EXTENSIONS OF REMARKS

THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000

HON. CHARLES T. CANADY
OF FLORIDA
IN THE HOUSE OF REPRESENTATIVES

Thursday, September 21, 2000

Mr. CANADY of Florida. Mr. Speaker, tomorrow the President of the United States will sign into law the Religious Land Use and Institutionalized Persons Act, a bill I was proud to sponsor with my colleagues the gentleman from New York, Mr. NADLER, and the gentleman from Texas, Mr. EDWARDS. This Act, which will protect the free exercise of religion from unnecessary government interference, is a product of the diligent efforts of more than 70 religious and civil rights groups from all points on the political spectrum. I commend these groups for their work in helping to bring about this important new law.

The Religious Land Use and Institutionalized Persons Act, S. 2869, is patterned after an earlier, more expansive bill, H.R. 1691, which passed the House of Representatives with an overwhelming vote after several committee hearings, two markups, and the filing of a Committee Report. S. 2869, on the other hand, passed the Senate and the House without committee action and by unanimous consent. Because it is not accompanied by any recorded legislative history, it is appropriate that I submit at this time a Section-by-Section Analysis of the S. 2869:

The Religious Land Use and Institutionalized Persons Act

Section 1. This section provides that the title of the Act is the Religious Land Use and Institutionalized Persons Act of 2000.

Section 2(a). The ''General Rule'' in §2(a)(1) tracks the substantive language of the Religious Freedom Restoration Act (''RFRA''), providing that land use regulation shall not be applied in ways that substantially burden religious exercise, unless imposing that burden on the person complaining serves a compelling interest by the least restrictive means. The provision is substantially the same as §§2(a) and 2(b) of H.R. 1691, except that its scope has been restricted to land use. H.R. 1691 is the broader Religious Liberty Protection Act, which passed the House and is the subject of H.R. Report 106–219.

The phrase ''in furtherance of a compelling governmental interest'' is taken directly from RFRA, which was enacted in 1993; the phrase was and is intended to codify the traditional compelling interest test. The Act does not use this phrase in the sense in which the Supreme Court interpreted the verb ''furthers'' in *City of Erie* v. *Pap's A.M.*, 120 S.Ct. 1382 (2000), a case that did not involve the compelling interest test. In that context, the Court held that even a marginal contribution to the achievement of a government interest ''furthers'' that interest. *Id.* at 1387. This statutory language was drafted long before Paps, and should not be read in light of Pap's.

Section 2(a)(2) confines the General Rule to cases within Congress's constitutional authority under the Commerce Clause, the Spending Clause, or Section 5 of the Fourteenth Amendment. Section 2(a)(2)(A) applies the General Rule to cases in which the burden is imposed in a program or activity that receives federal financial assistance. This provision tracks other civil rights legislation based on the Spending Clause, and corresponds to §2(a)(1) of H.R. 1691.

Section 2(a)(2)(B) applies the General Rule to cases in which the substantial burden affects commerce, or removal of the burden would affect commerce. This so-called jurisdictional element must be proved in each case under this subsection as an element of the cause of action. This subsection does not treat religious exercise itself as commerce, but it recognizes that the exercise of religion sometimes requires commercial transactions, as in the construction, purchase, or rental of buildings. This section corresponds to §2(a)(2) of H.R. 1691.

Section 2(a)(2)(C) applies the General Rule to cases in which the government has authority to make individualized assessments of the uses to which the property is put. Unlike the Commerce and Spending Clause sections, this section does not reach generally applicable laws. Laws that provide for individualized assessments of proposed uses are not generally applicable. This section corresponds to §3(b)(1)(A) of H.R. 1691.

Section 2(b). Section 2(b) codifies parts of the Supreme Court's constitutional tests as applied to land use regulation. These provisions directly address some of the more egregious forms of land use regulation, and provide more precise standards than the substantial burden and compelling interest tests. These provisions overlap, but some cases may fall under only one section, or the elements of one section may be easier to prove than the elements of other sections.

Section 2(b)(1) preempts land use regulation that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution. Section 2(b)(2) preempts land use regulation that discriminates against any religious assembly or institution on the basis of religion or religious denomination. These provisions substantially overlap, but section 2(b)(1) more squarely addresses the case in which the unequal treatment of different land uses does not fall into any apparent pattern. These sections correspond to §§3(b)(1)(B) and 3(b)(1)(C) of H.R. 1691.

Section 2(b)(3) provides that government may not unreasonably exclude religious assemblies from a jurisdiction, or unreasonably limit religious assemblies, institutions, or structures within the jurisdiction. What is reasonable must be determined in light of all the facts, including the actual availability of land and the economics of religious organizations. This section corresponds to §3(b)(1)(D) of H.R. 1691.

Section 2(b)(3)(A) is the only provision of §2 that is confined to ''assemblies'' and does not explicitly include institutions or structures. The subsection is limited in this way because there may conceivably be very small towns that exclude all institutions and all structures dedicated to public assembly (so there is no discrimination) and that can show a compelling interest in excluding all religious institutions or structures. Such a place could not use its land use regulations to wholly prohibit people from assembling for religious purposes in the spaces or structures that exist in the town.

Section 3. Section 3(a) applies the RFRA standard to protect the religious exercise of persons residing in or confined to institutions defined in the Civil Rights of Institutionalized Persons Act, such as prisons and mental hospitals. Section 3(b) confines the section to cases within Congress' constitutional authority under the Commerce Clause and the Spending Clause. The RFRA standard, the Commerce Clause standard, and the Spending Clause standard in §3 are identical to the parallel provisions in §2, and the same explanatory comments apply. These provisions are substantially the same as §§2(a) and 2(b) of H.R. 1691, except that their scope has been restricted to institutionalized persons.

Section 4. Section 4(a) tracks RFRA, creating a private cause of action for damages, injunction, and declaratory judgment, and a defense to liability. These claims and defenses lie against a government, but the Act does not abrogate the Eleventh Amendment immunity of states. In the case of violation by a state, the Act must be enforced by suits against state officials or employees. This section is identical to §4(a) of H.R. 1691.

Section 4(b) simplifies enforcement of the Free Exercise Clause as interpreted by the Supreme Court. *Employment Division* v. *Smith*, 494 U.S. 872 (1990), held that governmental burdens on religious exercise, without more, receive only rational-basis review. But this rule has important exceptions; the Court applies the compelling interest test to laws that are not neutral and generally applicable, to laws that provide for individualized assessment of regulated conduct, to regulation motivated by hostility to religion, to cases involving hybrid claims that implicate both the Free Exercise Clause and some other constitutional right, and to other exceptional cases. These exceptions present issues in which the facts are uncertain and difficult to prove, or in which essential information is controlled by the government. Section 4(b) is addressed principally to these issues about whether one of these exceptions applies. It provides generally that if a complaining party produces prima facie evidence of a free exercise violation, the government then bears the burden of persuasion on all issues except burden on religion. This section is substantially the same as §3(a) of H.R. 1691.

Section 4(c) requires a full and fair opportunity to litigate land use claims arising under section 2. This is based on existing law; no judgment is entitled to full faith and credit if there was not a full and fair opportunity to litigate. *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 480–81 (1982), interpreting 28 U.S.C. §1738 (1994). The rule has special application in this context, where a zoning board may refuse to entertain a federal claim because of limits on its jurisdiction, or may confine its inquiry to the individual parcel and exclude evidence of how places of secular assembly were treated. If a state court then confines itself to the record before the zoning board, there has been no opportunity to litigate essential elements of the federal claim, and the resulting judgment is not entitled to full faith and credit in a federal suit under section 2 of this Act. This section is based on §3(b)(2) of H.R. 1691.

Section 4(d) tracks RFRA and provides that a successful plaintiff may recover attorneys' fees. This section is substantially the same as §4(b)(1) of H.R. 1691.

Section 4(e) makes explicit that the bill does not ''amend or repeal the Prison Litigation Reform Act.'' The PLRA is therefore fully available to deal with frivolous prisoner claims. This section is based on §4(c) of H.R. 1691.

Section 4(f) expressly authorizes the United States to sue for injunctive or declaratory relief to enforce the Act. The United States has similar authority to enforce other civil rights acts. This section is based on §§2(c) and 4(d) of H.R. 1691.

Section 4(g). If a claimant proves an effect on commerce in a particular case, the courts assume or infer that all similar effects will, in the aggregate, substantially affect commerce. This section gives government an opportunity to rebut that inference. Government may show that even in the aggregate, there is no substantial effect on commerce. Such an opportunity to rebut the usual inference is not constitutionally required, but is provided to create an extra margin of constitutionality in potentially difficult cases. This section had no equivalent in H.R. 1691.

Section 5. This section states several rules of construction designed to clarify the meaning of all the other provisions. Section 5(a) provides that nothing in the Act authorizes government to burden religious belief, this tracks RFRA. Section 5(b) provides that nothing in the Act creates any basis for restricting or burdening religious exercise or for claims against a religious organization not acting under color of law. These two subsections serve the Act's central purpose of protecting religious liberty, and avoid any unintended consequence of reducing religious liberty. They are substantially identical to §§5(a) and 5(b) of H.R. 1691.

Sections 5(c) and 5(d) have been carefully negotiated to keep this Act neutral on all disputed questions about government financial assistance to religious organizations and religious activities. Section 5(c) states neutrality on whether such assistance can be provided at all; §5(d) states neutrality on the scope of existing authority to regulate private organizations that accept such aid. Litigation about such aid will be conducted under other theories and will not be affected by this bill. They are identical to §5(c) and 5(d) of H.R. 1691.

Section 5(e) emphasizes what would be true in any event—that this bill does not require governments to pursue any particular public policy or to abandon any policy, and that each government is free to choose its own means of eliminating substantial burdens on religious exercise. The bill preempts laws that unnecessarily burden the exercise of religion, but it does not require the states to enact or enforce a federal regulatory program. This section closely tracks §5(e) of H.R. 1691.

Section 5(f) provides that proof of an effect on commerce under §2(a)(2)(B) does not establish any inference or presumption that Congress meant to regulate religious exercise under any other law. Proof of an effect on commerce shows Congressional power to regulate, but says nothing about Congressional intent under other legislation. This section is substantially the same as §5(f) of H.R. 1691.

Section 5(g) provides that the Act should be broadly construed to protect religious exercise to the maximum extent permitted by its terms and the Constitution. Section 5(i) provides that each provision of the Act is severable from every other provision. These sections are substantially the same as §§5(g) and 5(h) of H.R. 1691.

Section 6. This section is taken from RFRA. It was carefully negotiated to ensure that the Act is neutral on all disputed issues under the Establishment Clause. It is more general than §§5(c) and 5(d), which were negotiated in light of this bill's reliance on the Spending Clause. This section is substantially identical to §6 of RFRA.

Section 7. Section 7 amends the Religious Freedom Restoration Act. Sections 7(a)(1) and (2) and 7(b) collectively conform RFRA to the Supreme Court's decision in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), eliminating all references to the states and leaving RFRA applicable only to the federal government. Section 7(a)(3) clarifies the definition of ''religious exercise,'' conforming the RFRA definition to the definition in this Act. These sections are substantially the same as §7 of H.R. 1691, but the incorporated definition of religious exercise has been changed in §8.

Section 8. This section defines important terms used in the Act. Section 8(l) defines ''claimant'' to mean a person raising either a claim or a defense under the Act. This section had no equivalent in H.R. 1691.

The definition of ''demonstrates'' in §8(2) is taken verbatim from RFRA. It includes both the burden of going forward and the burden of persuasion. This section is identical to §8(5) of H.R. 1691.

Section 8(3) defines ''Free Exercise Clause'' to mean the First Amendment's ban on laws prohibiting the free exercise of religion. This section is substantially the same as §8(2) of H.R. 1691.

The definition of ''government'' in §8(4)(A) includes the state and local entities previously covered by RFRA. ''Government'' does not include the United States and its agencies, because the United States remains subject to RFRA. But a further definition in §8(4)(B) does include the United States and its agencies for the purposes of §§4(b) and (5), because the burden-shifting provision in §4(a), and some of the rules of construction in §5, do not appear in RFRA. These definitions are substantially the same as those §8(6) of H.R. 1691.

Section 8(5) defines ''land use regulation'' to include only zoning and landmarking laws that limit the use or development of land or structures, and only if the claimant has a property interest in the affected land or a right to acquire such an interest. Fair housing laws are not land use regulation, and this bill does not apply to fair housing laws. This section is based on §8(3) of H.R. 1691.

Section 8(6) incorporates the relevant parts of the definition of program or activity from Title VI of the Civil Rights Act of 1964. This definition ensures that federal regulation is confined to the program or activity that receives federal aid, and does not extend to everything a government does. This section is substantially the same as §8(4) of H.R. 1691.

Section 8(7) clarifies the meaning of ''religious exercise.'' The section does not attempt a global definition; it relies on the meaning of religious exercise in existing case law, subject to clarification of two important issues that generated litigation under RFRA. First, religious exercise includes any exercise of religion, and need not be compulsory or central to the claimant's religious belief system. This is consistent with RFRA's legislative history, but much unnecessary litigation resulted from the failure to resolve this question in statutory text. This definition does not change the rule that insincere religious claims are not religious exercise at all, and thus are not protected. Nor does it change the rule that an individual's religious belief or practice need not be shared by other adherents of a larger faith to which the claimant also adheres.

Second, the use, building, or conversion of real property for religious purposes is religious exercise of the person or entity that intends to use the property for that purpose. It is only the use, building, or conversion for religious purposes that is protected, and not other uses or portions of the same property. Thus, if a commercial enterprise builds a chapel in one wing of the building, the chapel is protected if the owner is sincere about its religious purposes, but the commercial enterprise is not protected. Similarly if religious services are conducted once a week in a building otherwise devoted to secular commerce, the religious services may be protected but the secular commerce is not. Both parts of this definition are based on §8(l) of H.R. 1691.

THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000

HON. HENRY J. HYDE

OF ILLINOIS

IN THE HOUSE OF REPRESENTATIVES

Thursday, September 21, 2000

Mr. HYDE. Mr. Speaker, tomorrow the President of the United States will sign into law the Religious Land Use and Institutionalized Persons Act, S. 2869. I would like to submit for the RECORD a document prepared by the Christian Legal Society describing zoning conflicts between churches and cities which have come to light since subcommittee hearings on the subject:

RECENT LAND-USE CASES

''In the last 10 years, zoning conflicts between churches and cities have become a leading church-state issue. Disputes have arisen over church soup kitchens or homeless shelters in suburbs, expansion of church facilities, parking squeezes on Sunday, breaches of noise ordinances or disagreements on what kind of meetings the zoning permits. Growing churches that seek new land to relocate often cannot win zoning approvals in the face of public protest over traffic.'' Joyce Howard Price, Portland church ordered to limit attendance, Washington Times, February 18, 2000.

MONTGOMERY COUNTY, MD—8/16/00

A couple in Montgomery County, Maryland, challenged in federal court a zoning ordinance that allowed a Roman Catholic girls' school to build on its property without obtaining a special permit. In August 1999, a U.S. District Judge ruled that the ordinance violated the Establishment Clause, but on appeal a three-Judge panel of the 4th U.S. Circuit Court of Appeals reversed the district court by a 2-1 vote, concluding in August 2000, that '' [t]he authorized, and sometimes mandatory, accommodation of religion [by the government] is a necessary aspect of the Establishment Clause Jurisprudence because, without it, the government would find itself effectively and unconstitutionally promoting the absence of religion over its practice.'' The dissenting Judge differentiated between regulations that influence or alter programming and regulations that affect physical facilities.

Sources: David Hudson, Land-Use Ordinance Doesn't Advance Religion, Federal Appeals Panel Rules, The Freedom Forum Online, August 16, 2000.

PALOS HEIGHTS, IL—8/10/2000

On June 30, 2000, Chicago Public Radio's Jason DeRosa reported that the Al Salam Mosque Foundation encountered opposition from the city council of Palos Heights, Illinois, when Muslims tried to buy a building from a Reformed Church and turn it into a Muslim mosque. Although the city council attempted to block the $2.1 million sale by arguing that the city needed the building for