Creighton* 483 U.S. 635 (1987).

We assume that the legislation is not intended to strip the courts of the power to remedy contempts of court with monetary damages. The language, however, is not so limited. The language of Section 2(b) is broad enough to such monetary relief, even

though "make-whole" relief is often appropriate in civil contempt proceedings. See, in addition to cases cited at p 3, supra, *U.S. v. U.M.W.*, 330 U.S. 258, 303-04 (1947). If we are correct, courts would find themselves hampered in enforcing their orders.

Consider Roy Moore, who erected a huge Ten Commandments monument in the Alabama Supreme Court courthouse. The Eleventh Circuit easily found the display unconstitutional, and the U.S. Supreme Court refused to consider the case. Judge Moore flatly refused to comply with the injunction requiring the display's removal, virtually inviting a confrontation with federal marshals and the federal judge. If enacted, S.3696 would well have left that district judge with no choice but to either 'martyr' Judge Moore, then Chief Judge of the Alabama Supreme Court, by jailing him or ordering federal marshals to create a spectacle by forcibly removing the display. One suspects Roy Moore, and others like him, would be far less willing to defy federal court orders if they knew their assets were at risk.

Coerced prayer cases do not exhaust the possibilities for damages in Establishment Clause cases. In *Larson*, *supra*, officially disfavored churches were subjected to onerous regulatory requirements with attendant expenses, while more favored churches were exempted. S.3696 would bar recovery for the added, but unconstituionally imposed, costs or the loss of solicitation opportunities.

It is worth emphasizing how difficult it is to recover damages in Establishment Clause cases. First, of course, one must win, by no means easy. Where the law is not clearly established -- a purported concern of the House sponsors – the qualified immunity doctrine is a substantial barrier to recovery. *Harlow, supra.* Municipal bodies, including school boards, are only liable in damages for the acts of their line employees when they act

pursuant to an official policy set by high ranking public officials, again a high hurdle. *Jett v. Dallas I.S.D.*, 491 U.S. 701 (1989). Actual damages must be shown and not presumed, *Carey v. Piphus, supra.*

This is not to say there are no cases in which damages are not won in Establishment Clause cases. Although reported opinions often do not discuss damages, there is evidence in the case reports of such awards. See *Bell v. Little Axe I.D.S.*, 766 F.2d 1391 (10th Cir. 1985) (school prayer); *Kitzmiller v. Dover Area School Dist*, __ F.Supp.2d__ (M.D. Pa. 2005) (teaching intelligent design; nominal damages); *Hansen v. Ann Arbor Public Schools*, 293 F.Supp.2d 780 (E.D. Mich. 2003) (nominal damages) (exclusion of ministers who taught homosexuality sinful from public school forum). *Gospel Mission of America v. Los Angeles,* 951 F. Supp, 1429 (C.D. Cal. 1997) (invalidating charitable solicitation ordinance on Establishment Clause grounds); *Warnock v. Archer*, 380 F. 3d 1076 (8th Cir. 2004) (compelled attendance at prayer meetings); *Warnock v. Archer*, 443 F. 3d 954 (8th Cir. 2006) (monetary relief in the form of, inter alia, damages on contempt motion).

Some cases founder on qualified immunity grounds, but were the facts to be repeated involving others, monetary damages (actual or nominal) would be appropriate. *Kaufman v. McCaughty* __ F.Supp.2d __ (W.D. Wisc. 2006) (discrimination against atheist); *C.E.F. v. Montgomery County Public Schools*, __ F. Supp 2d __ (D.Md. 2005) (discrimination against religious speaker) (11th amendment immunity).

Other damage claims are pending. *Chaplaincy of Full Gospel Churches v. England*, __ F.3d__ (D.C.Cir.2006) (official favoritism toward chaplains of liturgical churches); *Summum v. Duchesne City*, __F.Supp.2d__ (D. Utah 2005) (Establishment and Free Speech Clauses; discrimination against small faith in display of symbols; setting demand

for damages for trial); *C.E.F. v. Anderson School Dist.*, __F.Supp.2d ___ (D.S.C. 2006) (discriminatory denial of fee waiver: claim denied on the merits, appeal appending): *Henderson v. Brush*, __F.Supp.2d __ (W.D.Wisc.2006) (denial of Taoist texts to inmate).

In addition, there are cases pending in which parties seek a remedy of an order (injunction?) of recoupment of tax funds spent in violation of the Establishment Clause. Those claims probably, but not certainly, would be barred by PERA. Americans *United v. Prison Fellowship*, __F.Supp.2d__ (S.D. Iowa 2006) (appeal pending); *Lakowski v. Spellings*, 443 F.3d 930 (7th Cir. 2006); *Moeller v. Bradford County*, __F.Supp.2d__ (M.D. Pa. 2006). Those recoupment claims are governed by a pair of Supreme Court decisions, laying out equitable rules for resolving such claims. *N.Y. v. Cathedral Academy*, 434 U.S. 125 (1977); *Lemon v. Kurtzman (II)*, 411 U.S. 192 (1973).

In one additional unreported case, which settled quietly, the reaction to plaintiffs' having objected to traditional religious practices in the public schools was so severe they had to leave the community. They settled for substantial damages.

Again, other than raw hostility to the non-establishment of religion as mandated by the Constitution, there is no justification for the wholesale denial of monetary damages or declaratory relief across the entire range of Establishment Clause cases. It is simply not true, as is the case with regard to prison inmate litigation addressed by the *Prison Litigation Reform Act*, that in Establishment Clause cases public officials operate under the especially difficult circumstances that prison officials do day-by-day.

Nor is it in any event true that the Establishment Clause is uniquely difficult to understand amongst constitutional rights. It is no more confusing than, say, when a regulation becomes a taking, where beginning with *Pennsylvania Coal v. Mahon*, 260 U.S.

393 1922) (Holmes, J.), and continuing through *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), confusion reigns supreme; the free speech rights of public employees, *Garcetti v. Cebalos*, __U.S. __ (2006); the Fourth Amendment or the public forum doctrine. In those cases where the law is not clear, the immunity doctrine is a bar to recovery against public officials.

That the interest advanced by the bill is hostility to existing Establishment Clause jurisprudence, not the preservation of the public fisc, is indicated by a comparison of two sets of cases, each presenting the same legal issues for consideration by the courts. In one, the full panoply of judicial remedies is available, as are attorney fees. In the other, only declaratory and injunctive relief is possible.

Example 1. A private party seeks to erect a Latin cross on public property, invoking her free speech rights. The city responds that it is barred from granting the request by the Establishment Clause. The private party sues.

Example 2. A private party seeks to erect a Latin cross on public property on Good Friday, and the town acquiesces, believing it is obligated to do so by the Free Speech Clause. The town, in turn, is sued by other citizens claiming that the display violates their rights under the Establishment Clause.

Example 3. A teacher, invoking academic freedom, prays with her class. She is disciplined by the school district, on the ground that the teacher's actions violated the Establishment Clause. The teacher sues her employer, alleging the discipline violated her Free Speech and Free Exercise rights.

Example 4. A student sues a teacher because the teacher led a class in prayer and refused to excuse students unwilling to participate in violation of the Establishment Clause. The defendant teacher invokes the Free Speech Clause in his own defense.

Leaving aside the merits of these cases for the moment, it is apparent that the plaintiffs in cases 1 and 3 have available to them a full range of judicial remedies, including declaratory judgments and monetary damages and are eligible for an award of attorney fees. By contrast, plaintiffs in cases 2 and 4 are entitled only to declaratory and injunctive relief, if they can overcome barriers of mootness and meet the other requirements for injunctive relief.

Each of these four cases is of a type now routine. Each presents exactly the same legal issues, albeit only sometimes the Establishment Clause is injected into the case at the behest of the plaintiffs, and sometimes at the behest of the defendants. Each of these litigations makes the same demands on the government, the courts and the public fisc. Each raises exactly the same Establishment Clause issues. Plaintiffs in cases 2 and 4 have no greater incentive than plaintiffs in cases 1 and 3 to bring legally frivolous or marginal claims. But only in 2 and 4 does S. 3696 have any effect.

In upholding the restriction on damages (and attorney's fees) in the *Prison Litigation Reform Act* ("PLRA"), the courts insisted on a rational basis for distinguishing between prison claims and all other constitutional claims. See, *e.g.*, *Johnson v. Daley*, 339 F.3d 582 (7th Cir. 2003) (*en banc*); *Zehner v. Trigg*, 133 F.3d 459, 463 (7th Cir. 1997). In the PRLA context, the courts have found that prisoners had a unique set of incentives to engage in frivolous litigation and harass their keepers since they were largely immune from

any penalties and costs imposed on other litigants, and that hence, such litigation posed a special risk to the public fisc and prison governance. *Zehner*, *supra*.

That is not the case with the Establishment Clause. Whatever disputes there may be at the margins of that Clause, no one can doubt the importance of the principle embodied in that clause for the religious peace Americans have enjoyed, nor that the overwhelming majority of cases present issues of profound importance. Such cases are not brought, in my experience, promiscuously or lightly.

None of the factors involved in inmate litigation—or any other ones we can conceive—justify the exception created by S. 3696. No one has an incentive to engage in frivolous Establishment Clause litigation, especially given the notoriety attaching to such plaintiffs. See *Santa Fe I.S.D. v. Doe*, 530 U.S. 290 (2000) (noting efforts by school officials to expose and harass Establishment Clause plaintiffs). I am unaware of any Establishment Clause challenge, let alone one brought by the "separationist" groups which bring a majority of these cases (ACLU, AJCongress, Americans United, Freedom from Religion Foundation), ever having incurred Federal Rule of Civ. Procedure Rule 11 sanctions for filing a frivolous action. [*]

Establishment Clause litigants are not inmates with unlimited time on their hands for whom litigation is a form of recreation, not hard work. They have no incentive to lie or retaliate, *Johnson v. Perry*, *supra*. They, or the organizations representing them, typically have to initially bear by themselves the not inconsiderable costs of litigation. The number of Establishment Clause cases (that is, for purposes of S. 3696, cases in which plaintiffs invoke the Establishment Clause), brought in the federal courts is a miniscule portion of the

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* But see *Peloza v. Capistrano U.S.D.*, 37 F.3d 517 (9th Cir. 1994) (Establishment Clause challenges to ban on teaching evolution; parts of claim frivolous; no Rule 11 fees).

docket, unlike prisoner civil rights cases. The proposed statute cannot possibly be defended as necessary to spare the federal courts from a deluge of lawsuits.

It is true that some have contended that the Establishment Clause creates no individual rights, but is merely a federalism provision. *Elk Grove I.S.D. v. Newdow*, 547 U.S. 1, 49-50 (2004) (Thomas, J., dissenting). That is not, however, the law, because it is an argument that has failed to persuade anyone but Justice Thomas. And if it were the law, private parties would lack standing to seek injunctive relief. Congress may not make it law de facto by majority vote.

We know authoritatively that Congress may not invoke powers it undoubtedly possesses, such as the power to regulate remedies, to enlarge or contract the judiciary's interpretation of the Constitution. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating *Religious Freedom Restoration Act* because it expanded the meaning of Constitution as interpreted by the Court):

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, ... alterable when the legislature shall please to alter it. *Marbury v. Madison*, 1 Cranch, at 177. Under this approach, it is difficult to conceive of a principle that would limit congressional power. ... Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.

521 U.S. at 529 (some citations omitted).

If this is true of congressional efforts to <u>expand</u> constitutional rights, it is *a fortiori* true of congressional efforts to <u>contract</u> them.

In too many places in this country, public officials routinely ignore Establishment Clause decisions of the Supreme Court and other federal courts. The political dynamic is

simple enough. Popular politics or tradition supports some evident and blatant violations of the Establishment Clause, say school prayer or permanent religious displays. Public officials make a deliberate decision to ignore the law, and to appease public opinion, betting (often correctly) that dissenters would not risk community displeasure to file a court challenge. See N. Banerjee, Families Challenging Religious Influence in Delaware Schools, N.Y. Times (July 29, 2006). Often, like Roy Moore mimicking George Wallace in the schoolhouse door, their own popularity is enhanced by their defiance.

In the fall of 1989, I represented a Jewish high school football player who objected to school-sponsored prayers at every football game. We sought interim injunctive relief for my client to remedy that blatant Establishment Clause violation. It was denied. (The school board contended, *inter alia*, that if the court granted the injunction there would be riot at the next game.)

We had made one important tactical error. We filed the lawsuit (*Berlin v. Okaloosa County*) while the school superintendent was running for reelection. He promptly drew a line in the sand, announcing that a vote for him was a vote to resist to the end all efforts to ban prayer at football games. The end to the litigation came only after he was safely reelected (and the local newspapers began to speculate on what the attorney's fees would be if the lawsuit was successful.)

II. Attorney's Fees

The bill recites that it is intended to prevent 'extortion' from local governments, which I take it refers to attorney's fees. In the House hearing, the sponsor pointed out, as an example of such 'extortion', a 1993 letter from the Indiana Civil Liberties Union to Indiana school districts demanding compliance with *Lee v. Weisman*, *supra*, on pain of litigation in

which, inter alia, attorney's fee would be sought. The sponsor did not -- and cannot – explain how a demand that a school district comply with the law could be extortion, especially when the remedies supposedly being extorted are provided for by Congress precisely to discourage government from ignoring constitutional rules. The ICLU would have been happy with compliance, rather than attorney's fees in cases whose sole point was to insist on compliance with settled law.

It is a good thing that the fee statute exists. It provides a tangible disincentive for the manipulation of the Constitution for the short-term advantage of unprincipled public officials. Moreover, it forces governments to take the Constitution seriously into account in decision-making, not just local and transient interests. Eliminate those as incentives—as S. 3696 would do—and the inevitable, perhaps the desired result, will be more open defiance of well-settled constitutional principle.

It is true that in some marginal cases, a governmental unit changes its conduct because it does not want to run the risk of incurring attorney's fees to those challenging its conduct. That problem is general. It applies as much to cases in which potential plaintiffs seek more religion, rather than less, and government defends on Establishment Clause grounds as when Plaintiffs invoke the Clause. [Given the not "substantially justified" standard under EAJA, this problem is not likely to arise in federal cases].

In a related vein, in its testimony to these House Judiciary Committee's Subcommittee on Constitution, the American Legion objected that the possibility that it would be jointly liable for attorney's fees has kept it from intervening in defense of so-called war memorials in the form of religious symbols. .

The American Legion could enter its defense of those memorials through the filing of briefs amicus curiae. I do most of my Establishment Clause practice that way. If it wants the privileges of being a party –discovery, the right to advance claims other than those raised by the original parties, and, if successful, the right to recover costs -- it is only reasonable to ask it to bear the risks of litigation, including attorney's fees.

The presence of intervenors adds to plaintiff's burden of litigation. There is no reason why intervenors like the American Legion should be able to impose those burdens on plaintiffs risk free. *cf.* 28 U.S.C. Section 2403 (requiring official intervenors to pay court costs).

To repeat, the only justification for the line drawn by S. 3696 is unvarnished hostility toward one set of constitutional claims, and a desire of its sponsors to encourage local government to defy existing restraints on endorsing and encouraging religion, particularly in cases not readily subject to injunctive relief such as one-time ceremonies or other temporary events. That is not a legitimate purpose; it may indeed be constitutionally impermissible sectarian purpose. See, *e.g.*, *Edwards v. Aguillard*, 482 U.S. 578 (1987). More to the point, Congress should not be in the business of encouraging violations of the Nation's fundamental charter.

Here, as in the remedy section, S. 3696 treats citizens' Establishment Clause claims less advantageously than it treats the constitutional claims of inmates. A successful inmate litigant is entitled to attorney's fees, like all other successful litigants under § 1983, except that fees for prisoners are capped by reference to the *Criminal Justice Act*, 18 U.S.C. § 3006A. (Presumably, if S. 3696 passes, inmates raising Establishment Clause claims will also be denied attorney's fees, unlike all other inmate litigants.) In upholding the

constitutionality of the fee cap against claims that the cap interferes with access to courts, courts have emphasized that the statute does not deny all fees, *Johnson*, *supra*. S. 3696 does not even make a capped fee available to Establishment Clause litigants.

What possible reason could there be for treating citizen litigants substantially less well than prison litigants? Again, it must be nothing less than naked hostility toward Establishment Clause claims itself. No rational reason justifies the crude line the bill draws. It therefore is doubtful that S. 3696 would withstand a constitutional challenge such as those brought unsuccessfully to challenge PLRA.

We recognize, of course, that the Constitution does not of its own force compel an award of attorney's fees. Congress could, if it thought it wise, repeal the attorney's fees statutes in their entirety and revert to the usual American rule on attorney's fees. It could create some sort of good faith defense; it could cap fees. Whether these are good or bad ideas, they are at least neutral across the run of constitutional cases. What Congress should not do is pick and choose among favored constitutional rights.

In passing the *Attorney Fees Act*, Congress recognized the importance of private litigation to enforce constitutional rights. In the ensuing decades attorney's fees have become an integral part of the mechanism for making real the rights guaranteed citizens by the Constitution. Our political institutions have adapted to that mechanism, both by considering it in setting their budgets, and more importantly, in taking constitutional law more seriously.

Local government now treats constitutional law as law that is relevant to local governments and the way they do business, and not just something, as a Montana state judge once memorably told a lawyer, only for the Supreme Court, *Sandstrom v. Montana*,

442 U.S. 510, 513 (1979) ("you can give those [citations] to the Supreme Court"). The judge's reaction is, unfortunately, still common, although not nearly as common as it was before fees were mandated.

The attorney's fees statute embodies the view that the public weal is best served by ensuring official compliance with the Constitution. Given the imbalance of power and resources between the government and the citizen, and the costs of contemporary litigation, the *Attorney Fees Act* represents an important effort to recalibrate that balance. Its selective gutting would be a mistake of the first order.

If Congress is to begin to deny attorney's fees to unpopular cases, there will be no end to the loopholes it will be pressed to create. The attorney fee statute will soon be pock-marked with carve outs for controversial cases. One does not need a particularly long memory to recall that desegregating the nation's schools was once a controversial subject. Indeed, as the Supreme Court's recent decision to review two school desegregation cases reveals, *Parents Involved v Seattle School Dist.*, 426 F. 3d 1162 (9th Cir. 2005) (en banc) cert. granted, 547 U.S. __ (2006); *McFarland v. Jefferson County*, 416 F. 3d 513 (6th Cir. 2005), cert. granted, 547 U.S. ___ (2006), it remains a controversial subject.

Any number of other civil liberties issues remain contentious. Should Congress deny attorney's fees to those seeking to integrate schools; challenge reverse discrimination; anti-terrorism legislation; ensure free access to the ballot; invalidate English-only rules; exclude illegal aliens from government benefits; rectify abuse of the power of eminent domain; protect or suppress speech of violent extremist groups; advance gay rights claims; resist ordinances protecting rights of gays and lesbians in cases affecting religious institutions?

Depending on the political winds of the moment, one or the other of these classes of claims will be politically controversial. To take but one set of current controversies: At some times and for some people, decisions expanding the rights of gay and lesbian Americans, such as *Lawrence v. Texas*, 539 U.S. 558 (2003), will be controversial. At other times, and in other places in this country, decisions denying religious institutions the right to be excused from compliance with anti-discrimination laws will be controversial. M. Stern, Two Way Street, New York Sun (June 14, 2006). The only practical way to make sure that all these claims can be heard is to ensure that access to the courts is on an equal footing.

III.

Conservatives may think that they do their causes no harm by restricting the access to the courts of "liberal" claims. I deny that separating church and state, a cause dear to the Founders, is particularly a liberal cause. Many of the damages cases cited were brought by religious conservatives challenging liberal or bureaucratic establishments. But the major premise is mistaken. Once the Congress establishes exceptions to the *Attorney Fees Act* and the remedial powers of the federal courts in pursuit of one vision of church-state relations, it will set a precedent that will be invoked by others with very different visions.

At the moment, political power rests with those who reject a sharp line dividing church and state. That dominance will not last forever. And when advocates of a sharp division between the two are politically ascendant, supporters of S.3696 will be fighting to defeat exceptions of the sort they created but favoring their opponents' causes.

Cases challenging traditional civic religious practices are deeply unpopular among many Americans. Some of the most controversial decisions have been exploited by

demagogues of all stripes to support their claim that there is a judicial war against religion and Christianity or an imminent threat of theocracy. If the subject today were the value of the separation of church and state as such, I would be pleased to defend most but not all of these challenges to official religion. But I need not enter those lists today.

The bill you are considering today is a reflection of the mistaken view that Establishment Clause litigation is brought only by those who detest religion, and who seek a named public square. That is a gross over-simplification. In some cases, it is a simple lie. In recent years, conservatives have also successfully invoked the Establishment Clause to stop efforts to grant preferred status to "progressive" religious views on sexuality in the public schools. *Citizens for a Responsible Curriculum v. Montgomery County*, __F. Supp.2d __ (D.Md. 2005); *Hansen v. Ann Arbor Public Schools,* 293 F.Supp.2d, 7780, 804-05 (E.D. Mich 2003). (In Hansen, plaintiffs won nominal damages and attorney's fees.) Those were solid and welcome decisions. They were hailed by all those who view the Establishment Clause as a guarantor of religious liberty, and not as a means of suppressing faiths with which one disagrees.

If S.3696 were law, neither the *Hansen* or *Montgomery County* plaintiffs would have been entitled to damages or attorney's fees, collateral victims of legislation creating disincentive to litigation on the part of 'liberal' groups. The Michigan lawsuit involved a one-time event, long since complete by the time that case was adjudicated. Claims for injunctive relief were moot. S. 3696 would have denied all of us, including public school officials across the Nation, the sound guidance that decision provides.

As I have said, one should not think that the current balance of forces in religion and politics will prevail forever. One need not be much of a prophet to predict that

sometime in the coming years there will be a resurgence of political power to those holding "liberal" religious views, to say nothing of those hostile to public faith claims altogether. Some of those persons are likely to attempt to use governmental authority to lord over their religious opponents. It is a sad fact of human nature that some of those who today protest official efforts to impose religion will, when they hold the reins of power, not hesitate to impose their secular views on others. When that happens, as it inevitably will, the sponsors of S. 3696 will rue the day that they supported this legislation. *

Marc D. Stern
General Counsel
American Jewish Congress
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New York, NY 10022
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mstern@ajcongress.org

June 20, 2006

[*] Although the bill's title suggests a preoccupation with a subset of Establishment Clause claims—those involving the names issues such as municipal seals, so-called war memorials, and other "public religious expression"—the actual text of the bill is not so limited, but applies to all Establishment Clause claims. Section 3 of the Bill, relating to attorneys' fees lists for kinds of lawsuits subject to this section (veterans' memorials, religious displays or imagery, religious words on the official U.S. seal or currency (but, not, for some reason municipal seals) and the support of Boy Scouts by public entities. The list by its terms does not apply to the limitations on remedies in Section 2.

However, since this listing is merely illustrative, but not limiting, the difference between Sections 2 and 3 is academic. It is simply an exploitation of current celebrity litigation, not any sensible listing of cases or types of cases where there is rational reason for different remedial treatment.

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August 8, 2006

Honorable Sam Brownback, Chair
Subcommittee on the Constitution,
Civil Rights and Property Rights
Senate Committee on the Judiciary
SD – 224
Washington, DC 20610-6275

By fax

(202) 228-1265

Re: S. 3696

Dear Senator Brownback:

I am writing both to thank you for inviting me to testify at the hearing on S.3696 - PERA and for conducting a hearing that was substantive and thoughtful.

I enclose here the document I referred to in my testimony.

I would like to make four additional points that time did not permit me to make at the hearing:

(1) The Mt. Soledad cross decision turns on the no-preference clause of the California Constitution, not the Federal Establishment Clause. *Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993). The no-preference clause requires a more stringent level of separation than the Federal Constitution. See *Fox v. City of Los Angeles*, 22 Cal.3d 792, 150 Cal.Rptr. 867, 587 P.2d 663 (1978). The decision of the City of Los Angeles to alter its seal was based, one suspects, in large part on an evaluation of the likelihood of prevailing under state law.

By statute, Code of Civil Procedure § 1021.5, California allows attorney fees for litigating cases "which result[ ] in the enforcement of an important right affecting the public interest." The statute would, on its face, be available to 'no-preference' clause plaintiffs. It implements the same policies as § 1988 and the Equal Access to Justice Act.

"The doctrine rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies ...." *Woodland Hills Residential Ass'n v. City Council*, 23 Cal.3d 917, 933 (1979) (emphasis added). S.3696 would not displace either of these state policies.

However, it bears noting that the California Supreme Court has held that the statute does not permit an award of fees against an *amicus curiae* or an intervenor-

defendant, unless the intervenor was a "co-defendant with a direct interest intertwined with that of the principle defendant." *Connerly v. State Personnel Bd.*, 37 Cal.4th 1169, 1181, 39 Cal.Rptr.3d 788 (2006).

Similar rules apply under federal law. The United States Supreme Court has held that in ordinary Title VII cases, "attorney fees should be awarded against losing intervenors only where the intervenor's action was frivolous, unreasonable, or without foundation." *Democratic Party v. Reed*, 338 F.3d 1281, 1288 (9th Cir. 2004), citing *Independent Flight Attendants v. Zipes*, 491 U.S. 761 (1989). *Zipes* also holds that fee shifting statutes should be read in uniform fashion, such that § 1988 would generally not permit intervenor liability. *Democratic Party, supra.* It would seem that no change in the law is necessary to permit the American Legion to participate in the Mt. Soledad litigation without liability for attorney fees.

This is not the place to enter into a full discussion of the scope of intervention, but I should note in passing that the American Legion is almost certainly not eligible to invoke F.R.Civ.P. 24(a) regarding intervention as of right. Rule 24(b) details the occasions when a court in its discretion may allow intervention, but it is not at all certain that a court would grant such status to the American Legion in the Mt. Soledad case.

(2) There was testimony that,in the Mt. Soledad case, certain individual officers of the association named as defendants in the original suit were told that they would be personally liable for attorney fees if they did not yield to the plaintiff's demands.

I cannot comment on the specifics of what happened in the Mt. Soledad case almost 15 years ago. I have no personal knowledge of those facts. However, it is worth considering the problem from the perspective of a plaintiff and her/his attorney.

In the Mt. Soledad case, the cross itself was the property of a private party. Leaving aside the complex question of when private action intertwined with state action itself becomes state action, if the plaintiff sues only the official defendant, the issue immediately becomes whether all necessary parties have been joined since the private owner of the cross has an obvious interest in maintaining the status quo. To avoid later questions, Plaintiffs often reluctantly sue the private parties at the outset.

In one case in which I was recently involved, a case in which the government was sued for entering into a contract with a religious provider, we deliberately did not sue the recipient, which then moved to intervene on the ground that it was a necessary party. Had that not happened, the government could have responded with a claim that we had failed to sue a necessary party and move to dismiss.

(3) At the hearing Mr. Staver argued that the "capable of repetition, yet evading review" exception to the mootness doctrine would suffice to avoid the problems of mootness I alluded to in my testimony. There will be some such cases, *Brady by and through Sugzdinis v. Spang*, 957 F.2d 1108 (3rd Cir. 1992) (graduation

prayer; plaintiffs were parents with other children in the school) but very few, given the limited nature of that doctrine, *Doe v. Madison School District*, 177 F.3d 789 (9th Cir. 2000) (graduation prayers); *Society of Separationists v. Herman*, 959 F.2d 1283 (5th Cir. 1993); (oath of venire persons) *Davidson v. Stanley*, ___ F.Supp.2d ___ (D. N.H. 2003). And in *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003), the "capable of repetition" exception was held inapplicable but the case saved from mootness by the presence of a (nominal) damage claim.

(4) At the conclusion of the hearing, I promised to consider methods of addressing the problem of towns which yield to Establishment Clause demands simply to avoid ruinous attorney fees, so long as a solution took into account on an equal basis cases in which defendants invoke the Establishment Clause in response to various free speech/free exercise claims.

However, in light of the holding in *Zipes* and *Democratic Party* that all fee statutes should be read *in pari materia*, I need to think hard (and consult with others) about how to address the problem without affecting these other matters. Moreover, I think it also important to distinguish between cases where the law is uncertain and those cases where the law is entirely settled (*e.g.*, officially sponsored classroom prayer). In any event, I will think over these matters and be in touch with Amy Blankenship of your staff.

Sincerely,

Marc D. Stern
Assistant Executive Director

Cc: Honorable Russell Feingold
Amy Blankenship (Amy_Blankenship@brownback.senate.gov)

/drs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CLOSED

ELIZABETH HANSEN, CONSTANCE HANSEN, and RALPH MARTIN,

Plaintiffs,

No. 02-CV-72802-DT

vs.

Hon. Gerald E. Rosen

ANN ARBOR PUBLIC SCHOOLS, et al.,

Defendants.

FILED
SEP 29 2004
CLERK'S OFFICE
DETROIT

JUDGMENT

At a session of said Court, held in
the U.S. Courthouse, Detroit, Michigan
on SEP 29 2004
PRESENT: Honorable Gerald E. Rosen
United States District Judge

The Court having entered an Opinion and Order on December 5, 2003, granting, in part, and denying, in part, Plaintiffs' and Defendants' Motions for Summary Judgment, and finding Defendants liable to Plaintiffs for violation of certain constitutional rights; and the Court having this date entered an Opinion and Order awarding nominal damages and attorneys fees and costs to Plaintiffs,

NOW, THEREFORE,

JUDGMENT is hereby entered in favor of Plaintiffs and against Defendants in the amount of $35.00 nominal damages as set forth in the Opinion and Order of this date, plus $87,601.00 for attorneys' fees and $15, 137.44 for costs and expenses, for a total award of fees and costs pursuant to 42 U.S.C. § 1988 in the amount of $102,738.44.

Gerald E. Rosen
United States District Judge

AUG-08-2006 15:43 AMERICAN JEWISH CONGRESS 212 768 1633 P.02

August 1, 2006

Dear Senator:

On behalf of the 43,000 churches that are associated with Traditional Values Coalition, we are writing to ask that you please co-sponsor Senator Sam Brownback's bill, **S. 3696**, the **Veterans' Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006.**

This Public Expression of Religion Protection Act (PERA) legislation, will close a loophole in federal law that allows groups like the ACLU to be awarded attorneys fees when they win Establishment Clause (religious freedom) cases from local and state governments. The ACLU is using a section of federal code that was originally designed to aid poor defendants in civil rights cases. This loophole has provided the ACLU with millions of dollars in profits from pursuing case after case against the public display of religious belief in America.

The purpose of the bill is clear: It is designed to prohibit organizations such as the American Civil Liberties Union from profiting from Establishment Clause lawsuits against local and state governments.

Currently, the ACLU and its like-minded allies are making millions of dollars yearly by suing over the display of the Ten Commandments, or other cases involving religious expression. If they win in court, they not only stifle religious freedom, but then reap hundreds of thousands of dollars in legal fees that governments are forced to pay them as part of legal settlements.

In effect, the ACLU is using current federal law as a money machine to harass local governments and to fuel more costly lawsuits over religious freedom issues. This should not be. PERA will not prohibit the bringing of establishment clause lawsuits, but it will remove the financial incentive from the ACLU to file lawsuits as a way of fueling their anti-religious bias in our culture.

Here are few examples showing how the ACLU has profited from its attacks on religious freedom:

- In 2004, the ACLU was paid $950,000 in a City of San Diego settlement over the Boy Scouts.
- In Georgia, a federal judge ordered a county to remove the Ten Commandments from a county courthouse and awarded the ACLU $150,000 as part of the settlement.
- In Alabama, the ACLU and other anti-Christian groups won nearly $550,000 in 2004 over a Ten Commandments case.
- In 2003, the ACLU won $121,500 in a Kentucky Ten Commandments case.

139 C Street, S.E. Washington, DC 20003 (202) 547-8570 www.traditionalvalues.org

Current federal law ENCOURAGES the ACLU to file these lawsuits as a way of funding its anti-Christian activities!

PERA will stop the ACLU from profiting from its attacks on religious freedom!

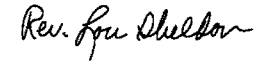
PERA will amend federal code 42 USC 1983 to make it clear that the ACLU, et al, shoulder their own costs of litigation—especially when the ACLU routinely files frivolous lawsuits. *No government agency should have to pay the fees of the ACLU if the agency loses the lawsuit.*

The current situation is intolerable. Quite often, local governments simply give in to ACLU demands rather than defend themselves against frivolous lawsuits. The ACLU wins by intimidation.

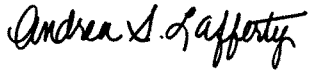
PERA will help remove financial damages from the equation to put local governments on a more even level with the ACLU and its war chest against the public expression of religion.

I urge you to please co-sponsor S. 3696 as well as vote in favor of it when it comes up for a floor vote.

Sincerely,



Rev. Louis P. Sheldon
Chairman



Andrea S. Lafferty
Executive Director

139 C Street, S.E. Washington, DC 20003 (202) 547-8570 www.traditionalvalues.org

Paying Your Own Way: Creating a Fair Standard for Attorney's Fee Awards in Establishment Clause Cases

August 2, 2006
2:30 p.m.

TESTIMONY OF THE AMERICAN CENTER FOR LAW AND JUSTICE

before the
Subcommittee on the Constitution, Civil Rights, and Property Rights
of the
Committee on the Judiciary
of the
United States Senate

Shannon Demos Woodruff
Senior Counsel
American Center for Law & Justice
1000 Regent University Drive
Virginia Beach, VA 23464

Introduction

My name is Shannon Woodruff,[1] and I would like to thank the Chairman and members of the Committee for inviting me to share the views of the American Center for Law and Justice[2] in support of S. 3696, *The Veterans' Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006.* As the Act clearly articulates, its purpose is "to prevent the use of the legal system in a manner that extorts money from State and local governments, and the Federal Government, and inhibits such governments' constitutional actions under the first, tenth, and fourteenth amendments." To accomplish this, the Act would eliminate the award of attorney's fees in lawsuits brought under 42 U.S.C. §§ 1983 and 1988 claiming a violation of the First Amendment's Establishment Clause.

While 42 U.S.C. § 1988 ("the attorney's fees statute")[3] was enacted for the laudable purpose of ensuring that those who cannot afford an attorney may still seek judicial protection of their basic civil rights, it has had the unintended effect of financing a fierce campaign against any and all expression, acknowledgement, or accommodation of religion in the public

[1] Senior Counsel, American Center for Law and Justice; J.D., Regent University School of Law; B.S., University of New Hampshire. A complete resume is available upon request.

[2] The American Center for Law and Justice (ACLJ), is a non-profit, public interest law firm committed to ensuring the ongoing viability of constitutional freedoms in accordance with principles of justice. ACLJ attorneys have argued or participated as amicus curiae in numerous cases involving constitutional issues before the Supreme Court of the United States and other federal and state courts, and a Supreme Court Justice recently cited an ACLJ amicus curiae brief in an opinion in a case involving the public display of the Ten Commandments. *Van Orden v. Perry*, 125 S. Ct. 2854, 2877, n.9 (2005) (Stevens, J., dissenting). The ACLJ has been involved in dozens of cases nationwide relating to the recognition of America's religious heritage in public life and has vast experience dealing with the unintended chilling effect that 42 U.S.C. § 1988 has on state and local governments with regard to threatened Establishment Clause litigation.

[3] 42 U.S.C. § 1988(b) provides, in relevant part: "In any action or proceeding to enforce a provision of [various civil rights statutes,] . . . 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 . . . ."

arena. This campaign, orchestrated by a few interest groups, is fueled not only by ideology but by the potential for large fee awards against government defendants, relaxed standing requirements for Establishment Clause claims, and the unsettled nature of current Establishment Clause jurisprudence. The law applying the Establishment Clause, beginning with the test announced in *Lemon v. Kurtzman*,[4] and continuing to the present quagmire of varying tests and modes of analysis, is in a state of hopeless confusion. This confusion has produced widely inconsistent results, with judges from the district court to the Supreme Court arriving at contradictory holdings in virtually identical cases. Under such circumstances, it is both counterintuitive and counterproductive to award attorney's fees to the prevailing party.

With respect to free speech and free exercise rights, the fear of sizeable attorney's fees awards has forced government officials into a secular straightjacket where they err on the side of religious discrimination to protect their pocketbook, and accommodation of religion is the exception rather than the rule. In the face of an impending legal attack, the threat of costly litigation, coupled with the utter unpredictability of the law in this area, has led state and local governments nationwide to sever their ties to America's rich religious tradition. S. 3696 seeks to remove the financial incentive behind such attacks.

I. S. 3696 is Necessary to Prevent the Chilling Effect that Establishment Clause Litigation Is Having on the Exercise of Important First Amendment Rights.

The attorney's fee statute was intended to preserve basic civil rights; however, it has been perverted in the Establishment Clause context to instead punish government bodies that, in good faith, permit the voluntary recitation of the Pledge of Allegiance, the inclusion of a

[4] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

commemorative cross on a veteran's memorial, or other public references to religion. The impact of attorney's fee awards in these types of Establishment Clause cases can be felt on two levels. First, the availability of taxpayer dollars encourages lawsuits that are not very well grounded. With respect to the defendants in such cases, those dollars represent vulnerability that causes elected bodies, both large and small, to surrender to demands that are not always constitutionally based.[5] Second, in the community at large, the inevitable result of large attorney's fee awards is a widespread fear among similarly situated government officials. In turn, such fear encourages government entities to take protective measures which, consciously or subconsciously, often incorporate a discriminatory posture toward the exercise of both Free Speech and Free Exercise rights.[6] The dynamic at work at both levels imposes a chilling effect upon the exercise of First Amendment rights that is unacceptable. S. 3696 simply removes from the legal equation both the lure and the threat presented by those taxpayer dollars.

[5] *See* Section I.B, *infra*, for a discussion of numerous examples of Establishment Clause cases where local governments have been forced to pay large attorney's fee awards, forgo an appeal, and/or settle out of court due to the combined effect of the attorney's fee statute and the confusing state of Establishment Clause jurisprudence.

[6] The importance of the effect of the attorney's fees statute on private First Amendment activity cannot be ignored. Establishment Clause cases are not limited solely to government action, but rather, frequently involve challenges to government accommodation of private expression of religious speech. The effect of the current state of Establishment Clause litigation is that municipalities, in an effort to avoid Establishment Clause claims, often adopt policies that overly restrict religious freedom and end up violating the Establishment Clause by demonstrating hostility toward religion. In this way, litigation under the current system of fee-shifting has transformed the Establishment Clause from a limitation on government to a very real and complex obstacle to the exercise of First Amendment rights by many citizens. Many government officials have chosen to take the calculated risk that suppressing First Amendment rights, at least until they are asserted, might be safer, from a liability standpoint, than possibly allowing too much and drawing the attention of eager Establishment Clause plaintiffs.

A. The Instability of Establishment Clause Jurisprudence Puts Governments Between a Rock and a Hard Place.

The chilling effect of awarding attorney's fees in Establishment Clause cases is exacerbated by the fact that no other area of law is more confusing or unstable. Over the past several decades, the Supreme Court has not only applied a variety of different tests to Establishment Clause claims, but the Court has done so inconsistently. In light of this confusion, municipalities and local public school boards are often placed in an untenable position when someone within the community is offended by a government acknowledgement of the religious heritage of the citizenry. Enthusiastic plaintiffs have been eager to exploit this legal uncertainty by threatening local governments with hundreds of thousands of dollars in attorney's fees if they do not end the conduct that "offends" them. Localities and school boards are often bullied into settling and giving in to plaintiffs' demands just to avoid the chance, however remote, that a judge will conclude that the government conduct violated the Establishment Clause. It is this abuse of the attorney's fees statute that S. 3696 seeks to address.

1. The Evolution of Current Establishment Clause Jurisprudence.

The *Lemon* test, which still nominally governs Establishment Clause cases, has been widely criticized[7] since its inception 35 years ago due to its inherent malleability and lack of any basis in practical legal theory or American tradition. The three-pronged *Lemon* test states:

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[7] *See, e.g., McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722, 2750-51 (2005) (Scalia, J., concurring); *Van Orden*, 125 S. Ct. at 2865-68 (Thomas, J., concurring); *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2125, n.1 (2005) (Thomas, J., concurring); *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251 (2000) (Scalia, J., dissenting from denial of certiorari); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting); *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-99 (1993) (Scalia, J.,

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.[8]

As one scholar has noted:

> [T]he problems with the [*Lemon*] test are numerous. Each part of the *Lemon* test is deeply ambiguous, and each—if taken literally—would produce highly unattractive results. Consequently, the lower federal courts and state courts have given the test widely different and seemingly contradictory interpretations, and they often ignore it altogether to avoid undesirable results.[9]

One former Supreme Court Justice concluded that *Lemon* "was not required by the First Amendment and is contrary to the long-range interests of the country,"[10] while another noted:

> [T]he *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests. The three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service. The three-part test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize. Even

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concurring); *Lee v. Weisman*, 505 U.S. 577, 586-87 (1992); *id.* at 644-45 (Scalia, J., dissenting); *County of Allegheny v. ACLU*, 492 U.S. 573, 655-56 (1989) (Kennedy, J., dissenting in part); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 346-48 (1987) (O'Connor, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 67 (1985) (O'Connor, J., concurring); *id.* at 112 (Rehnquist, J., dissenting); *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting); Thomas C. Marks, Jr. & Michael Bertolini, Lemon *Is a* Lemon*: Toward a Rational Interpretation of the Establishment Clause*, 12 BYU J. PUB. L. 1 (1997); Michael W. McConnell, *Stuck with a* Lemon*: A New Test for Establishment Clause Cases Would Help Ease Current Confusion*, 83 A.B.A.J. 46 (1997); Michael W. McConnell, *Religious Participation in Religious Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992); Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989); Michael Stokes Paulsen, *Religion and the Public Schools After* Lee v. Weisman*:* Lemon *is Dead*, 43 CASE W. RES. L. REV. 795 (1993); Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657 (1998).

[8] *Lemon*, 403 U.S. at 612-613 (citations omitted).

[9] McConnell, *supra* note 7, 83 A.B.A.J. at 46.

[10] *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 820 (1973) (White, J., dissenting).

> worse, the *Lemon* test has caused this Court to fracture into unworkable plurality opinions, depending upon how each of the three factors applies to a certain state action.[11]

Justice Stevens has referred to "the sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon*,"[12] while Justice Thomas has noted that "the very 'flexibility' of [the] Court's Establishment Clause precedent leaves it incapable of consistent application."[13]

The most colorful critique of *Lemon* comes from Justice Scalia's concurring opinion in *Lamb's Chapel v. Center Moriches Union Free School District*:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v. Weisman*, 505 U.S. 577 (1992), conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so.
>
> The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts." Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.[14]

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[11] *Wallace*, 472 U.S. at 110 (Rehnquist, J., dissenting).

[12] *Comm. for Pub. Educ. & Religious Liberty*, 444 U.S. at 671 (Stevens, J., dissenting) (quoting *Lemon*, 403 U.S. at 614).

[13] *Van Orden*, 125 S. Ct. at 2867 (Thomas, J., concurring).

[14] *Lamb's Chapel*, 508 U.S. at 398-99 (Scalia, J., concurring) (citations omitted).

Justice Scalia added that the inevitable result of applying the *Lemon* test is a "strange Establishment Clause geometry of crooked lines and wavering shapes."[15]

The introduction of the "endorsement" analysis has enhanced the *Lemon* test's unpredictability. In *County of Allegheny v. ACLU*, the Supreme Court explained that it had "refined the definition of governmental action that unconstitutionally advances religion," and added that it had "paid particularly close attention to whether the challenged governmental practice has the purpose or effect of 'endorsing' religion."[16] The primary problem with this analysis is that "[t]here is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion."[17] While courts attempt to answer this amorphous question by considering the perspective of a fictitious "reasonable observer" who is "deemed aware of the history and context of the community and forum,"[18] the reality is that one person's permissible acknowledgment of the public's religious beliefs is another's impermissible endorsement of religion. Although "the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe," it has often been applied that way in practice.[19]

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[15] *Id.* at 399.

[16] *County of Allegheny*, 492 U.S. at 592.

[17] *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J, concurring).

[18] *See id.*

[19] *Id.* at 779. Many of the cases described in Section I.B, *infra*, involve challenges to public recognition of America's religious heritage that are based upon such a "discomfort of viewing symbols [somehow affiliated with] a faith to which [the plaintiffs] do not subscribe."

The shortcomings of *Lemon* and its endorsement analysis are most problematic when they are applied to longstanding traditions of public recognition of the country's religious heritage. Despite confusion in the Court's Establishment Clause analysis, a few fundamental constitutional principles remain intact. It is quite clear from the Supreme Court's Establishment Clause jurisprudence that the Constitution is not to be interpreted in a manner that would purge religion or religious references from society. The Supreme Court has acknowledged for over a century that "this is a religious nation"[20] and, with respect to the historical role of religion in our society, has concluded that "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."[21] Recognition of the primacy of religion in the Nation's heritage is nowhere more affirmatively expressed than in *Zorach v. Clauson*:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. *That would be preferring those who believe in no religion over those who do believe.*[22]

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[20] *Church of the Holy Trinity v. United States*, 143 U.S. 457, 470 (1892).

[21] *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984).

[22] 343 U.S. 306, 313-14 (1952) (emphasis added).

"[T]he Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."[23] Nothing in past or present Establishment Clause jurisprudence compels the redaction of all references to God just to suit atheistic preferences. Consequently, American governments have a long venerable history of public acknowledgment of the nation's religious heritage that should not be trampled upon by an improper reading of the Establishment Clause or by overly zealous interest groups.

2. Recent Decisions Involving Ten Commandments and Holiday Displays Illustrate the Extent of the Problem.

The wholesale disagreement and inconsistency regarding the appropriate legal framework to apply to Establishment Clause claims can only be described as analytical schizophrenia. Nowhere is this problem more evident than in recent decisions concerning the display of the Ten Commandments.[24] Just last summer, the Supreme Court issued decisions on the same day in two cases involving public displays of the Ten Commandments. Not only did the Court arrive at opposite holdings, but it did not even apply the same Establishment Clause analysis in both cases. In *McCreary County v. ACLU of Kentucky*,[25] the Court held that displaying a framed copy of the Ten Commandments in a courthouse hallway violated the Establishment Clause, and yet in *Van Orden v. Perry*,[26] the Court upheld a Ten

[23] *Lynch*, 465 U.S. at 673.

[24] *See, e.g.*, Jay A. Sekulow & Francis J. Manion, Symposium, *The Supreme Court and the Ten Commandments: Compounding the Establishment Clause Confusion*, 14 WM. & MARY BILL OF RTS. J. 33 (2005).

[25] 125 S. Ct. at 2722.

[26] 125 S. Ct. at 2854.

Commandments monument on State capitol grounds. The vote in each case was 5-4,[27] seven Justices authored a total of ten opinions,[28] and each case involved an entirely different mode of legal analysis.[29]

Commentators declared that these decisions had added "mud to murky water,"[30] "couldn't be more confusing or convoluted,"[31] "offered muddled and confusing answers,"[32] and fell in line with other Establishment Clause cases "where schizophrenia is business as usual."[33] As one author explained: "The Supreme Court's ruling[s] . . . promise[] no relief. Like Moses and the Hebrews forced to wander 40 years in the wilderness, we remain lost."[34]

The Supreme Court's confusion is only magnified when one examines lower court decisions on the same issue. For example, a few months before the Supreme Court struck down the display in *McCreary County*, a federal appeals court upheld a virtually identical display, noting, "[t]he Establishment Clause is not violated when government teaches about

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[27] Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer formed the *McCreary County* majority which struck down that display, while Justice Breyer joined Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas in upholding the display in *Van Orden*.

[28] Justices Souter, O'Connor, and Scalia wrote opinions in *McCreary County*, while Chief Justice Rehnquist and Justices Scalia, Thomas, Breyer, Stevens, O'Connor, and Souter wrote opinions in *Van Orden*.

[29] *McCreary County* applied *Lemon*'s purpose prong, while the *Van Orden* plurality held that the *Lemon* test is "not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds." *See Van Orden*, 125 S. Ct. at 2861 (Rehnquist, C.J., plurality opinion).

[30] Stephen Henderson, *Split on Ten Commandments: High Court Only Confused the Issue, Both Sides Argue*, PHILADELPHIA INQUIRER, June 28, 2005, at A1.

[31] Editorial, *Commandments Confusion*, HARTFORD COURANT, July 11, 2005, at A6.

[32] Bill Adair, *Supreme Court: No Clear Rule on Religious Displays*, ST. PETERSBURG TIMES, June 28, 2005, at 1A.

[33] Margo Hammond, *In Religious War, No Middle Ground*, ST. PETERSBURG TIMES, July 3, 2005, at 7P.

[34] Ruth Holladay, *Commandments Issue is a Monumental Mess*, INDIANAPOLIS STAR, June 30, 2005, at 1B.

the historical role of religion."[35] In another case decided six months *after McCreary County*, a federal appeals court upheld a display identical to the one struck down in *McCreary County*, noting that "[n]othing in the [*McCreary County*] opinion can be read to stand for the proposition that governmental displays such as the ones involved here, without more, are unconstitutional."[36] The bizarre result of these decisions is that one Kentucky county and one Indiana county may maintain a particular display that includes the Ten Commandments while another Kentucky county may not.

The public display of menorahs, creches, and other symbols during the holiday season is another area where the *Lemon* test has wreaked havoc. In 1984, the Supreme Court upheld a publicly-owned display which included a crèche and many other things such as a Christmas tree, a "Seasons Greetings" banner, and Santa's reindeer and sleigh.[37] Just five years later, the Court upheld a display outside a public office building which included a menorah and a Christmas tree, but it also struck down the display of a creche inside a courthouse next to a "Glory to God in the Highest!" banner and a plaque noting the creche's private ownership.[38] One federal appellate judge has derided these cases as creating a malleable "St. Nicholas too" test:

> It may be convenient to think of this as a "St. Nicholas too" test—a city can get by with displaying a creche if it throws in a sleigh full of toys and a Santa Claus, too. The application of such a test may prove troublesome in practice.

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[35] *Books v. Elkhart County*, 401 F.3d 857, 868 (7th Cir. 2005).

[36] *ACLU of Kentucky v. Mercer County*, 432 F.3d 624, 633 (6th Cir. 2005).

[37] *Lynch*, 465 U.S. at 671.

[38] *County of Allegheny*, 492 U.S. at 581-87.

> Will a mere Santa Claus suffice, or must there also be a Mrs. Claus? Are reindeer needed? If so, will one do or must there be a full complement of eight? Or is it now nine? Where in the works of Story, Cooley or Tribe are we to find answers to constitutional questions such as these?[39]

Another federal appellate judge has noted how Establishment Clause challenges to holiday displays have essentially turned federal judges into interior decorators:

> [The *Lynch*] decision, like others requiring multi-factor balances, gives judges of the inferior federal courts fits. The Court avoided creating a rule about the treatment of religious symbols and instead announced that judges should examine each symbol's context. But which items of the context matter? If different elements cut in different directions, what is to be done? It is discomfiting to think that our fundamental charter of government distinguishes between painted and white figures—a subject the parties have debated—and governs the interaction of elements of a display, thus requiring scrutiny more commonly associated with interior decorators than with the judiciary. When everything matters, when nothing is dispositive, when we must juggle incommensurable factors, a judge can do little but announce his gestalt.[40]

Unfortunately, confusion and inconsistency experienced in Ten Commandments and holiday display cases is the rule rather than the exception under the current state of Establishment Clause jurisprudence. Such legal uncertainty has allowed the attorney's fees statute to be used as a weapon against permissible government acknowledgment of America's religious heritage. The specter of attorney's fees in these cases has had an unintended chilling effect on a wide variety of government action that is not actually prohibited by the Establishment Clause. If the Justices of the Supreme Court cannot consistently discern the parameters of the Establishment Clause, other government officials deserve at least a small margin of error as they attempt to do the same. S. 3696 is necessary to ensure that the narrow

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[39] *ACLU v. Birmingham*, 791 F.2d 1561, 1569 (6th Cir. 1986) (Nelson, J., dissenting).

[40] *Am. Jewish Congress v. Chicago*, 827 F.2d 120, 128-29 (7th Cir. 1987) (Easterbrook, J., dissenting).

exception to the general rule created by the attorney's fees statute is no longer used to blackmail government officials into stripping all religious references from the public arena.

B. The Current Fee Shifting in Establishment Clause Challenges Works to Frustrate and Often Prevent the Full and Complete Resolution of the Legal Questions at Stake.

Section 1988 has generally been successful in helping to preserve basic civil rights such as the freedom of speech or the right to be free from racial discrimination, but it has also been used far too often to muzzle state and local governments seeking to acknowledge the longstanding religious traditions of their citizens in a constitutionally permissible manner. In such circumstances, attorney's fee awards in Establishment Clause cases can have a devastating impact upon small towns, counties, and school districts. Localities that honestly believe their actions are completely legal and proper, and that have a good chance of winning their case should an appellate court decide it, are often forced to settle rather than take the risk of having to pay enormous fees should they lose the case. It is the taxpayer that must bear the costs of both the defendant's and plaintiff's attorney's fees. The specter of mammoth attorney's fee awards, coupled with the confusion rampant under the Establishment Clause, often handcuff state and local governments by forcing them to shy away from many permissible courses of action for fear of potential litigation costs.

A prime example demonstrating the need for S. 3696 was the recent high-profile case of *Kitzmiller v. Dover Area School District*[41] out of Pennsylvania dealing with the teaching of evolutionary theory in public school classrooms. The school board sought to comply with

[41] *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 708 (M.D. Pa. 2005).

existing Establishment Clause case law but ended up **paying $1 million in attorney's fees after a court ordered it to pay over $2 million.** The school board adopted a policy requiring high school science teachers to read a simple disclaimer that Darwin's theory of evolution is not the only scientific theory available to explain the origin of life.[42] The disclaimer did not mandate the teaching of intelligent design theory in science classrooms, nor did it seek to prohibit the teaching of evolutionary theory; it merely sought to ensure that students are aware of the ongoing controversy within the scientific community over the origin of life and the fact that alternative theories, including intelligent design, exist.[43]

The school district did not act in blatant disregard of the Establishment Clause but rather sought to follow statements of the Supreme Court and the United States Senate noting that public schools can and should take a balanced, accurate approach to the origin of life controversy. In *Edwards v. Aguillard*,[44] the Supreme Court held that a Louisiana statute which

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[42] The disclaimer read as follows:

> The Pennsylvania Academic Standards require students to learn about Darwin's Theory of Evolution and eventually to take a standardized test of which evolution is a part.
>
> Because Darwin's Theory is a theory, it continues to be tested as new evidence is discovered. The Theory is not a fact. Gaps in the Theory exist for which there is no evidence. A theory is defined as a well-tested explanation that unifies a broad range of observations.
>
> Intelligent Design is an explanation of the origin of life that differs from Darwin's view. The reference book, Of Pandas and People, is available for students who might be interested in gaining an understanding of what Intelligent Design actually involves.
>
> With respect to any theory, students are encouraged to keep an open mind. The school leaves the discussion of the Origins of Life to individual students and their families. As a Standards-driven district, class instruction focuses upon preparing students to achieve proficiency on Standards-based assessments.

Id. at 708-09.

[43] *Id.*

[44] 482 U.S. 578 (1987).

banned the teaching of evolution in science classes unless creationism was also taught violated the *Lemon* test because it was enacted for a religious purpose. The Court did *not* hold, however, that Darwinian evolution must be given an unquestionable monopoly in public science classrooms on the issue of the origin of life. Instead, the Court specifically noted that evolutionary theory can be questioned in an appropriate manner:

> We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught. . . . Teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction.[45]

The Dover Area School District did not even go so far as to require "[t]eaching a variety of scientific theories about the origins of humankind," but merely sought to ensure that students are aware that evolutionary theory is not the only theory in existence.

The school board's modest disclaimer also fully complied with the United States Senate's stated guidelines for science education. In June 2001, the Senate overwhelmingly approved Amendment 799 to S.1, the Better Education For Students and Teachers Act, by a vote of 91-8.[46] Amendment 799 states:

> It is the sense of the Senate that:
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> 1) good science education should prepare students to distinguish the data or testable theories of science from philosophical or religious claims that are made in the name of science; and
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> 2) where biological evolution is taught, the curriculum should help students to understand why this subject generates so much continuing controversy, and

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[45] *Id.* at 593-94.

[46] 2001 Senate Vote No. 182.

> should prepare the students to be informed participants in public discussions regarding the subject.[47]

The Dover Area School District's short disclaimer sought to further the laudable goals set forth in the Senate Amendment 799. By simply explaining that evolutionary theory is not the only scientific explanation for the origin of life, the disclaimer was a reasonable manner of preparing students "to distinguish . . . theories of science from philosophical or religious claims" and "to be informed participants in public discussions regarding the subject."

Opponents of the disclaimer brought a lawsuit under the Establishment Clause. After holding a trial, the federal district court concluded that the school district's disclaimer violated the Establishment Clause because it had the purpose and effect of promoting a religious view.[48] The result of the decision was a district court order for the school to pay over $2 million in attorney's fees. While many of the district court's legal conclusions appear to be unsupported by the Supreme Court's Establishment cases, the decision was never appealed because the case ultimately settled for $1 million after new members joined the school board and the board agreed not to appeal to appease the ACLU and Americans United for Separation of Church and State.[49] $1 million is a tremendous price for any school district to pay for simply taking action in good faith in accordance with the directions of the Supreme Court and the Senate. The application of the attorney's fees statute in the Dover case also served to further muddy the unclear Establishment Clause waters by forcing the school district

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[47] 147 CONG. REC. S 6081, 6113 (2001).

[48] *Kitzmiller*, 400 F. Supp. 2d at 707.

[49] Paula Reed Ward, *District in Evolution Debate to Pay $1 Million in Legal Fees,* PITTSBURGH POST-GAZETTE, Feb. 23, 2006, at B3.

to forgo appealing the questionable district court decision. Unfortunately, however, other school districts will likely face a similar fate unless S. 3696 is enacted. In the words of one local director of the ACLU, "[t]he $2 million was a very conservative number, so they got a terrific deal . . . The next school district isn't going to get the same break that Dover did."[50]

Cases involving public displays that include the Ten Commandments also provide a good example of the need for S. 3696. As discussed previously, Ten Commandments displays on public property are frequently challenged in court, with some being upheld and some being struck down. Small municipalities often do not believe that it is worth the financial risk of defending displays that may very well be constitutional given that a court loss could lead to a huge attorney's fee award. Several public interest law firms that frequently bring Establishment Clause claims such as the ACLU have a tremendous amount of resources available for litigation[51] in comparison to many local governments and are therefore not burdened by the same financial concerns. While the attorney's fee statute was designed to help preserve the basic civil rights of the "little guy," in Establishment Clause cases, the little guy is often a cash-strapped local government facing a threat of litigation from a large, well-funded public interest law firm.

Often times, municipalities immediately fold at the threat of an Establishment Clause lawsuit, regardless of the chances of in-court success, due to the threat of attorney's fees. For example, in Duluth, Minnesota, the city council reached a compromise with the ACLU and

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[50] *Id.*

[51] For example, the national chapter of the ACLU reported a $17,000,000 surplus of income over and beyond what was spent in the 2004 Fiscal Year. *See* ACLU Annual Report Fiscal Year 2004, at 41-42, *available at* http://www.aclu.org/FilesPDFs/ar_fy2004.pdf (last visited July 26, 2006).

agreed to remove a Ten Commandments monument that had been in place for over 40 years.[52] The local newspaper warned readers that standing up to the ACLU might cost the city up to $90,000.[53] Consequently, the issue of whether the display was actually constitutional was never litigated by the courts, and the ACLU could then use this settlement to further pressure other municipalities.

In other cases, municipalities have initially defended Ten Commandments displays but have failed to pursue an appeal after an initial adverse judgment by a district court judge. In *Turner v. Habersham County,*[54] for example, two residents represented by the ACLU sued the county claiming that a Ten Commandments display violated the Establishment clause. The county lost at the trial court level and was ordered to pay $74,462 in attorney's fees.[55] While the county originally appealed the order to remove the monument, it ultimately dropped the appeal because of concerns about the mounting costs to taxpayers.[56] Although Habersham County was represented pro bono by a public interest law firm, the County Manager cited the risk of having to pay the ACLU's attorney's fees as the reason for not pursuing the appeal.[57] He stated that the county's decision "was basically a financial decision" based "on the fact

[52] Phyllis Schlafly, *Jury Still Out on Ten Commandments*, COPLEY NEWS SERVICE, Sept. 21, 2004.

[53] *Accept Monument Removal Without Other Conditions; ACLU Goes Too Far When it Sets Sale Conditions for Ten Commandments*, DULUTH NEWS-TRIBUNE, Apr. 10, 2004, at 08A.

[54] 290 F. Supp. 2d 1362, 1365 (N.D. Ga. 2003).

[55] ACLU of Georgia, *2003-2005 Litigation/Advocacy Docket, available at* http://www.acluga.org/docket.html (last visited July 26, 2006).

[56] *Barrow Ten Commandments Backers Encouraged by Supreme Court Decision,* THE ASSOCIATED PRESS STATE & LOCAL WIRE, Oct. 12, 2004.

[57] Plott Brice, *County Gives up Fight for Commandments; Habersham Leaders Won't Risk 'Waste'*, ATLANTA JOURNAL-CONSTITUTION, Feb. 12, 2004, at 6D.

that if we lost then we would be picking up the fees and costs of the other attorneys. The costs would have come to us."[58]

There are countless other examples of the attorney's fee statute being used to punish state and local governments in Establishment Clause cases. Some of the many examples (some of which are still pending cases) include:

- *Selman v. Cobb County School District*, in which the school district had placed a sticker on school textbooks with the disclaimer, "Evolution is a theory, not a fact." The ACLU sued and received $135,000 in attorney's fees.[59]

- *ACLU of Tennessee v. Hamilton County*, where the ACLU was awarded a total of $35,240 when it sued the County for the removal of Ten Commandments displays on County property. After an appeal, the County ended up paying the ACLU $50,000.[60]

- *Barnes-Wallace v. BSA*, in which the ACLU sued a city for leasing land to the Boy Scouts because of the group's stance against homosexual behavior. The ACLU received $950,000 of taxpayer money.[61]

- *Doe v. Barrow County*, in which the ACLU filed a lawsuit against Barrow County to remove a copy of the Ten Commandments from the County Courthouse. The judge ordered the county to pay $150,000 in attorney's fees and expenses to the ACLU.[62]

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[58] *Id.*

[59] *Selman v. Cobb County School District*, 449 F.3d 1320 (11th Cir. 2006); *see also* Sam Kastensmidt, *ACLU Sues to Stop County Commission Prayers*, *available at* http://www.reclaimamerica.org/Pages/NEWS/news.aspx?story=2868 (last visited July 26, 2006).

[60] *ACLU of Tenn. v. Hamilton County*, 2002 U.S. Dist. LEXIS 26893 (D. Tenn. 2002); *In Sullivan, Leaders Pick Wrong Fight*, BRISTOL HERALD COURIER, Jan 21, 2004, *available at* http://www.sullivan-county.com/bush/10cs3.htm (last visited July 26, 2006).

[61] *Barnes-Wallace v. BSA*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003); Julia Duin, *Boy Scouts Fight Back; San Diego Park Case Heads to Court in Latest Gay-Rights Battle*, WASHINGTON TIMES, Mar. 7, 2004, at A1.

[62] *Doe v. Barrow County*, 2003 U.S. Dist. LEXIS 22734 (N.D. Ga. 2003); *see also* Cameron McWhirter, *10 Commandments: Barrow Removes Religious Display; County Complies With U.S. Judge*, ATLANTA JOURNAL-CONSTITUTION, July 20, 2005, at 1B; ACLU of Georgia, *2003-2005 Litigation/Advocacy Docket*, *supra* note 55; *Barrow County to Remove 10 Commandments Display*, *at* www.acluga.org/press.releases/0507/barrow.county.html (last visited July 26, 2006).

- *Glassroth v. Moore*, where three organizations sued for the removal of a Ten Commandments monument in a courthouse. The State of Alabama settled the case and paid out $500,000 in attorney's fees and about $49,000 in expenses.[63]

- *Freiler v. Tangipahoa Parish Board of Education*, in which the ACLU was awarded $49,444.50 in attorney's fees in a case contesting a Louisiana policy requiring a disclaimer to be read before teaching students about the theory of evolution.[64]

- *Buono v. Norton*, in which the ACLU received $62,793.69 in attorney's fees and costs after suing the federal government for the removal of a cross from the Mojave National Preserve.[65]

- *ACLU Nebraska Foundation v. City of Plattsmouth*, where the ACLU received a total of $14,036.43, including $13,764 for attorney's fees and $272.43 for expenses, when it sued the City of Plattsmouth for the removal of a Ten Commandments monument.[66]

- A case in Great Falls, South Carolina where the ACLU received $65,490 in legal fees after representing a Wiccan high priestess who sued the town council for beginning council meetings with a prayer. The City had to pay this massive amount, **totaling more than a quarter of the town's annual administrative budget.** The ACLU used the threat of further attorney's fees to try to prevent the town from pursuing an appeal to the United States Court of Appeals for the Fourth Circuit.[67]

- A case in London, Ohio in which a football coach engaged in voluntary prayer with the team. The school board settled to avoid rising legal costs and agreed to pay the ACLU $18,000.[68]

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[63] *Glassroth v. Moore*, 335 F.3d 1282, 1303 (11th Cir. 2003); Kyle Wingfield, *Legal Battle Over Ten Commandments Monument Will Cost Alabama Taxpayers more than $500,000*, THE ASSOCIATED PRESS, Apr. 14, 2004.

[64] *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 348-49 (5th Cir. 1999).

[65] *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004); *see also* Sept. 21, 2004 order to pay plaintiffs.

[66] *ACLU Neb. Found. v. City of Plattsmouth*, 199 F. Supp. 2d 964, 965 (D. Neb. 2002).

[67] Tim Smith, *ACLU Targets Council Prayers*, THE GREENVILLE NEWS (South Carolina), Sept. 20, 2005, at 13B; Bill Rankin, *Prayer Provokes Lawsuits*, ATLANTA J. CONST., Aug. 21, 2005, *available at* http://www.ajc.com/sunday/content/epaper/editions/sunday/metro_3480f11e2126114a0079.html (last visited July 26, 2006).

[68] Donna Glenn, *School-Prayer Case Costs District $18,000 to Settle*, COLUMBUS DISPATCH, Oct. 20, 1999, at 1C; *see also Bennett v. London City Sch. Dist. Bd. of Educ.*, Case No. C2-99-601 (S.D. Ohio 1999).

- *Adland v. Russ*, where Kentucky passed a law stipulating the placement of a monument containing the Ten Commandments on the capital grounds. A court held that the law violated the Establishment Clause and awarded the ACLU $121,500 in fees.[69]

- *Powell v. Bunn*, in which the Portland Public School District allowed the Boy Scouts to recruit during school hours. The ACLU sued and the taxpayers were required to pay $108,000 in ACLU attorney's fees.[70]

- A case in Humansville, Missouri where a mother of a student (represented by the ACLU) sued a public school because it had a small Ten Commandments plaque. The school district settled for $45,000 and the school Superintendent lost his job.[71]

- *Staley v. Harris County*, in which the County allowed a memorial to a local philanthropist to consist of an open Bible. A plaintiff was awarded $41,000 in court costs and attorney's fees and, after the County filed an Emergency Motion to Stay the Final Judgment, the amount the county was required to pay was increased to $43,961.00.[72]

There are countless other similar examples nationwide of the adverse effect the attorney's fees statute has had on state and local governments in Establishment Clause cases. These cases show that awarding attorney's fees in Establishment Clause cases has harmed taxpayers and also forced municipalities to give into the demands of one person rather than pursuing litigation to its fullest extent. The frequent failure to appeal lower court losses adds

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[69] *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002); *see also State Pays ACLU $121,500 in Ten Commandments Fight*, ASSOCIATED PRESS, July 9, 2003, *available at* http://www.enquirer.com/editions/2003/07/09/loc_kytencommandments09.html (last visited July 26, 2006).

[70] *Powell v. Bunn*, 108 P.3d 37 (Or. Ct. App. 2005); *cert. granted*, 108 P.3d 37 (Or. 2005); *Oregon, Schools Must Pay Lawyers in Boy Scout Case*, SEATTLE TIMES, July 14, 2002, at B3; Paige Parker, *Judges Uphold Ruling Barring Scout Recruiting; The Appeals Court Concurs that Portland Schools Discriminated Against Atheist Students*, *available at* http://www.scoutingforall.org/articles/2005030701.shtml (last visited July 26, 2006).

[71] James Goodwin & Linda Lecht, *Missouri Capital Monument Safe for Now*, SPRINGFIELD NEWS-LEADER, June 28, 2005, *available at* http://www.news-leader.com/apps/pbcs.dll/article?AID=/20050628/NEWS01/506280351/1095 (last visited July 26, 2006).

[72] *Staley v. Harris County*, 332 F. Supp. 2d 1030 (S.D. Tex. 2004); *Staley v. Harris County*, 332 F. Supp. 2d 1041, 1044 (S.D. Tex. 2004).

to the confusion over the Establishment Clause by allowing erroneous lower court decisions to stand. Removing the threat of attorney's fee awards in Establishment Clause cases through the enactment of S. 3696 would help state and local governments to fully litigate cases if they desire to do so. S. 3696 preserves the attorney's fees statute as it was originally designed—as a tool to encourage the protection of civil rights rather as a bludgeon for those who seek "to exclude religion from every aspect of public life" [73] at taxpayer expense.

II. S. 3696 is Based on the Inherent Difference Between Establishment Clause Challenges and Traditional Civil Rights Cases.

S. 3696 is both logical and reasonable to the extent that it distinguishes between Establishment Clause claims and the various civil rights protected by 42 U.S.C. § 1983 and the other statutes covered by 42 U.S.C. § 1988. Establishment Clause claims differ both in application and definition. The civil rights identified under these sections deal largely with concrete, individualized harms, while the Establishment Clause is primarily "a specific prohibition on forms of state intervention in religious affairs."[74] Civil rights claims seek to remedy specific violations of individual rights, whereas Establishment Clause claims seek to define or clarify often abstract structural limitations on government. In this respect, the Establishment Clause is much more like the Commerce Clause[75] and other generalized limitations on government power than it is like a specific protection of individual civil rights.

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[73] *See Lee*, 505 U.S. at 598.

[74] *Id.* at 591.

[75] U.S. CONST. art. 1, § 8.

This largely explains why there is a more relaxed standing requirement for Establishment Clause cases than there is for many other cases involving actual harm to an individual right.

Section 1988 arose out of the recognition that fee awards were necessary to enable private citizens to assert their civil rights. The remedy of attorney's fees is appropriate in civil rights actions because the vindication of one's constitutional rights is vital to the public interest. The Supreme Court in *Elrod v. Burns*,[76] recognized that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." By contrast, the injury in most Establishment Clause cases is abstract, consisting of mere "offense." Just as the irreparable harm that accompanies a civil rights violation supports the notion of fee-shifting in those cases, the lack of such harm in Establishment Clause cases weighs against it. For example, one cannot, with any degree of intellectual honesty, compare the harm suffered by an individual who is denied the right to vote on account of race or sex, with the "offense" typically alleged in Establishment Clause cases. Likewise, the significance of a decision vindicating someone's right to vote far outweighs that of a declaratory judgment holding that a County's Christmas display did not have enough reindeer next to the Baby Jesus.

This fundamental distinction between the Establishment Clause and the rights-protecting provisions of the Constitution ensures that S. 3696 will not produce some kind of adverse domino effect on the protection of basic civil rights through the elimination of attorney's fees in other contexts. The bill is designed to address an unintended misuse of the

[76] 427 U.S. 347, 373 (1976).

attorney's fees statute in Establishment Clause cases that is simply not present in cases involving civil rights. The bill merely places Establishment Clause cases within the general rule applicable to similar restrictions on government power such as the Commerce Clause.

III. The Passage of S. 3696 Will Have Little or No Impact on the Prosecution of Legitimate Establishment Clause Claims.

S. 3696 would simply return the fee structure in Establishment Clause cases to the way it existed prior to the passage of § 1988. With the attorney's fee statute, Congress carved out a narrow exception to the general rule, applicable to the vast majority of all lawsuits, that each party bears its own attorney's fees. This general rule, also known as the American rule, operates in every case to prevent the recovery of attorney's fees in the absence of an applicable fee-shifting statute.

Opponents of S. 3696 claim that it will close the courthouse doors on potential Establishment Clause plaintiffs who cannot afford to pay an attorney. This criticism is without merit because it ignores the reality that most Establishment Clause plaintiffs are already represented pro bono by public interest law firms; S. 3696 will not change that fact. Moreover, the effect of the potential loss of attorney's fees awards on the budgets of the major law firms that handle most Establishment Clause cases is miniscule. For example, legal awards only constitute a very small fraction of the ACLU's annual income, and only a small percentage of those awards are attorney's fees that would be affected by S. 3696. The ACLU reported an income of $21,722,600 for the 2004 fiscal year, with $19,817,957 in expenses.[77] Of the reported income, 91% came from membership dues, 6% from bequests, and 3% from

[77] *ACLU Annual Report Fiscal Year 2004*, at 41-42, *available at* http://www.aclu.org/FilesPDFs/ ar_fy2004.pdf (last visited July 26, 2006).

grants and contributions.[78] The ACLU Foundation reported an income of $48,398,241, with only $31,349,650 in expenses. Of the reported income, 78% came from grants and contributions, 10% from bequests, 9% from interest and dividends, and only 3% came from legal awards.[79] Since only a slight fraction of the 3% composed of legal awards came from Establishment Clause attorney's fees, S. 3696 would have an insignificant impact on the ACLU's ability to take Establishment Clause cases.

The effect of S. 3696 on most local chapters of the ACLU, and on most other pro bono law firms, would be similar. For example, the ACLU Foundation of Florida reported a total revenue of $1,590,135 for the 2003-04 fiscal year. Of that revenue, only $16,696 (just over 1%) came from attorney's fees and cost reimbursement.[80] The ACLU of Utah[81] reported $367,302 in revenue between April 1, 2004 and March 31, 2005; legal awards of all kinds totaled $21,405, or just under 6%, of the total revenue.[82] The ACLU of Minnesota reported $453,916 in income from January 1, 2003-March 31, 2004, and none of that money came from legal reimbursements.[83] Even in the rare case where S. 3696 would actually affect an

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[78] *Id.*

[79] *Id.*

[80] *ACLU of Florida Financial Report for the Fiscal Year Ending March 2004*, at 8, *available at* http://www.aclufl.org/about/ACLU%20annual%20report2.pdf (last visited July 26, 2006).

[81] Combined ACLU of Utah Union and ACLU of Utah Foundation.

[82] *ACLU of Utah Annual Report April 2004 to March 2005*, at 7, *available at* http://www.acluutah.org/05report.pdf (last visited July 26, 2006).

[83] *ACLU of Minnesota Annual Report January 1, 2003-March 31, 2004*, at 8, *available at* http://www.aclu-mn.org/sites/ed4a3989-49fd-4f1f-8dff-1b9a8d23cf25/uploads/2003_Annual_Report.pdf (last visited July 26, 2006).

ACLU chapter's budget,[84] the national chapter of the ACLU—which reported over $17,000,000 of income above and beyond what was spent in the 2004 Fiscal Year—often subsidizes local chapters.[85] S. 3696 would in no way damage the ability of the ACLU and other firms to take Establishment Clause claims on a pro bono basis. Any minor inconvenience incurred by these firms would be minimal in comparison to the burden that the current attorney's fee statute has placed upon towns, cities, counties, and school boards with respect to Establishment Clause cases.

Finally, the argument in opposition to S. 3696 that removal of attorney's fees in Establishment Clause cases will somehow encourage municipalities and school boards to blatantly violate the Establishment Clause is specious at best. First and foremost, this claim ignores the fact that the vast majority of public officials take their oaths of office seriously and diligently seek to comply with all of the Constitution's requirements. Courts apply a strong presumption that any official act is constitutional precisely because it is the rare case indeed that public officials deliberately seek to break the law. The reality is that state and local governments and school boards diligently try to walk the fine, albeit blurred, line drawn by the Supreme Court with respect to the Establishment Clause. In the rare case in which public officials inadvertently overstep the bounds of the Establishment Clause, there are plenty of public interest groups ready, willing, and able to represent potential plaintiffs.

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[84] *See, e.g., ACLU of Georgia 2004 Annual Report*, at 12, *available at* http://www.acluga.org/docs/2004annualreport.pdf (last visited July 26, 2006) (ACLU Foundation of Georgia received 40% of its income from litigation in 2003-2004).

[85] Wikipedia, *American Civil Liberties Union*, *available at* http://en.wikipedia.org/wiki/ACLU#Funding (last visited July 26, 2006).

Additionally, the fact that state and local governments and school boards have to pay for their own attorneys is a built-in incentive to comply with the Constitution. Moreover, this argument ignores the first part of the *Lemon* test which dictates that a law "must have a secular legislative purpose."[86] Any policy enacted for the purpose of violating the Establishment Clause would automatically violate the first prong of *Lemon*.

S. 3696 provides a much-needed change in the attorney's fees statute with respect to Establishment Clause cases while leaving the statute's protection of basic civil rights untouched. Rather than encouraging public officials to violate the Establishment Clause, the bill merely acknowledges the Supreme Court's statement that "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution."[87] S. 3696 should be viewed as remedial, not as some special privilege or accommodation, as it seeks to eradicate a system that encourages the use of extortion as a means to a legal end. Ultimately, S. 3696 should create an atmosphere where fewer Establishment Clause violations occur because governments will not have to banish religion just to protect their pocketbooks.

S. 3696 simply ensures that the many forms of permissible "[n]oncoercive government action within the realm of flexible accommodation" that do not "benefit[] religion in a way

[86] *Lemon*, 403 U.S. at 612.

[87] *Lee*, 505 U.S. at 598; *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 846 (1995) ("a pervasive bias or hostility to religion . . . could undermine the very neutrality the Establishment Clause requires").

more direct and more substantial than practices that are accepted in our national heritage" are not unduly hampered by the attorney's fees statute.[88]

Conclusion

The narrow exception to the general rule carved out by 42 U.S.C. § 1988 was meant to encourage the protection of basic civil rights; it was never intended to be used as weapon to force state and local governments to remove any and all public acknowledgments of America's religious heritage. Former Supreme Court Justice Sandra Day O'Connor recently noted:

> It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today.[89]

Nevertheless, elected officials, in order to avoid financial hardship, are quite often forced to surrender to the intimidation tactics of groups such as the ACLU who demand the removal of "references to divinity in [their] symbols, songs, mottoes, and oaths." The impact that § 1988 and the virtual flood of Establishment Clause litigation has had upon towns, cities, counties, and school districts cannot be overstated. Officials are faced with the difficult choice of either draining already sparse public resources or settling and giving in to the pressure to abandon often constitutional religious activity or expression. Congress should adopt S. 3696 to protect the countless municipalities and school boards across America who have been bullied in this manner as the result of 42 U.S.C. § 1988 in Establishment Clause cases.

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[88] *County of Allegheny*, 492 U.S. at 662-63 (Kennedy, J., concurring in part, dissenting in part).

[89] *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35-36 (2004) (O'Connor, J., concurring).

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