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109TH CONGRESS, 2d Session } HOUSE OF REPRESENTATIVES { REPORT 109–657

VETERANS' MEMORIALS, BOY SCOUTS, PUBLIC SEALS, AND OTHER PUBLIC EXPRESSIONS OF RELIGION PROTECTION ACT OF 2006

SEPTEMBER 14, 2006.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 2679]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2679) to 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, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Veterans' Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006".

SEC. 2. LIMITATIONS ON CERTAIN LAWSUITS AGAINST STATE AND LOCAL OFFICIALS.

(a) CIVIL ACTION FOR DEPRIVATION OF RIGHTS.—Section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) is amended—

(1) by inserting "(a)" before the first sentence; and

(2) by adding at the end the following:

"(b) The remedies with respect to a claim under this section are limited to injunctive and declaratory relief where the deprivation consists of a violation of a prohibition in the Constitution against the establishment of religion, including, but not limited to, a violation resulting from—

"(1) a veterans' memorial's containing religious words or imagery;

"(2) a public building's containing religious words or imagery;

"(3) the presence of religious words or imagery in the official seals of the several States and the political subdivisions thereof; or

"(4) the chartering of Boy Scout units by components of States and political subdivisions, and the Boy Scouts' using public buildings of States and political subdivisions.".

(b) ATTORNEY'S FEES.—Section 722(b) of the Revised Statutes of the United States (42 U.S.C. 1988(b)) is amended by adding at the end the following: "However, no fees shall be awarded under this subsection with respect to a claim described in subsection (b) of section nineteen hundred and seventy nine.".

SEC. 3. LIMITATIONS ON CERTAIN LAWSUITS AGAINST THE UNITED STATES AND FEDERAL OFFICIALS.

(a) IN GENERAL.—Notwithstanding any other provision of law, a court shall not award reasonable fees and expenses of attorneys to the prevailing party on a claim of injury consisting of the violation of a prohibition in the Constitution against the establishment of religion brought against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction over such claim, and the remedies with respect to such a claim shall be limited to injunctive and declaratory relief.

(b) DEFINITION.—As used in this section, the term "a claim of injury consisting of the violation of a prohibition in the Constitution against the establishment of religion" includes, but is not limited to, a claim of injury resulting from—

(1) a veterans' memorial's containing religious words or imagery;

(2) a Federal building's containing religious words or imagery;

(3) the presence of religious words or imagery in the official seal of the United States and in its currency and official Pledge; or

(4) the chartering of Boy Scout units by components of the Armed Forces of the United States and by other public entities, and the Boy Scouts' using Department of Defense and other public installations.

SEC. 4. EFFECTIVE DATE.

This Act and the amendments made by this Act take effect on the date of the enactment of this Act and apply to any case that—

(1) is pending on such date of enactment; or

(2) is commenced on or after such date of enactment.

Amend the title so as to read:

A bill to amend the Revised Statutes of the United States 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.

PURPOSE AND SUMMARY

Under current law, attorneys' fees can be demanded by the winning side in lawsuits against States or localities and the Federal government—brought under the Constitution's Establishment Clause—demanding that veterans' memorials be torn down because they happen to have religious symbols on them; that the Ten Commandments be removed from public buildings; that the Boy Scouts be forced off public property; and that crosses be eliminated from official county seals, among other things. Caselaw under the Establishment Clause is so unpredictable that States and localities know defending themselves in such lawsuits is fraught with uncertainty./1/ The threat of having to pay attorneys' fees in such cases should they happen to lose sometimes leads States and localities to forego whatever rights they might have under the Constitution—and concede to the demands of those bringing Establishment Clause law-

/1/For example, the Fifth Circuit Court of Appeals has called the Supreme Court's Establishment Clause jurisprudence "rife with confusion." *Freiler* v. *Tangipahoa Parish Bd. of Educ.,* 185 F.3d 337, 343 (5th Cir. 1999). And as one professor has written, "[T]he Supreme Court's establishment clause jurisprudence has unified critical opinion: people who disagree about nearly everything else in the law agree that establishment doctrine is seriously, perhaps distinctively, defective." Steven D. Smith, "Separation and the 'Secular': Reconstructing the Disestablishment Decision," 67 Tex. L. Rev. 955, 956 (1989).

suits—often before such cases even go to trial. H.R. 2679, the "Veterans" Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006," will address concerns that current law compels local, State, and Federal government entities to accede to demands for the removal of religious text and imagery when such removal is not compelled by the Constitution.

BACKGROUND AND NEED FOR THE LEGISLATION

The Supreme Court has held that "the State may not establish a religion of secularism in the sense of affirmatively opposing or showing hostility to religion, thus preferring those who believe in no religion over those who do believe."/2/ However, contrary to that principle, current litigation rules allow some groups to compel States and localities into removing any reference to religion in public places.

42 U.S.C. § 1983 is the Federal statute that allows people to sue States and local governments for alleged constitutional violations of their individual rights. 42 U.S.C. § 1988 is the Federal fee-shifting statute that allows prevailing plaintiffs in lawsuits filed under § 1983 to be awarded attorneys' fees from the defendant. Consequently, under 42 U.S.C. § 1983, anyone can sue State and local governments claiming their individual rights were violated and demand attorneys' fees in the case if they prevail at any stage of judicial review./3/ Using these Federal statutes, groups like the American Civil Liberties Union ("ACLU") can threaten to file lawsuits claiming cities and towns have violated the Establishment Clause./4/ Towns know that a single adverse judgment at any level of the court system will require them to pay not only their own legal fees, but the ACLU's as well. Localities could file an appeal of any such adverse judgment, but the appeal would cost additional money, money most towns don't have to spend, especially when they face competing claims for spending on education and health care. As a result, localities are often required to capitulate to the ACLU's demands at the outset of litigation because the costs to the town of complying with the ACLU's demands are less than the costs of successfully litigating the case to a final judgment. Even if a locality wins the case after an extremely costly appeal, the locality will most likely not be awarded attorneys' fees because the Supreme Court has set the standard for an award of attorneys' fees to a prevailing defendant very high. Consequently, localities that are sued have little hope of being awarded attorneys' fees even if they win the case./5/

/2/*School District of Abington Township* v. *Schempp*, 374 U.S. 203, 225 (1963) (quotations and citations omitted).

/3/Local governments, but not State governments, are persons subject to §1983 liability. See *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 70 (1989); *Monell* v. *New York City Dep't of Soc. Serv.,* 436 U.S. 658, 690 (1978). However, State and local government officials are also persons under § 1983. As the Supreme Court stated in *Will* v. *Michigan Dep't of State Police,* "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because official-capacity actions for prospective relief are not treated as actions against the State." *Will* v. *Michigan Dep't of State Police,* 491 U.S. 58, 71 n.10 (1989) (citing *Kentucky* v. *Graham*, 473 U.S. 159, at 167 n.14 (1985)). Section 2 of H.R. 2679 applies only to cases for prospective relief, namely injunctive and declaratory relief.

/4/The First Amendment to the Constitution provides that "Congress shall make no law respecting an establishment of religion ..."

/5/The Supreme Court has read fee-shifting statutes in such a way that they only operate to the benefit of those filing the lawsuits, not those defending the lawsuits. See e.g., *Christianburg*

Continued

This legal dynamic has provided enormous leverage to groups like the ACLU to require that State and local governments: tear down veterans' memorials that happen to have religious symbols on them; remove the Ten Commandments from public buildings; force the Boy Scouts off public property; and eliminate crosses from official county seals. In short, 42 U.S.C. § 1983 and 42 U.S.C. § 1988 often force localities to make the following choice: accede to the demands of the ACLU or similar organizations to remove religious words and imagery from the public square, or risk a single adverse judgment by a single judge that requires the payment of tens or hundreds of thousands of dollars in legal fees in a case too expensive to litigate through the appeals process. Consequently, local governments are being forced to agree to the demands of those seeking to tear down religious words or symbols and ban religious people from using the public square, even when permitting those religious words and expressions is constitutional.

Contributing to this result is the fact that Establishment Clause law is one of the most unpredictable and confusing areas of law. As Professor Patrick Garry testified before the Constitution Subcommittee on June 22, 2006:

> The threat of an attorney's fee award is particularly chilling because of the highly uncertain and inconsistent status of current constitutional doctrines governing the Establishment Clause. Over the past several decades, the courts have not only used an array of different constitutional tests for determining Establishment Clause violations, but have applied those tests in confusing and inconsistent ways. In 2005, for instance, the Supreme Court issued rulings on the same day in two cases involving the public display of the Ten Commandments. Those rulings, however, contained opposite holdings. In *McCreary County* v. *ACLU,*/6/ the Court found a framed copy of the Ten Commandments in a courthouse hallway to be an unconstitutional establishment of religion. But in *Van Orden* v. *Perry,*/7/ the Court upheld a Ten Commandments monument on the grounds of the Texas state capitol. Not only were the rulings different in the two cases, but different constitutional tests were used in each case. In *Van Orden,* the plurality opinion did not even mention what had, up to that time, become the most prominent test for judging public displays or expressions of religion—the endorsement test—nor did *Van Orden* employ the infamous Lemon test./

Garment Co. v. *EEOC*, 434 U.S. 412, 420 0922 (1978). In *Christianburg*, the Supreme held that, even though the statute on its face provided "no indication whatever of the circumstances under which either a plaintiff or defendant should be entitled to attorney's fees," an award of attorneys' fees may be made to a successful defendant, rather than a successful plaintiff, in a Title VII action only if the court found that the plaintiff's action was "frivolous, unreasonable, or without foundation." Id. at 418, 421. This was because "Congress wanted to clear the way for suits to be brought under [Title VII]," id. at 420, in a manner that did not unduly stifle a plaintiff's incentives to bring such claims. See id. at 412 ("To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII. "). The Court elaborated in *Hughes* v. *Rowe*, 449 U.S. 5, 14 (1980) that, for a defendant to benefit from cost-shifting, "The plaintiff's action must be meritless in the sense that it is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees."

/6/125 S. Ct. 2722 (2005).

/7/25 S. Ct. 2854 (2005).

8/ Instead, the Court resorted to a somewhat infrequently used test articulated in *Marsh* v. *Chambers:*/9/ a test looking at whether there has been an unbroken tradition of certain religious acknowledgments, such as with the public display of the Ten Commandments./10/ Furthermore, the crucial fifth vote supplied by Justice Breyer in *Van Orden* appeared to rely on yet a brand new test—a "legal judgment" test that seems to call on justices to exercise their [subjective] common sense in cases such as these./11/

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. A fee shifting statute that governs in such a confused area of law allows plaintiffs to use the threat of attorneys' fees to compel government officials to a desired result, whether or not that result is the right one.

WHAT H.R. 2679 DOES

H.R. 2679, the "Veterans" Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006," will remedy current law that requires local, State and Federal government to accede to demands for the removal of religious text and imagery when such removal is not compelled by the Constitution.

Section 1 of H.R. 2679 provides the short title of the bill.

Section 2 of H.R. 2679 amends 42 U.S.C. § 1988 such that attorneys' fees could not be awarded to prevailing parties in Establishment Clause cases. Section 2 also amends 42 U.S.C. § 1983 to make clear that while Establishment Clause cases can continue to be brought against State and local governments, cases can be brought only for injunctive or declaratory relief./12/ That means the only relief a court can order in those cases is for a State official or local government to stop doing whatever it is doing that is an alleged violation of the Establishment Clause or simply declare what the law is. (That is, under Section 2 of H.R. 2679, a court could not order monetary damages or attorneys' fees in Establishment Clause cases.) Establishment Clause cases covered by Section 2 include cases challenging a veterans' memorial's containing religious words or imagery; a public building's containing religious words or imagery; the presence of religious words or imagery in the official seals of States and localities; the chartering of Boy Scout units by components of States and localities; and the Boy Scouts' using public buildings.

/8/125 S. Ct. at 2861 (calling the *Lemon* test inappropriate for "passive" religious expressions).

/9/463 U.S. 783, 792 (1983) (upholding the Nebraska legislature's practice of opening sessions with a prayer by a state-employed clergy).

/10/*Van Orden,* 125 S. Ct. at 2861 0963.

/11/125 S. Ct. at 2869 (Breyer, J., concurring).

/12/An injunction is "a court order commanding or preventing an action. To get an injunction, the complainant must show that there is no plain, adequate, and complete remedy at law and that an irreparable injury will result unless the relief is granted." Black's Law Dictionary (8th ed. 2004). Injunctions are enforceable by contempt proceedings and contempt is punishable by fine or imprisonment. See Black's Law Dictionary (8th ed. 2004) (contempt).

Section 3 of H.R. 2679 applies the same principles embodied in Section 2 to Establishment Clause cases brought against the Federal government. Section 3 creates a new section in the U.S. Code that provides that a court shall not award attorneys' fees or expenses to the prevailing party in Establishment Clause cases brought against the United States or any agency or any official of the United States acting in his or her official capacity, and that the remedies available with respect to such a claim shall be limited to injunctive and declaratory relief. The Establishment Clause cases covered by this section include cases challenging a veterans' memorial's containing religious words or imagery; a Federal building's containing religious words or imagery; the presence of religious words or imagery in the official seal of the United States and in its currency and official Pledge; the chartering of Boy Scout units by components of the Armed Forces of the United States and by other public entities; and the Boy Scouts' using Department of Defense and other public installations.

The amended title of the bill provides that the secular purpose of the bill is to prevent the use of the legal process to unfairly extract money from local, State and Federal governments, or otherwise inhibit constitutional actions by such governments as they pertain to public expressions of religion.

WHY SECTION 2 OF H.R. 2679 IS NECESSARY

Section 2 of H.R. 2679 (which applies to lawsuits against State officials and local governments) is necessary because, under existing law, groups such as the ACLU have won millions of dollars in attorneys' fees while forcing localities to tear down unobtrusive religious references on public property.[13] Rees Lloyd, a former ACLU civil rights attorney who is now with the American Legion, supports H.R. 2679, saying, "We're talking about millions of dollars annually. I don't think it should be forgotten that, in driving the Boy Scouts out of Balboa Park in San Diego, that the ACLU ended up with $940,000 in attorney fees, taxpayer funds." [14]

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[13] These awards include the following:

• The ACLU received $950,000 in a settlement with the City of San Diego in a case involving the San Diego Boy Scouts. *See* Seth Hettena, "City of San Diego Settles Boy Scout Suit," AP Online (January 8, 2004).

• The ACLU received $150,000 from Barrow County, Georgia, after a Federal judge ordered the county to remove a framed copy of the Ten Commandments from a hallway in the County Courthouse. *See* Cameron McWhirter, "10 Commandments: Barrow Removes Religious Display; County Complies with U.S. Judge," *The Atlanta Journal-Constitution* (July 20, 2005) at 1B.

• The ACLU received $121,500 from Kentucky in a case to remove a Ten Commandments monument outside the Capitol. *See* Jack Brammer, "State Legislature Foots the Bill for ACLU Victory; Group Fought Lawmaker's Plan for Monument," *Lexington Herald Leader* (July 8, 2003) at B1.

• The ACLU received $38,000 in legal fees in a case against Hamilton County, Tennessee, to remove the Ten Commandments from a court building. See Chris Joyner and Kimberly Greuter, "Judge Awards Attorneys" Fees in Postings Case," *Chattanooga Times Free Press* (June 19, 2002) at B1.

• The ACLU and two other groups received nearly $550,000 in an Alabama case to remove the Ten Commandments from a courthouse. *See* Kyle Wingfield, "Legal Battle over Ten Commandments Monument Will Cost Alabama Taxpayers More Than $500,000," Associated Press (April 14, 2004).

• The ACLU received nearly $75,000 from Habersham County, Georgia, in a case involving two Ten Commandments displays, one at the county courthouse and one in the county swimming pool building. *See* http://www.acluga.org/docket.html.

[14] Hannity & Colmes (Fox News) (transcript) (December 30, 2005).

A huge number of these legal "victories" have been trumpeted in ACLU press releases, in which the ACLU often openly acknowledges it was the threat of lawsuits against localities that could least afford them that resulted in the ACLU's getting its way. The following are examples of ACLU press releases:

- "County Officials in Iowa Agree to Remove Ten Commandments from Courthouse Grounds" (March 15, 2001) ("Ben Stone, Executive Director of the Iowa Civil Liberties Union [said] *'[w]e . . . wanted to spare the community a divisive and costly lawsuit.'*") (emphasis added);
- "ACLU of Montana Settles Lawsuit Over Ten Commandments, Nativity Scene Placed on County Property" (October 12, 2000) ("The ACLU said the lawsuit was a 'last attempt' to nudge Custer County into addressing the *possible* unconstitutionality of the displays.") (emphasis added);
- "ACLU Action Prompts [Val Verde, California] School Board to Abandon Posting of Ten Commandments" (November 24, 1999) ("*The school board's decision came in the wake of the filing of a lawsuit last week by the ACLU . . .*") (emphasis added);
- "ACLU of Illinois Lauds Officials' Decision to Remove Religious Postings in Harrisburg Schools" (December 7, 1999) (The "Director of Communications for the ACLU [said] *'This action means the people of Harrisburg can focus all their energies, resources, and attention on the needs of their students, rather than worrying about a lengthy, expensive and disruptive court battle.'*") (emphasis added);
- "Commandments Come Down in West Virginia School" (August 27, 1999) ("School board attorney Brian Abraham recommended at a Thursday night meeting that the signs be taken down *to avoid* possible lawsuits.") (emphasis added).

The County of Los Angeles was recently extorted into removing a tiny cross from its official county seal (symbolizing the founding of the city by missionaries),[15] which is costing the county around $1 million as it would entail changing the seal on some 90,000 uniforms, 6,000 buildings, and 12,000 county vehicles.[16]

This summer, in a legal dispute that has continued for 17 years, a Federal judge ordered the city of San Diego to remove a cross from Mount Soledad that was raised as a veterans' memorial 50 years ago on a site where a cross had stood as far back as 1913.[17]

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[15] *See* Troy Anderson, "Vote on Cross Upheld Before Angry Crowd," *The Los Angeles Daily News* (June 9, 2004) at N1 ("Despite passionate pleas from an overflow crowd of 2,000, Los Angeles County's Board of Supervisors refused Tuesday to back down on its decision to remove a tiny Christian cross on the official seal because of a legal threat from the ACLU."). As columnist John Leo observed, "Last year the ACLU demanded that Los Angeles County eliminate from its seal a microscopic cross representing the missions that settled the state of California. Under threat of expensive litigation, the county complied. The cross was about one-sixth the size of a not-very-big image of a cow tucked away on the lower right segment of the seal, and maybe a hundredth of the size of a pagan god (Pomona, goddess of fruit) who dominated the seal. Pomona survived the religious purge. She is not the sort of god that the ACLU worries about, whereas the flyspeck-sized cross was a threat to unravel separation of church and state, as we know it. What will happen if the ACLU learns that Los Angeles, Santa Monica, Sacramento, San Francisco, St. Louis and Corpus Christi actually have religious names? We shudder to think." John Leo, "How Many ACLU Lawyers Can Dance on the Head of a Pin?" *The Mobile Register* (October 25, 2005) at A8.

[16] Hannity & Colmes (Fox News) (transcript) (December 30, 2005).

[17] Onell R. Soto, "City Has 90 Days to Remove Mt. Soledad Cross," *The San Diego Union-Tribune* (May 4, 2006) at A1; Matthew T. Hall, "Radio Takes up Effort to Save Cross," *The San Diego Union-Tribune* (March 19, 2005) at B1.

According to the plaintiff's attorney, he is owed more than $500,000 in legal fees from the city.[18]

The official name of the City of Los Angeles (known as "The City of Angels") is "The Town of Our Lady the Queen of Angels of the Little Portion," which refers to Mary, Mother of Jesus. Many other California cities contain religious references, including San Clemente, Santa Monica, Sacramento (named for the "Holy Sacrament"), San Francisco and San Luis Obispo (named for Saint Louis the Bishop). Under precedents groups like the ACLU are setting under 42 U.S.C. § 1983, the very names of these cities are in legal jeopardy. According to one prominent legal commentator: '"I think the ACLU may very well bring similar cases in future years all over the country,' said Erwin Chemerinsky, a professor of constitutional law at the University of Southern California. Since 1999, the ACLU, other groups and individuals have been successful in getting crosses on government seals removed in Los Angeles County, Redlands and La Mesa; Zion, Illinois; Stow, Ohio; Bernalillo, New Mexico; Rolling Meadows, Illinois; and Edmond, Oklahoma."[19]

In Redlands, California, the city council reluctantly capitulated to ACLU's demands and agreed to change their official seal. But Redlands didn't have the municipal funds to revise police and firefighter badges that contained the old seal so, as reported by the Sacramento Bee, "rather than face the likelihood of costly litigation," Redlands residents now "see blue tape covering the cross on city trucks, while some firefighters have taken drills to 'obliterate it' from their badges."[20] The old seals are "everywhere," according to a Redlands county spokeswoman, who "couldn't even hazard a guess what it would cost to replace the logos."[21]

Section 2 of H.R. 2679 will protect cities and towns from these unfair and coercive practices.

WHY SECTION 3 OF H.R. 2679 IS NECESSARY

Section 3 of H.R. 2679 is necessary because even the Federal government, with vast superior litigation resources, has been forced to bow to similar pressure and stop the Pentagon from sponsoring the Boy Scouts.[22] Further, section 3 is necessary because, without it, extortionist lawsuits will threaten to remove religious references from our most prominent Federal buildings and on Federal property, and from some of our Nation's most important cultural tradi-

[18] Tony Perry, "Officials Turn to U.S. to Save Cross," Los Angeles Times (May 12, 2006) at B4.

[19] Troy Anderson, "Will the Law Wipe L.A. Off the Map? Courts: ACLU Challenge to Cross on County Seal Leads Some to Wonder if Holy City Names Are Next," *The Long Beach Press-Telegram* (June 13, 2004) at A1.

[20] Marjie Lundstrom, "At a Crossroads for Diversity," *Sacramento Bee* (June 3, 2004) at A3.

[21] Marjie Lundstrom, "At a Crossroads for Diversity," *Sacramento Bee* (June 3, 2004) at A3.

[22] See "Pentagon Agrees to End Direct Sponsorship of Boy Scout Troops in Response to Religious Discrimination Charge" (November 15, 2004) (ACLU press release) ("In response to a religious discrimination lawsuits brought by the American Civil Liberties Union of Illinois, the Defense Department today agreed to end direct sponsorship of hundreds of Boy Scouts units, which require members to swear religious oaths, on military facilities across the United States and overseas."). In another case, *Buono* v. *Norton*, 371 F.3d 543 (9th Cir. 2004), the Ninth Circuit held that a small, approximately six-foot tall cross affixed to the top of a rock that serves as a veterans' memorial was unconstitutional because it was located on federally-owned land in the Mojave National Preserve in California, roughly 11 miles from the main highway, and the plaintiff, who lived in Oregon, found it offensive. The ACLU was awarded $63,000 in the case. See David Asman, "Battle to Tear Down a Tribute," Fox News (June 2, 2005).

tions. What sorts of religious references are these? Consider the following.

The First Congress not only acknowledged a proper role for religion in public life, but it did so at the very time it drafted the Establishment Clause. Just three days before Congress sent the text of the First Amendment to the States for ratification, it authorized the appointment of legislative chaplains.[23] Both Houses of Congress open their daily sessions with prayer and, in recent years, recitation of the Pledge of Allegiance.[24] Manifestations of the religious faith of our forebears appear throughout the Nation's Capital. The Senate Chamber is inscribed with the words "In God We Trust" and the Latin phrase "Annuit Coeptis" or "God has favored our undertakings."[25] The Main Reading Room of the Library of Congress prominently displays the Biblical quotation: "The heavens declare the Glory of God, and the firmament showeth His handiwork."[26] Friezes on the North and South walls of the Supreme Court chamber depict a procession of historical lawgivers including Moses.[27]

In the Rotunda of the Capitol Building, there are paintings with religious themes, such as the Apotheosis of Washington, depicting the ascent of George Washington into Heaven, and the Baptism of Pocahontas, portraying Pocahontas' baptism by an Anglican minister. A wall in the Cox Corridor of the Capitol is inscribed with this line from Katharyn Lee Bates' Hymn, America the Beautiful, "America! God shed his grace on Thee, and crown thy good with brotherhood from sea to shining sea." In the prayer room of the House chamber, the following prayer is inscribed: "preserve me, O God—for in thee do I put my trust."

On July 20, 1956, Congress proclaimed that the national motto of the United States is "In God We Trust," and that motto is inscribed above the main door of the Senate, behind the Chair of the Speaker of the House of Representatives, and on the currency of the United States.[28]

The Supreme Court opens each session with "God save the United States and this Honorable Court."[29] The very chamber in which oral arguments are heard before the Supreme Court "is decorated with a notable and permanent—not seasonal—symbol of religion: Moses with Ten Commandments."[30] Our courtrooms generally include the oath, "so help me God."[31]

The Tomb of the Unknown Soldier is engraved with the words: "Here rests in honored glory an American soldier known but to God."[32] Arlington National Cemetery maintains thousands of religious inscriptions on state-owned property.

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[23] See *Marsh* v. *Chambers*, 463 U.S. 783, 788 (1983).

[24] See Senate Rule IV.1, Standing Rules of the Senate, S. Doc. No. 107–1, at 4 (2002); House Rule XIV.1, Constitution, Jefferson's Manual, and Rules of the House of Representatives, H.R. Doc. No. 106–320, at 620 (2001).

[25] S. Doc. No. 82–20, at 27 (1951); 4 U.S.C.A. § 4.

[26] John Y. Cole, On These Walls 35 (1995) (Psalms 19:1).

[27] See *County of Allegheny* v. *ACLU*, 492 U.S. 573, 652–53 (1989) (Stevens, J., concurring in part and dissenting in part).

[28] 4 U.S.C. § 4 (historical notes) (Congressional finding (10)).

[29] See *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952).

[30] *Lynch* v. *Donnelly*, 465 U.S. 668, 677 (1984).

[31] *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952).

[32] See Lieutenant Colonel H. Wayne Elliott, The Third Priority: The Battlefield Dead, 1996 Army Law. 3, 20.

Our National holidays ("holy days") include Christmas ("Christ Mass"), Thanksgiving, and the National Day of Prayer.[33] Our children celebrate St. Valentine's Day and St. Patrick's Day in school. (St. Valentine was a Christian martyr, and St. Patrick was a Catholic.)[34] Even "Santa Claus" is derived from St. Nicholas ("Santa" means "saint" and "Claus" is short for "Nicolaus"), the archbishop of Myra known for distributing his inherited wealth to the needy by anonymously throwing bags of gold coins through windows.[35]

And some of our most patriotic songs, such as "God Bless America," affirm a belief in God. The fourth stanza of the statutorily prescribed National Anthem includes the following: "Blest with victory and peace, may the heaven-rescued land, Praise the Power that hath made and preserved us a nation. Then conquer we must, when our cause is just, And this be our motto: 'in God is our trust.'"[36]

H.R. 2679 IS CONSTITUTIONAL

H.R. 2679 is constitutional. The Supreme Court has used the following three factors to determine whether a statute violates the Establishment Clause. It has asked: (1) does the statute have a religious purpose?; (2) does the statute have the primary effect of either promoting or inhibiting religion?; (3) does the statute create an "excessive entanglement" between churches and the government?[37]

The clear answer to all three questions regarding H.R. 2679 is no.

First, H.R. 2679 has a secular legislative purpose, namely the purpose of preventing the use of the legal system in a manner that extorts money from State and local governments, and the Federal government, and inhibits their constitutional actions. In doing so, it restores the original purpose of 42 U.S.C. §§ 1983 and 1988, which was to protect individual rights (not Establishment Clause claims).

Second, H.R. 2679 does not have the primary effect of either promoting or inhibiting religion. Rather, it simply removes the coercive effects of the current legal rules. It does so by: (1) allowing Establishment Clause cases to go forward and allowing violations to be ordered stopped; and (2) restoring the "American rule" to Establishment Clause cases such that each side will pay its own legal fees.[38] (Establishment Clause cases can be brought both by those who claim the government is unconstitutionally promoting religion,

[33] See *Lynch* v. *Donnelly*, 465 U.S. 668, 676 (1952).
[34] St. Patrick, Encarta Encyclopedia (2003).
[35] See "Santa Claus," Encarta Encyclopedia (2003).
[36] 36 U.S.C. § 301(a).
[37] See Lemon v. Kurtzman, 403 U.S. 602 (1971).
[38] What is known as the "American Rule" is the rule that each side in a lawsuit shoulders the burden of paying their own legal costs whether they win or lose the case. As the Supreme Court has stated, "Under this 'American Rule,' we follow a general practice of not awarding fees to a prevailing party absent explicit statutory authority." *Buckhannon* v. *West Virginia Department of Health and Human Resources*, 532 U.S. 598, 602 (2001). While 42 U.S.C. § 1988 allows prevailing parties to be awarded attorneys' fees in litigation under 42 U.S.C. § 1983, H.R. 2679 simply removes Establishment Clause cases from coverage under 42 U.S.C. § 1988 and restores the application of the American Rule—a rule that governs the vast majority of lawsuits already—in Establishment Clause cases.

and by those who claim the government is unconstitutionally hostile to religion,[39] and H.R. 2679 affects each group equally.)

Third, H.R. 2679 does not create an excessive government entanglement with religion because it removes the existing extortionist abuse of the legal rules that pressures local governments to give up their right to constitutionally protected activity. In doing so, H.R. 2679 disentangles Federal authority from religion by removing the major financial incentive that encourages groups like the ACLU to bring these cases in the first place.[40]

Further, 42 U.S.C. § 1983 currently provides that: "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 . . ."[41] Section 1983 was designed as a mechanism for protecting only individual rights. Because the Establishment Clause does not secure an individual right, Establishment Clause lawsuits should not be covered under §1983 in the first place.[42] As Justice Kennedy made a similar distinction in Lee v. Weisman, "the Establishment Clause is a specific prohibition on the forms of state intervention in religious affairs with no precise counterpart in the [free] speech provision [in the Constitution]."[43]

Further, 42 U.S.C. § 1988, which allows attorneys' fees in cases brought under 42 U.S.C. § 1983, was intended only to allow the award of attorneys' fees under civil rights laws enacted by Congress after 1866. The history of 42 U.S.C. § 1988 is as follows. In *Alyeska Pipeline Service Co.* v. *Wilderness Society*,[44] the Supreme Court held that Federal courts do not have inherent power to award prevailing party attorney's fees to remedy government viola-

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[39] The Supreme Court has stated that "the State may not establish a religion of secularism in the sense of affirmatively opposing or showing hostility to religion, thus preferring those who believe in no religion over those who do believe." *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 225 (1963) (quotations and citations omitted).

[40] In recent years, the Supreme Court has conflated the last two prongs of the *Lemon* test. See *Agostini* v. *Felton*, 521 U.S. 203, 232 (1997) ("Regardless of how we have characterized the issue, however, the factors we use to assess whether an entanglement is 'excessive' are similar to the factors we use to examine 'effect.' That is, to assess entanglement, we have looked to the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority. Similarly, we have assessed a law's 'effect' by examining the character of the institutions benefited (e.g., whether the religious institutions were 'predominantly religious'), and the nature of the aid that the State provided (e.g., whether it was neutral and nonideological). Indeed, in *Lemon* itself, the entanglement that the Court found 'independently' to necessitate the program's invalidation also was found to have the effect of inhibiting religion. Thus, it is simplest to recognize why entanglement is significant and treat it ... as an aspect of the inquiry into a statute's effect.") (citations and quotations omitted).

H.R. 2679 is of course constitutional under these conflated factors as well because (1) the institutions it would benefit are the State, local, and Federal governments (and not, for example, inherently religious organizations); (2) the nature of the aid H.R. 2679 provides is simply the removal of a legal rule that has an extortionist effect on those State, local, and Federal governments; and (3) the resulting relationship between the government and religious authorities is unchanged by H.R. 2679.

[41] 42 U.S.C. § 1983 (emphasis added).

[42] Individual rights are there to protect individuals, whereas the Establishment Clause is a structural prohibition against the government's establishing a national religion. While structural limits on government power often expand the sphere in which individuals can act, the purpose of structural limits is to confine each governmental branch into its proper sphere, rather than to define the sphere of liberties within which individuals are free to act.

[43] 505 U.S. 577, 591–92 (1992).

[44] 421 U.S. 240 (1975).

tions of the law. The Court observed that the "American Rule"—that is, the rule that each party bears its own attorneys" fees—is "deeply rooted in our history and in congressional policy."[45] Accordingly, the Court held that fee-shifting relief can only validly be awarded by courts when statutorily authorized by Congress, in specific exceptions to the general rule.[46] In response to the *Alyeska Pipeline* decision, Congress enacted 42 U.S.C. § 1988 to allow the award of attorneys' fees in limited cases. Those cases were explained in the Senate Committee report on the legislation, as follows:

> 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.*[47]

Clearly, the Establishment Clause is not a civil rights act that Congress passed after 1866, and Establishment Clause cases should not be covered at all under the attorneys' fees provisions of 42 U.S.C. §1988.

Finally, as Professor Patrick Garry emphasized in his written testimony before the Constitution Subcommittee, "the Public Expression of Religion Act is necessary to avoid a chilling of First Amendment rights."[48] As his testimony states, "[t]he Supreme Court has specifically overturned governmental attempts to avoid Establishment Clause litigation when those attempts result in the chilling or infringement of free speech or religious exercise freedoms."[49] Professor Garry outlined cases, including *Good News Club* v. *Milford Central School*,[50] *Lamb's Chapel* v. *Center Moriches Union Free School District*,[51] and *Rosenberger* v. *Rector & Visitors of the University of Virginia*,[52] which "stand for the proposition that fears [on the part of the government] of incurring Establishment Clause lawsuits cannot justify viewpoint discrimination against religious speech or organizations."[53] As Professor Garry states, "the kind of infringement on First Amendment freedoms that occurred in *Lamb's Chapel, Good News,* and *Rosenberger*, all because of a fear of facing Establishment Clause lawsuits, is just the kind of infringement that can arise because of the chilling effect caused by a fear of being saddled with a Section 1988 award for attorney's fees."[54]

ARGUMENTS REGARDING "THE SEPARATION OF CHURCH AND STATE"

While opponents of this legislation may rely on arguments that H.R. 2679 somehow violates "the separation of church and state,"

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[45] 421 U.S. at 270.
[46] *Id.* at 269.
[47] S. Rep. No. 94–1011, at 2 (1976) (emphasis added).
[48] Testimony of Professor Patrick M. Garry before the Subcommittee on the Constitution in support of H.R. 2679, June 22, 2006, at 6.
[49] Id. at 6–7.
[50] 533 U.S. 98 (2001).
[51] 508 U.S. 384 (1993).
[52] 515 U.S. 819 (1995).
[53] Testimony of Professor Patrick M. Garry before the Subcommittee on the Constitution in support of H.R. 2679, June 22, 2006, at 7.
[54] Id.

it is important to keep in mind that no such phrase appears in the Constitution.

In his book entitled "Separation of Church and State," Philip Hamburger, the John P. Wilson Professor of Law at the University of Chicago, provides an exhaustively researched account of the history of the oft-repeated notion of "the separation of church and state."

Essentially, the phrase originated when Thomas Jefferson (who, as the Ambassador to France, was in Paris when the Continental Congress framed the First Amendment) used it in a letter intended to silence clergyman who were members of the Federalist political party who were using their sermons in the Northeast to criticize Jefferson, a member of the Republican party.[55] The phrase went largely unnoticed until, in the eighteenth and nineteenth centuries, there were attempts to amend the Constitution to explicitly require a separation of church and state.[56] Following those failed attempts, the Ku Klux Klan officially adopted the phrase as a means of articulating its disapproval of Roman Catholics in government.[57] One

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[55] See Philip Hamburger, Separation of Church and State (Harvard University Press 2002) at 111–12, 151, 161–62 ("During the election of 1800, Republicans had reason to try to separate Federalist clergymen from politics. Beginning in the 1790s, and now with renewed effort, Federalist ministers inveighed against Jefferson, often from their pulpits, excoriating his infidelity and deism . . . In defense of Jefferson, Republicans argued that clergymen ought not preach about politics, and eventually, beginning in 1800, some made such arguments in terms of separation—in particular, a separation of religion and politics. Seizing upon the idea of separation—a concept that until 1800 had been unusual and anything but popular—these Republicans elevated it to a political principle. Although establishment ministers had caricatured dissenters as seeking a separation of religion from civil government, and although dissenters had declined to seek separation, Republicans now endorsed it as a means of discouraging Federalist clergy, especially in Congregational New England, from preaching against Jefferson . . . [I]n 1815, Jefferson wrote a letter arguing that . . . the clergy should not have 'the right of discussing public affairs in the pulpit'. . . Jefferson's letter elevated anticlerical rhetoric to constitutional law . . . Jefferson adopted the demand of his partisans, arguing that the First Amendment built 'a wall of separation between church and state,' writing that '. . . I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & State.' . . . Jefferson interpreted the U.S. Constitution to require a version of what his supporters had sought in the heat of the campaign . . . If Jefferson had high hopes that his letter would promptly sow useful truths and principles, he must have been disappointed, for his epistle was not widely published or even noticed.").

[56] See Philip Hamburger, Separation of Church and State (Harvard University Press 2002) at 285, 287, 335 ("Contrary to what may be expected, the nineteenth-century advocates who desired the separation of church and state as a constitutional right did not rely upon constitutional interpretation to secure this goal. Instead, recognizing separation's inadequate constitutional foundations, they sought constitutional amendments. Only in the twentieth century, after the amendment process had been abandoned, did an interpretive approach prevail, and, by this means, separation became part of American constitutional law . . . In the 1870s and 1880s anti-Christian secularists organized a national campaign to obtain a constitutional amendment guaranteeing a separation of church and state . . . After the failure of the Liberal and Protestant proposals for a constitutional amendment, advocates of separation focused on constitutional interpretation. They quickly forgot about arguments that an amendment was necessary and claimed instead that American constitutions had already, since their inception, fully guaranteed a separation of church and state.").

[57] See Philip Hamburger, Separation of Church and State (Harvard University Press 2002) 407–09, ("No nativist or Protestant organization more prominently supported the ideal of separation than the Revised [Ku Klux] Klan. Founded in 1915, this second Ku Klux Klan enjoyed particular success between 1921 and 1926, when it had about five million members and innumerable sympathizers. It exerted profound political power in states across the country and, probably more than any other national group in the first half of the century, drew Americans to the principle of separation . . . Separation became a crucial tenet of the Klan. When recruiting members, the Klan sometimes distributed cards listing 'the separation of church and state' as one of the organization's principles . . . Both in the South and the North, members even recited in their 'Klansman's Creed': 'I believe in the eternal Separation of Church and State.' Commenting on such vows, an 'authoritative' writer—identified only as '931KNOIOK'—explained: 'The Klan is pledged to maintain inviolate and perpetuate forever the principle of complete separation of Church and State, and the Roman Catholics fight this, because no sincere and devout Roman Catholic does or is permitted to believe in the separation of Church and State. The Roman Catholic Church is first, last and forever opposed to the separation of Church and State

Continued

of those Klan members was Hugo Black,[58] who later became a Supreme Court Justice and authored the Supreme Court's 1947 decision in Everson v. Board of Education, which first enshrined the concept of "the separation of church and state" in constitutional law.[59]

HEARINGS

The Committee's Subcommittee on the Constitution held a hearing on H.R. 2679 on June 22, 2006. Testimony was received from Rees Lloyd, Commander, District 21, The American Legion; Mathew D. Staver, Founder and Chairman, Liberty Counsel & Interim Dean, Liberty University School of Law; Marc Stern, General Counsel, American Jewish Congress; and Professor Patrick Garry, Associate Professor of Law, University of South Dakota School of Law, with additional material submitted by individuals and organizations.

COMMITTEE CONSIDERATION

On July 26, 2006, and September 7, 2006, the Committee met in open session and considered H.R. 2679. On September 7, 2006, the Committee met in open session and ordered favorably reported the bill H.R. 2679 with an amendment by voice vote, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee notes that the following

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and in favor of the absolute control and domination of the State by the Roman Catholic Church.'").

[58] See Philip Hamburger, Separation of Church and State (Harvard University Press 2002) at 423, 426–28, 462 ("Hugo Black was more than simply a Baptist and a progressive. He was also a Klansman . . . The Klan provided Black with his path to the Senate. In September 1923 Black joined the powerful Richard E. Lee Klan No. 1 and promptly became Kladd of his Klavern—the officer who initiated new members by administering the oath about 'white supremacy' and 'separation of church and state.' . . . After Black decided to run [for U.S. Senate], Grand Dragon Jim Esdale told him, 'Give me a letter of resignation and I'll keep it in my safe against the day when you'll need to say you're not a Klan member.' Recognizing the wisdom of this suggestion, Black gave Esdale a brief letter of resignation, signing it, 'Yours, I.T.S.U.B. [In The Sacred, Unfailing Bond], Hugo L. Black.' . . . Black appealed directly to Klan and other anti-Catholic voters. According to Esdale, 'I arranged for Hugo to go to Klaverns all over the state, making talks on Catholicism. What kinds of talks? Well, just the history of the church and what we know about it. Not to talk on politics. Hugo could make the best anti-Catholic speech you ever heard.' . . . Then Imperial Wizard Hiram Evans awarded Black the very rare honor of a golden 'grand passport.' Upon receiving this, Black spoke of his gratitude for the Klan's support: 'I know that without the support of the members of this organization I would not have been called, even by my enemies, the "Junior Senator from Alabama." (Applause.) I realize that I was elected by men who believe in the principles that I have sought to advocate and which are the principles of this organization.' . . . Black had long . . . sworn, under the light of flaming crosses, to preserve 'the sacred constitutional rights' of 'free public schools' and 'separation of church and state.' Subsequently, he had administered this oath to thousands of others in similar ceremonies.").

[59] See Philip Hamburger, Separation of Church and State (Harvard University Press 2002) at 429, 454–55, 461 ("Hugo Black's association with the Klan became public little more than a decade later, in 1937, when President Franklin Delano Roosevelt appointed Black as Associate Justice of the Supreme Court . . . The Supreme Court finally interpreted the First and Fourteenth Amendments to require separation of church and state in 1947, in the New Jersey case of *Everson* v. *Board of Education of the Township of Ewing* . . . Only in 1947 [,] did the Court clearly make separation the basis for a decision—opining that the First Amendment required separation, that the Fourteenth Amendment applied it to the states, and that New Jersey's subsidized school busing for both public schools and private schools did not violate the First and Fourteenth Amendments. In this way, the Court recognized separation as part of American constitutional law . . . Justice Black, writing for the majority, declared that separation was the constitutional standard: 'In the words of Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between church and State.'").

rollcall votes occurred during the committee's consideration of H.R. 2679.

1. An amendment was offered by Mr. Nadler to except from the bill cases "involving religious coercion." The amendment was defeated by a rollcall vote of 10 ayes to 17 nays.

Rollcall No. 1

	Ayes	Nays	Present
MR. HYDE.			
MR. COBLE		X	
MR. SMITH		X	
MR. GALLEGLY.			
MR. GOODLATTE.			
MR. CHABOT		X	
MR. LUNGREN		X	
MR. JENKINS		X	
MR. CANNON		X	
MR. BACHUS		X	
MR. INGLIS		X	
MR. HOSTETTLER		X	
MR. GREEN.			
MR. KELLER		X	
MR. ISSA.			
MR. FLAKE.			
MR. PENCE		X	
MR. FORBES		X	
MR. KING		X	
MR. FEENEY		X	
MR. FRANKS		X	
MR. GOHMERT		X	
MR. CONYERS	X		
MR. BERMAN.			
MR. BOUCHER.			
MR. NADLER	X		
MR. SCOTT	X		
MR. WATT	X		
MS. LOFGREN	X		
MS. JACKSON LEE	X		
MS. WATERS.			
MR. MEEHAN.			
MR. DELAHUNT.			
MR. WEXLER.			
MR. WEINER	X		
MR. SCHIFF	X		
MS. SANCHEZ	X		
MR. VAN HOLLEN.			
MRS. WASSERMAN SCHULTZ	X		
MR. SENSENBRENNER, CHAIRMAN		X	
TOTAL	10	17	

2. An amendment was offered by Mr. Scott to except from the bill cases "involving sectarian prayer conducted by a governmental official in a public school." The amendment was defeated by a rollcall vote of 12 ayes to 19 nays.

Rollcall No. 2

	Ayes	Nays	Present
MR. HYDE.			
MR. COBLE		X	
MR. SMITH		X	
MR. GALLEGLY		X	

Rollcall No. 2—Continued

	Ayes	Nays	Present
MR. GOODLATTE.			
MR. CHABOT		X	
MR. LUNGREN		X	
MR. JENKINS		X	
MR. CANNON		X	
MR. BACHUS		X	
MR. INGLIS		X	
MR. HOSTETTLER		X	
MR. GREEN		X	
MR. KELLER		X	
MR. ISSA		X	
MR. FLAKE.			
MR. PENCE.			
MR. FORBES		X	
MR. KING		X	
MR. FEENEY		X	
MR. FRANKS		X	
MR. GOHMERT		X	
MR. CONYERS	X		
MR. BERMAN	X		
MR. BOUCHER.			
MR. NADLER	X		
MR. SCOTT	X		
MR. WATT	X		
MS. LOFGREN	X		
MS. JACKSON LEE	X		
MS. WATERS.			
MR. MEEHAN.			
MR. DELAHUNT.			
MR. WEXLER.			
MR. WEINER	X		
MR. SCHIFF	X		
MS. SANCHEZ	X		
MR. VAN HOLLEN	X		
MRS. WASSERMAN SCHULTZ	X		
MR. SENSENBRENNER, CHAIRMAN		X	
TOTAL	12	19	

3. An amendment was offered by Ms. Jackson-Lee that would allow attorney's fees to be available to prevailing parties in Establishment Clause cases to the same extent that attorney's fees are available to prevailing parties in cases involving the unconstitutional taking of private property. The amendment was defeated by a rollcall vote of 11 ayes to 19 nays.

Rollcall No. 3

	Ayes	Nays	Present
MR. HYDE.			
MR. COBLE		X	
MR. SMITH		X	
MR. GALLEGLY		X	
MR. GOODLATTE.			
MR. CHABOT		X	
MR. LUNGREN		X	
MR. JENKINS		X	
MR. CANNON		X	
MR. BACHUS		X	
MR. INGLIS.			
MR. HOSTETTLER		X	
MR. GREEN		X	

Rollcall No. 3—Continued

	Ayes	Nays	Present
MR. KELLER		X	
MR. ISSA		X	
MR. FLAKE		X	
MR. PENCE.			
MR. FORBES		X	
MR. KING		X	
MR. FEENEY		X	
MR. FRANKS		X	
MR. GOHMERT		X	
MR. CONYERS	X		
MR. BERMAN	X		
MR. BOUCHER.			
MR. NADLER	X		
MR. SCOTT	X		
MR. WATT	X		
MS. LOFGREN	X		
MS. JACKSON LEE	X		
MS. WATERS.			
MR. MEEHAN.			
MR. DELAHUNT.			
MR. WEXLER.			
MR. WEINER	X		
MR. SCHIFF	X		
MS. SANCHEZ.			
MR. VAN HOLLEN	X		
MRS. WASSERMAN SCHULTZ	X		
MR. SENSENBRENNER, CHAIRMAN		X	
TOTAL	11	19	

4. An amendment was offered by Mr. Nadler that would except from the bill cases "involving a declaration of an official religion." The amendment was defeated by a rollcall vote of 12 ayes to 20 nays.

Rollcall No. 4

	Ayes	Nays	Present
MR. HYDE.			
MR. COBLE		X	
MR. SMITH		X	
MR. GALLEGLY		X	
MR. GOODLATTE.			
MR. CHABOT		X	
MR. LUNGREN		X	
MR. JENKINS		X	
MR. CANNON		X	
MR. BACHUS		X	
MR. INGLIS		X	
MR. HOSTETTLER		X	
MR. GREEN		X	
MR. KELLER		X	
MR. ISSA		X	
MR. FLAKE		X	
MR. PENCE.			
MR. FORBES		X	
MR. KING		X	
MR. FEENEY		X	
MR. FRANKS		X	
MR. GOHMERT		X	
MR. CONYERS	X		
MR. BERMAN	X		

Rollcall No. 4—Continued

	Ayes	Nays	Present
MR. BOUCHER.			
MR. NADLER	X		
MR. SCOTT	X		
MR. WATT	X		
MS. LOFGREN	X		
MS. JACKSON LEE	X		
MS. WATERS.			
MR. MEEHAN	X		
MR. DELAHUNT.			
MR. WEXLER.			
MR. WEINER	X		
MR. SCHIFF	X		
MS. SANCHEZ.			
MR. VAN HOLLEN	X		
MRS. WASSERMAN SCHULTZ	X		
MR.SENSENBRENNER, CHAIRMAN		X	
TOTAL	12	20	

5. An amendment was offered by Mr. Scott that would except from the bill cases in which the court find that the defendant knowingly disobeyed a lawful order of the court. The amendment was defeated by a rollcall vote of 5 ayes to 17 nays.

Rollcall No. 5

	Ayes	Nays	Present
MR. HYDE.			
MR. COBLE		X	
MR. SMITH		X	
MR. GALLEGLY.			
MR. GOODLATTE.			
MR. CHABOT		X	
MR. LUNGREN		X	
MR. JENKINS		X	
MR. CANNON		X	
MR. BACHUS		X	
MR. INGLIS		X	
MR. HOSTETTLER		X	
MR. GREEN.			
MR. KELLER		X	
MR. ISSA		X	
MR. FLAKE.			
MR. PENCE		X	
MR. FORBES		X	
MR. KING		X	
MR. FEENEY		X	
MR. FRANKS		X	
MR. GOHMERT			
MR. CONYERS	X		
MR. BERMAN.			
MR. BOUCHER.			
MR. NADLER.			
MR. SCOTT	X		
MR. WATT	X		
MS. LOFGREN.			
MS. JACKSON LEE.			
MS. WATERS.			
MR. MEEHAN.			
MR. DELAHUNT.			
MR. WEXLER.			
MR. WEINER	X		

Rollcall No. 5—Continued

	Ayes	Nays	Present
MR. SCHIFF	X		
MS. SANCHEZ.			
MR. VAN HOLLEN.			
MRS. WASSERMAN SCHULTZ.			
MR.SENSENBRENNER, CHAIRMAN		X	
TOTAL	5	17	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2679, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

SEPTEMBER 11, 2006.

Hon. F. JAMES SENSENBRENNER,
Chairman, Committee on the Judiciary,
U.S. House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2679, the Veterans' Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006.

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

Sincerely,

DONALD B. MARRON,
Acting Director.

Enclosure

H.R. 2679—Veterans' Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006

H.R. 2679 would prevent federal courts from awarding monetary relief to parties claiming violations of the Constitutional prohibition on the establishment of religion by federal, state, or local governments. In addition, parties who have prevailed on claims of such violations could no longer be awarded attorneys' fees and expenses. Because few suits are brought against the federal govern-

ment for such violations, CBO expects that enacting H.R. 2679 would have no significant effect on the federal budget.

H.R. 2679 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments. H.R. 2679 would impose new private-sector mandates, as defined in UMRA, on certain individuals and certain attorneys. Based on information from government and other sources, CBO expects that the direct cost of those mandates would fall below the annual threshold established by UMRA for private-sector mandates ($128 million in 2006, adjusted annually for inflation).

H.R. 2679 would impose a new private-sector mandate on certain individuals by prohibiting them from receiving monetary damages and costs in certain lawsuits involving a violation of a prohibition in the Constitution against the establishment of religion. Because the bill would eliminate existing rights to seek compensation for injury caused by certain acts, it would impose a private-sector mandate. The direct cost of the mandate would be the forgone net value of awards and settlements in such claims. The bill also would prohibit awards for attorneys' fees from lawsuits involving a violation of a prohibition in the Constitution against the establishment of religion. Under current law, the courts may award the prevailing party a reasonable attorney's fee. The direct cost of the mandate would be the net loss of revenue that certain attorneys would experience as a result of the prohibition on fee awards.

The CBO staff contact for this estimate is Daniel Hoople. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 2679, the "Veterans' Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006," will prevent the legal extortion that currently requires local, State and the Federal government, to accede to demands for the removal of religious text, imagery, and references when such removal is not compelled by the Constitution.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, clause 3 of the Constitution; article I, section 8, clause 9 of the Constitution; article III, section 1, clause 1 of the Constitution; and article III, section 2, clause 2 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short title

This section sets forth the title of the bill as the, "Veterans' Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006".

Sec. 2. Limitations on certain lawsuits against State and local officials

Section 2 amends 42 U.S.C. § 1988 such that attorneys' fees could not be awarded to prevailing parties in Establishment Clause cases. This section also amends 42 U.S.C. § 1983 to make clear that, while Establishment Clause cases can continue to be brought against State and local governments, they can be brought only for injunctive or declaratory relief, which means the only relief a court could order in those cases is that a State official or local government stop doing whatever it was doing that was an alleged violation of the Establishment Clause or simply declare what the law is. (That is, under Section 2 of the bill, a court could not order monetary damages or attorneys' fees in Establishment Clause cases.) The Establishment Clause cases covered by Section 2 include cases challenging a veterans' memorial's containing religious words or imagery; a public building's containing religious words or imagery; the presence of religious words or imagery in the official seals of States and localities; the chartering of Boy Scout units by components of States and localities; and the Boy Scouts' using public buildings.

Sec. 3. Limitations on certain lawsuits against the United States and federal officials

Section 3 of H.R. 2679 applies the same principles embodied in Section 2 to Establishment Clause cases brought against the federal government. Section 3 creates a new section in the U.S. Code that provides that a court shall not award attorneys fees or expenses to the prevailing party in Establishment Clause cases brought against the United States or any agency or any official of the United States acting in his or her official capacity, and that the remedies available with respect to such a claim shall be limited to injunctive or declaratory relief. The Establishment Clause cases covered by this section include cases challenging a veterans' memorial's containing religious words or imagery; a Federal building's containing religious words or imagery; the presence of religious words or imagery in the official seal of the United States and in its currency and official Pledge; the chartering of Boy Scout units by components of the Armed Forces of the United States and by other public entities; and the Boy Scouts' using Department of Defense and other public installations.

Sec. 4. Effective date

Section 4 of the bill provides that the Act and any amendments made by the Act take effect on the date of enactment of the Act and apply to any case that is pending on such date of enactment or is commenced on or after such date of enactment.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

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

REVISED STATUTES OF THE UNITED STATES

TITLE XIII

THE JUDICIARY.

* * * * * * *

CHAPTER TWELVE.

PROVISIONS COMMON TO MORE THAN ONE COURT OR JUDGE.

* * * * * * *

SEC. 722. (a) * * *

(b) In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92–318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 40302 of the Violence Against Women Act of 1994, 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. *However, no fees shall be awarded under this subsection with respect to a claim described in subsection (b) of section nineteen hundred and seventy nine.*

* * * * * * *

TITLE XXIV

* * * * * * *

CIVIL RIGHTS.

* * * * * * *

SEC. 1979. *(a)* 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, in-

junctive 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.

(b) The remedies with respect to a claim under this section are limited to injunctive and declaratory relief where the deprivation consists of a violation of a prohibition in the Constitution against the establishment of religion, including, but not limited to, a violation resulting from—

(1) a veterans' memorial's containing religious words or imagery;

(2) a public building's containing religious words or imagery;

(3) the presence of religious words or imagery in the official seals of the several States and the political subdivisions thereof; or

(4) the chartering of Boy Scout units by components of States and political subdivisions, and the Boy Scouts' using public buildings of States and political subdivisions.

* * * * * * *

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, JULY 26, 2006

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:05 a.m., in Room 2141, Rayburn House Office Building, the Honorable F. James Sensenbrenner, Jr. (Chairman of the Committee) presiding.

[Intervening business.]

Chairman SENSENBRENNER. Pursuant to notice, I now call up the bill H.R. 2679, the Public Expression of Religion Act of 2005, for purposes of markup and move its favorable recommendation to the House.

[The bill, H.R. 2679, follows:]

I

109TH CONGRESS
1ST SESSION

H. R. 2679

To 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.

IN THE HOUSE OF REPRESENTATIVES

MAY 26, 2005

Mr. HOSTETTLER (for himself, Mr. WAMP, Mr. NORWOOD, Mr. JENKINS, Mr. PAUL, Mr. DOOLITTLE, Mr. SODREL, Mr. WELDON of Florida, Mr. ALEXANDER, Mr. BACHUS, Mr. PITTS, Mr. INGLIS of South Carolina, Mr. OTTER, Mr. DUNCAN, Mr. JONES of North Carolina, Mr. KINGSTON, Mr. SMITH of Texas, Mr. BARTLETT of Maryland, Mr. POE, and Mr. BARRETT of South Carolina) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To 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.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Public Expression of
5 Religion Act of 2005".

SEC. 2. LIMITATIONS ON CERTAIN LAWSUITS AGAINST STATE AND LOCAL OFFICIALS.

(a) CIVIL ACTION FOR DEPRIVATION OF RIGHTS.—Section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) is amended—

(1) by inserting "(a)" before the first sentence; and

(2) by adding at the end the following:

"(b) The remedies with respect to a claim under this section where the deprivation consists of a violation of a prohibition in the Constitution against the establishment of religion shall be limited to injunctive relief.".

(b) ATTORNEYS FEES.—Section 722(b) of the Revised Statutes of the United States (42 U.S.C. 1988(b)) is amended by adding at the end the following: "However, no fees shall be awarded under this subsection with respect to a claim described in subsection (b) of section nineteen hundred and seventy nine.".

○

Chairman SENSENBRENNER. Without objection, the bill will be considered as read and open for amendment at any point. And the Chair recognizes the author of this legislation, the gentleman from Indiana, Mr. Hostettler, for 5 minutes to explain the bill.

Mr. HOSTETTLER. Thank you, Mr. Chairman. Mr. Chairman, H.R. 2679, the Public Expression of Religion Act, would amend 42 USC Sections 1983 and 1988 to prevent the use of the legal system in a manner that extorts behavior from State and local governments and inhibits their constitutional actions.

Title 42 USC § 1983 is the Federal statute that allows people to sue State and local governments for alleged constitutional violations of their individual rights. Title 42 USC § 1988 is the Federal fee shifting statute that allows prevailing plaintiffs in lawsuits filed under 1983 to be awarded attorney's fees from the defendant.

Consequently, under 42 USC 1983, parties can sue State and local governments claiming their individual rights were violated and demand attorney's fees in the case under 42 USC——

Mr. NADLER. Mr. Chairman, I can't hear him. Maybe the microphone isn't working or something.

Mr. HOSTETTLER. I will move closer.

Chairman SENSENBRENNER. The gentleman from Indiana will enunciate clearly.

Mr. HOSTETTLER. Consequently, under 42 USC 1983, parties can sue State and local governments, claiming their individual rights were violated, and demand attorney's fees in the case under 42 USC 1988, if they prevail at any stage of judicial review.

Because of these laws, the threat of litigation against State and local officials alleging that they have violated the establishment clause often forces States and localities to cave to demands to remove even the smallest religious references on public property.

Most localities do not have the money to pay not only their fees but also the plaintiff's attorney's fees, if they receive an adverse judgment. PERA addresses this problem by amending 42 USC 1983 to permit only injunctive relief in cases alleging violations of the establishment clause.

PERA also amends 42 USC 1988 to disallow the award of attorney's fees to prevailing parties in cases alleging violations of the establishment clause.

I first introduced the Public Expression of Religion Act in the 105th Congress, after I realized that the imposition of attorney's fees in establishment clause cases were jeopardizing our constituents' constitutional rights, causing them, in many cases, to choose between defending their rights or giving up in the face of exorbitant attorney's fees.

What makes this even more difficult for States and localities is that the jurisprudence in establishment clause cases is about as clear as mud. Different districts and even the Supreme Court itself flip-flops on issues.

For instance, last year, the Supreme Court handed down two Ten Commandments decisions on the same day, with a different decision in each. In the Van Orden case, the court applied the Marsh test of historical perspective to determine that the Ten Commandments in a public venue was constitutional, while the McCreary case used the Lemon test to determine that the Ten Commandments in a public venue was unconstitutional.

It is about as clear as mud. Our constituents who are being threatened with these lawsuits know that even if they are right, they will still have to pay their own attorney's fees to take the gamble that the court will muddle through the jurisprudential mess of the establishment clause and come out on their side.

If the court chooses to use the Marsh test, they might win. If the court chooses to use the Lemon test, they might lose. It is a toss-up.

Unfortunately, many of our constituents do not have the means by which to set aside a small fortune each year to defend their constitutional rights against liberal organizations nor do they look kindly on the fact that their constitutional rights have become subject to the whims of unelected judges, but that issue is for another day.

Regardless, many do not wish to roll the dice to have their day in court, so they capitulate to these organizations and their often questionable pronouncement of what is or is not constitutional.

A majority of the cases the ACLU and its affiliates represent are facilitated by staff attorneys or through pro bono work. So any attorney's fees awarded to them is icing on the cake.

It is a win-win situation for them right now. On the other hand, cities and States have to consider where the attorney's fees would come from if they lose their case and have to pay the ACLU. Where would that money come from? From the taxpayers.

States and localities have limited resources with which to fight court battles, thus another reason that they are capitulating before they even go to court. This was the case recently with the Los Angeles County seal. The ACLU threatened to sue Los Angeles County if they did not remove the small cross from the county seal. The cross symbolized L.A.'s birth as a Spanish mission town.

The county was forced to choose between paying to change the seal or paying to go to court and possibly pay exorbitant attorney's fees to the ACLU.

In the end, the L.A. County commissions, in a 3-2 vote, decided to ignore the will of the people of Los Angeles and pay to change the seal instead of paying to go to court. They had been advised by their attorneys that if they lost in court, they would not only have to change the seal, but they would additionally have to pay attorney's fees.

Mr. Chairman, I believe it is time to bring this extortion to an end. The Public Expression of Religion Act would make sure that these cases are tried on their merits and are not merely used to extort money either via settlements or attorney's fees.

I would urge my colleagues to support the bill and the amendment in the nature of a substitute that I will soon offer.

I yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from New York, Mr. Nadler, is recognized for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. NADLER. Mr. Chairman, this bill would, for the first since the enactment in 1871 of Section 1983, which bars the deprivation of any rights, privileges or immunities secured by the Constitution

and laws, under color of law, that is to say, by a State official, this bill would, for the first time, single out a particular group of individuals whose constitutional rights have been violated by the government and deny them remedies available to everyone else under Section 1983.

In effect, it disfavors the establishment of religion clause, because it says that people who have proven the violation of their constitutional rights under the establishment clause shall be denied remedies available to anyone else who proves violation of any other constitutional right.

In more than a century, nothing like this has ever been done. I have checked with CRS, and I ask unanimous consent to place their memo to that effect in the record.

Chairman SENSENBRENNER. Without objection.

[The memo follows:]

Memorandum July 25, 2006

TO: House Judiciary Committee

FROM: Kenneth R. Thomas
Legislative Attorney
American Law Division

SUBJECT: Scope of the Proposed Public Expression of Religion Act of 2005

The memorandum is in response to your request to examine the scope of H.R.2679, the Public Expression of Religion Act of 2005,[1] which would limit the relief available and the payment of attorney's fees for cases brought under 42 U.S.C. § 1983 when the underlying case involves the Establishment Clause of the First Amendment of the Constitution. Specifically, you requested an analysis of whether Congress had previously limited the types of damages available under § 1983 as regards particular constitutional provisions. Second, you requested an analysis as to whether the bill would be limited to the public expression of religious faith in a governmental context, or whether this bill would also affect other Establishment Clause issues.

42 U.S.C. § 1983 addresses a broad array of rights and privileges protected by the United States Constitution. It provides that:

> 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.

The proposed Public Expression of Religion Act of 2005 would appear to limit certain litigants from receiving either damages or attorneys fees. Specifically, the proposed Act provides that "[t]he remedies with respect to a claim under [42 U.S.C. § 1983] where the deprivation consists of a violation of a prohibition in the Constitution against the

[1] 109th Cong., 1st Sess. (as introduced).

establishment of religion shall be limited to injunctive relief." The bill also amends 42 U.S.C. 1988(b) to provide that no attorney's fees shall be awarded with respect to a claim under 42 U.S.C. § 1983 regarding the Establishment Clause.

42 U.S.C. § 1983 was first passed in 1871.[2] Although it has been recodified and relatively recently amended,[3] it has not been substantially altered since 1871. It does not appear that it has been amended so as to limit the type of damages available to litigants who choose to utilize its provisions regarding particular constitutional issues. Whether such a limitation is constitutional is beyond the scope of this memorandum.

The provisions of the proposed Public Expression of Religion Act of 2005, despite its title, would appear to include both the public expression of religion under governmental auspices and a variety of other issues. The types of cases which the bill would cover would appear to include, among other things, cases involving financial assistance to church-related institutions, governmental encouragement of religion in public schools (prayers, bible reading), access of religious groups to public property, tax exemptions of religious property, exemption of religious organizations from generally applicable laws, Sunday closing laws, conscientious objectors, regulation of religious solicitation, religion in governmental observances, and religious displays on government property.[4]

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[2] Act April 20, 1871, ch 22, § 1, 17 Stat. 13.

[3] *See* Act of Dec. 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284 (extending 42 U.S.C. § 1983 to the District of Columbia); *See* Act of Oct. 19, 1996, P.L. 104-317, Title III, § 309(c), 110 Stat. 3853 (limiting injunctive relief to cases where a declaratory decree was violated or declaratory relief was unavailable).

[4] *See* Johnny Killian, George Costello, Kenneth Thomas, UNITED STATES CONSTITUTION: ANALYSIS AND INTERPRETATION 1022-58 (2002).

Mr. NADLER. This bill is aimed at people who have proved in court that the government has violated their constitutional rights. By denying them the normal relief of monetary damages and the normal ability to petition for attorney's fees, we would not just deny them their day in court, but we would be telling government officials everywhere that Congress thinks it is okay to violate people's religious liberty with impunity.

It is especially galling that everyone here, well, almost everyone has taken a victory lap for reauthorizing the Voting Rights Act, in which we enhance the attorney's fees provisions by adding a right to be awarded the cost of extra witnesses.

As this Committee stated in its report on the Voting Rights Act, "The Committee received substantial testimony indicating that much of the burden associated with either proving or defending a Section 2 vote dilution claim is established by information that only an expert can prepare. In harmonizing the Voting Rights Act of 1965 with other Federal civil rights laws, the Committee also seeks to ensure that those minority voters who have been victimized by continued acts of discrimination are made whole."

But not people who have been victimized by deprivation of their constitutional rights under the establishment clause. I would warn my colleagues that starting down this path will only lead to depriving other unpopular groups of their civil rights remedies.

It wasn't so long ago that attacks on unelected judges and ACLU lawyers stirring up trouble was the common language of the militant segregationists. It is distressing and sadly ironic that today that language is being used to gut the nation's oldest and most durable civil rights law.

It is all chillingly reminiscent of Governor George Wallace's infamous 1963 inaugural speech, in which he said, "From this day, from this hour, from this minute, we give the word of a race of honor that we will tolerate their boot in our faces no longer and let those certain judges put that in their opium pipes of power and smoke it, for what it is worth."

I think the governor would feel right at home with the sponsors of this bill today or the notorious seven manifesto signed by Members of both houses, in defiance of the Supreme Court's school desegregation decisions. "We regard the decisions of the Supreme Court in the school cases as a clear abuse of judicial power. It climaxes a trend in the Federal judiciary undertaken to legislate, in derogation of the authority of Congress and to encroach upon the reserved rights of the States and the people."

Does any of this sound familiar? I raise this not to suggest that any Members of this House today are segregationists, far from it. I only recall the overheated rhetoric of a half-century ago to urge Members to take care with what they support.

Unpopular minorities, and those are the people of these cases and decisions, and decisions defending the rights of unpopular minorities against the will of the majority have always inflamed passion. People have always questioned our system of checks and balances and especially the role of the independent judiciary.

Recourse through an independent judiciary is bulwark of our liberties. We recognizes this by allowing people to go to court and force the government to respect their rights. We recognize this by

allowing them to receive damages where the government has done damage.

We recognize this by ensuring, just as we have done with the Voting Rights Act, that people who can prove their rights have been violated can get attorney's fees paid, so that people with valid claims will be able to go to court.

I would remind my friends that this legislation is not limited to religious symbols in public places. This legislation applies to any violation of the establishment clause. This would include forced prayer. If government forcing your child to say a prayer of another faith is not the establishment of religion, the phrase has no meaning.

The substitute lists certain cases the authors are particularly concerned about, but it is not limited to those cases. So it still means everything is covered.

I want to lay to rest right now the red herring about veterans' gravestones. I know that many sincere people have been misled into believing the ACLU wants to use Section 1983——

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. NADLER. I ask unanimous consent for 1½ additional minutes.

Chairman SENSENBRENNER. Without objection.

Mr. NADLER. Thank you. I know that many sincere people have been misled into believing that the ACLU wants to use Section 1983 to force the removal of the religious symbols from the individual gravestones of thousands of veterans across the nation and around the world.

We received testimony from the American Legion to this effect and Members have received a great deal of mail on the subject. This assertion is a myth. If you are thinking of voting for this bill because you are concerned about national cemeteries, don't bother.

Neither the ACLU nor anyone else has ever brought such a lawsuit. As a matter of fact, I have a letter here from the ACLU taking the opposite position, that individual veterans have a first amendment right to have a religious symbol on their gravestones.

I should also remind my friends that the one kind of relief this bill leaves standing is injunctive relief, precisely the kind of relief that you are afraid of. That is the one that gives the court the power to say, "Take down the Ten Commandments monument." So if that is really what you are worried about, this bill would do absolutely nothing to stop that.

It is an election year. The months leading up to elections have long been known as a silly season. We all understand that. But getting an earmark for a bridge to nowhere or something is one thing.

Gutting the ability to have the court enforce the first amendment and saying that people who are injured, who prove that their first amendment rights under the establishment clause have been violated, should be entitled to less remedies and different remedies than those who prove their other constitutional rights have been violated is saying, in effect, that the establishment clause is less important than other rights and that is a road that we should not take.

Leave the first amendment and our civil rights laws out of it.

Chairman SENSENBRENNER. The time of the gentleman has once again expired.

The Chair recognizes the gentleman from Indiana, Mr. Hostettler, to offer an amendment in the nature of a substitute.

The clerk will report the amendment.

The CLERK. "Amendment in the nature of a substitute to H.R. 2679, offered by Mr. Hostettler of Indiana. Strike all after the enacting clause and insert the following. Section 1"——

[The amendment offered by Mr. Hostettler follows:]

AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 2679 OFFERED BY MR. HOSTETTLER OF INDIANA

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Veterans' Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006''.

SEC. 2. LIMITATIONS ON CERTAIN LAWSUITS AGAINST STATE AND LOCAL OFFICIALS.

(a) CIVIL ACTION FOR DEPRIVATION OF RIGHTS.—Section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) is amended—

(1) by inserting ''(a)'' before the first sentence; and

(2) by adding at the end the following:

''(b) The remedies with respect to a claim under this section are limited to injunctive and declaratory relief where the deprivation consists of a violation of a prohibition in the Constitution against the establishment of religion, including, but not limited to, a violation resulting from—

"(1) a veterans' memorial's containing religious words or imagery;

"(2) a public building's containing religious words or imagery;

"(3) the presence of religious words or imagery in the official seals of the several States and the political subdivisions thereof; or

"(4) the chartering of Boy Scout units by components of States and political subdivisions, and the Boy Scouts' using public buildings of States and political subdivisions.".

(b) ATTORNEY'S FEES.—Section 722(b) of the Revised Statutes of the United States (42 U.S.C. 1988(b)) is amended by adding at the end the following: "However, no fees shall be awarded under this subsection with respect to a claim described in subsection (b) of section nineteen hundred and seventy nine.".

SEC. 3. LIMITATIONS ON CERTAIN LAWSUITS AGAINST THE UNITED STATES AND FEDERAL OFFICIALS.

(a) IN GENERAL.—Notwithstanding any other provision of law, a court shall not award reasonable fees and expenses of attorneys to the prevailing party on a claim of injury consisting of the violation of a prohibition in the Constitution against the establishment of religion brought against the United States or any agency or any official

of the United States acting in his or her official capacity in any court having jurisdiction over such claim, and the remedies with respect to such a claim shall be limited to injunctive and declaratory relief.

(b) DEFINITION.—As used in this section, the term ''a claim of injury consisting of the violation of a prohibition in the Constitution against the establishment of religion'' includes, but is not limited to, a claim of injury resulting from—

(1) a veterans' memorial's containing religious words or imagery;

(2) a Federal building's containing religious words or imagery;

(3) the presence of religious words or imagery in the official seal of the United States and in its currency and official Pledge; or

(4) the chartering of Boy Scout units by components of the Armed Forces of the United States and by other public entities, and the Boy Scouts' using Department of Defense and other public installations.

SEC. 4. EFFECTIVE DATE.

This Act and the amendments made by this Act take effect on the date of the enactment of this Act and apply to any case that—

(1) is pending on such date of enactment; or

(2) is commenced on or after such date of enactment.

Amend the title so as to read: ''A bill to amend the Revised Statutes of the United States 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.''.

Chairman SENSENBRENNER. Without objection, the amendment is considered as read. And the gentleman from Indiana is recognized for 5 minutes.

Mr. HOSTETTLER. I thank the Chairman. Briefly, Mr. Chairman, at the suggestion of both majority and minority witnesses during the June 22 hearing on the Public Expression Religion Act, this amendment in the nature of a substitute would provide both injunctive and declaratory relief and would add declaratory relief, because injunctive relief was already possible under the underlying bill, as remedies in establishment clause cases under 42 USC 1983.

This amendment would also apply the same principles embodied in my original bill to establishment clause cases brought against the Federal Government. This is a necessary addition to the bill, since even the Federal Government has given in to pressure from the ACLU and stopped the Pentagon, for example, from sponsoring the Boy Scouts.

Religious words and symbols on Federal buildings are also prime targets for extortionist threats from some of these groups. My amendment in the nature of a substitute clarifies that this legislation, if signed into law, would apply to pending, as well as future cases.

I hope my colleagues support this amendment in the nature of a substitute, and yield back.

Chairman SENSENBRENNER. Are there any second-degree amendments to the amendment in the nature of a substitute?

For what purpose does the gentleman from New York, Mr. Nadler, seek recognition?

Mr. NADLER. I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. "Amendment to the amendment in the nature of a substitute to H.R. 2679 offered by Mr. Nadler. Page 1, line 17, insert 'except in a case involving religious coercion' after 'religion.' Page 3, line 4, insert 'except in a case involving religious coercion' after 'relief.'"

[The amendment offered by Mr. Nadler follows:]

Amendment to the Amendment
In the nature of a Substitute
to H.R. 2678~~9~~
Offered by Nadler

Page 1, line 17, insert ", except in a case involving religious coercion" after "religion".

Page 3, line 4, insert "except in a case involving religious coercion" after "relief".

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes in support of his amendment.

Mr. NADLER. Thank you, Mr. Chairman. This amendment would allow, would exempt, in effect, from the provisions of this bill people who were subject to religious coercion to have all the remedies available under our civil rights law.

What kind of religious coercion? For example, a teacher forcing a child to say a prayer of another faith. How about Jehovah's Witness children being expelled from school and charged with truancy for refusing to say the Pledge of Allegiance, in violation of their religious faith?

That happened, until the Supreme Court put a stop to it in the 1943 case of *Barnett v. West Virginia*. How bout firing someone from a government job because they adhered to their own faith instead of that of the boss?

We are not talking in this amendment about so-called voluntary school prayer or posting religious symbols, the Ten Commandants on the courthouse lawn or whatever. Those things don't force anyone to do anything.

We are talking here about only direct religious coercion, "Say the prayer or you are expelled from school." "Profess your boss's belief or you are fired." Now, those are, admittedly, I hope, fairly rare instances, but where they occur, there is no reason that, in those egregious cases where someone egregiously, under color of law, flouts the establishment clause to coerce somebody, that that victim should not have the right to attorney's fees and damages, like any other victim of a deprivation of civil rights under the color of law.

So I hope that this amendment will be accepted, because we are not talking about what Mr. Hostettler is talking about. We are talking only about—which I would say is bad enough—but we are talking only about direct cases of religious coercion. And I hope nobody in this Committee would justify religious coercion or say that

victims of it who prove it, that victims who prove religious coercion should get less remedies than people who prove other violations of their civil rights.

I yield back.

Mr. HOSTETTLER. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Indiana.

Mr. HOSTETTLER. Mr. Chairman, I rise in opposition to the amendment.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. HOSTETTLER. Mr. Chairman, the concept of coercion is so vague that it has been used to find even voluntary recitations of the Pledge of Allegiance——

Mr. NADLER. Mr. Chairman, I can't hear the gentleman.

Mr. HOSTETTLER. The concept of coercion is so vague that it has been used to find even voluntary recitations of the Pledge of Allegiance to be unconstitutional. For that reason, an identical amendment to the Pledge Protection Act was defeated here just a few weeks ago.

This amendment should be similarly defeated. And I would just suggest once again to the gentleman from New York that injunctive relief is still a remedy and the main remedy that is sought by most plaintiffs in these cases. And given that injunctive relief and declaratory relief are allowed under the amendment in the nature of a substitute, that if there is, in fact, coercion, that, in fact, that coercion will be stopped as a result of civil rights laws that are on the books and will not be eliminated in any way by this bill.

Mr. NADLER. Would the gentleman yield?

Mr. HOSTETTLER. I yield to the gentleman from New York.

Mr. NADLER. Thank you. Well, coercion, under this amendment, would have to—since, under the bill, attorney's fees and damages are not available, except under my amendment for coercion, it would be an element of getting attorney's fees and getting damages. You have to prove that there was, in fact, coercion. Not a vague concept, but you have to prove—the court would have to find that there was coercion. In that case——

Mr. HOSTETTLER. Reclaiming my time. As the gentleman knows, in these cases, the courts have often found that a coercive environment has been created as the result of programs that allow for the voluntary recitation of the pledge, for example.

So while the gentleman may have his idea of what the term "coercion" means, that, in fact, the term is a term that will ultimately be decided by a court and that court can still find that this coercion is inconsistent with the establishment clause in order to end the activity, which is what the plaintiff desires and what all desired in these cases.

So I would just remind the gentleman that while he may have a notion of what "coercion" is, that as he and I both don't sit on a Federal bench, that that will ultimately be left up to those judges and I would just as soon allow for that judge to stop a coercive activity or order the stopping of a coercive activity as a result of being tried in court and not the ACLU trying to coerce a local governmental entity that they know what coercion is and they know what a judge is going to call coercion and the case never sees the light of day in a Federal court.

And I yield back the balance of time.

Chairman SENSENBRENNER. The question is on——

Mr. LUNGREN. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from California, Mr. Lungren.

Mr. LUNGREN. Strike the requisite number of words.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. LUNGREN. Could I ask the gentleman from New York, in terms of the issue of coercion, there are probably two different approaches to analyzing the term "coercion." One, the Scalia approach, which is kind of straightforward what "coercion" is and I would suggest the more expansive version of coercion exemplified by Justice Kennedy's comments in the case involving the prayer. I believe it was by a rabbi that was fairly secular prayer, but he felt that it created an atmosphere of coercion as a result of psychological coercion.

I would be inclined to support the gentleman's amendment if, in some way, we were talking about what most of us would think of as the strict Scalia interpretation of coercion as opposed to the more expansive Justice Kennedy insight into it.

So I would just ask the gentleman, what is his notion of coercion, as contained in his amendment? And I yield to the gentleman.

Mr. NADLER. Thank you. My notion of coercion is as I gave the examples of the statement, probably a fairly narrower version of coercion. Of course, as Mr. Hostettler points out I am not on the Supreme Court nor are you.

But the legislative history, and, surprise, the Supreme Court looks at legislative history. Even if Scalia doesn't, most of the others do, would certainly suggest a narrower version.

Mr. LUNGREN. I appreciate it, and I reclaim my time. If I could be convinced the Supreme Court would look at this with that in mind, I would be inclined to support the gentleman's amendment, because I think he is going at exactly what we are talking about.

My fear is that with the latest review by the Supreme Court, at least Justice Kennedy, in my judgment, has expanded the notion of what coercion is.

Mr. WATT. Would the gentleman yield?

Mr. LUNGREN. Yes, I will be happy to.

Mr. WATT. I am just wondering whether either Scalia's version or Kennedy's version represents the majority of them. What was the decision in the case? That would be the definition. Was it Kennedy's opinion that prevailed or was it Scalia's opinion that prevailed?

Mr. LUNGREN. It was Kennedy's opinion, *Lee v. Weisman*, it was the one where, as I understand it, there was a general—well, there was a prayer given by someone who was a rabbi, but it was a prayer that was really not to anybody but God and it wasn't the Jewish God, the Christian God, the Muslim God, it was to God, and they found that coercive in terms of psychological coercion.

And that is the problem I have. I understand what the gentleman from New York is trying to do. I think he is probably where we would like to all be, but I think the gentleman from Indiana raises a legitimate point about how expansive this has become and

that is the quandary I am in, and I was just trying to get some clarification, if there is any way we could nail it down.

Mr. WATT. Would the gentleman yield again?

Mr. LUNGREN. Yes.

Mr. WATT. Would it help to put the word "direct" in front of "religion?" Just a thought.

Mr. LUNGREN. I understand. I am thinking. Well, I haven't resolved my own question, I am sorry. I was just trying to see if we could in some way. And I yield back the balance of my time.

Chairman SENSENBRENNER. The question is on the Nadler amendment to the Hostettler amendment in the nature of a substitute.

Those in favor will say "aye."

Opposed, "no."

The noes appear to have it.

Mr. NADLER. Record vote.

Chairman SENSENBRENNER. Record vote is requested. Those in favor of the Nadler amendment in the second-degree to the Hostettler amendment in the nature of a substitute will, as your names are called, answer, "aye"; those opposed, "no."

And the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no.

Mr. Smith?

Mr. SMITH. No.

The CLERK. Mr. Smith, no.

Mr. Gallegly?

[No response.]

The CLERK. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no.

Mr. Lungren?

Mr. LUNGREN. No.

The CLERK. Mr. Lungren, no.

Mr. Jenkins?

[No response.]

The CLERK. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no.

Mr. Bachus?

Mr. BACHUS. No.

The CLERK. Mr. Bachus, no.

Mr. Inglis?

[No response.]

The CLERK. Mr. Hostettler?

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler, no.

Mr. Green?

[No response.]

The CLERK. Mr. Keller?

[No response.]
The CLERK. Mr. Issa?
[No response.]
The CLERK. Mr. Flake?
[No response.]
The CLERK. Mr. Pence?
Mr. PENCE. No.
The CLERK. Mr. Pence, no.
Mr. Forbes?
Mr. FORBES. No.
The CLERK. Mr. Forbes, no.
Mr. King?
Mr. KING. No.
The CLERK. Mr. King, no.
Mr. Feeney?
Mr. FEENEY. Mr. Feeney, no.
Mr. Franks?
Mr. FRANKS. No.
The CLERK. Mr. Franks, no.
Mr. Gohmert?
Mr. GOHMERT. No.
The CLERK. Mr. Gohmert, no.
Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye.
Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye.
Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye.
Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye.
Ms. Lofgren?
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren, aye.
Ms. Jackson Lee?
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee, aye.
Ms. Waters?
[No response.]
The CLERK. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Mr. Weiner?
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye.

Mr. Schiff?

Mr. SCHIFF. Pass.

The CLERK. Mr. Schiff, pass.

Ms. Sánchez?

Ms. SÁNCHEZ. Aye.

The CLERK. Ms. Sánchez, aye.

Mr. Van Hollen?

[No response.]

The CLERK. Mrs. Wasserman Schultz?

Ms. WASSERMAN SCHULTZ. Aye.

The CLERK. Mrs. Wasserman Schultz, aye.

Mr. Chairman?

Chairman SENSENBRENNER. No.

The CLERK. Mr. Chairman, no.

Chairman SENSENBRENNER. Members who wish to cast or change your vote? The gentleman from Florida, Mr. Keller.

Mr. KELLER. No.

The CLERK. Mr. Keller, no.

Chairman SENSENBRENNER. The gentleman from South Carolina, Mr. Inglis.

Mr. INGLIS. No.

The CLERK. Mr. Inglis, no.

Chairman SENSENBRENNER. The gentleman from California, Mr. Schiff.

Mr. SCHIFF. Aye.

The CLERK. Mr. Schiff, aye.

Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? If not, the clerk will—the gentleman from Tennessee, Mr. Jenkins.

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no.

Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? The clerk will report.

The CLERK. Mr. Chairman, there are 10 ayes and 17 nays.

Chairman SENSENBRENNER. And the amendment is not agreed to.

Are there further second-degree amendments to the Hostettler substitute? The gentleman from Virginia, Mr. Scott, for what purpose do you seek recognition?

Mr. SCOTT. Mr. Chairman, I have an amendment at the desk, Scott No. 2.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. "Amendment to the amendment in the nature of a substitute to H.R. 2679, offered by Mr. Scott. Page 1, line 17, insert 'except in a case involving sectarian prayer conducted by a governmental official in a public school' after 'religion.' Page 3, line 4, insert 'except in a case involving sectarian prayer conducted by a government official in a public school' after 'relief.'"

[The amendment offered by Mr. Scott follows:]

Amendment to the Amendment

In the nature of a Substitute

to H.R. 2679

Offered by Scott (2)

Page 1, line 17, insert ",except in a case involving sectarian prayer conducted by a governmental official in a public school" after "religion".

Page 3, line 4, insert "except in a case involving sectarian prayer conducted by a governmental official in a public school" after "relief".

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. First, Mr. Chairman, I would ask unanimous consent that the bill number on the amendment be corrected.

Chairman SENSENBRENNER. Without objection.

Mr. SCOTT. Thank you. Mr. Chairman, my amendment would create an exception for those instances which have been clearly determined to be unconstitutional by the Supreme Court, namely, where establishment claims involve sectarian prayer conducted by a government official in a public school.

The U.S. Supreme Court has been vigilant in forbidding public schools and other agencies of government to interfere with Americans' constitutional right to follow their own consciences when it comes to religion.

In 1962, the justices ruled that official prayer had no place in public education. This decision is widely misunderstood today. The court did not rule that the students are forbidden to pray on their own. The justices merely said that government officials had no business composing a prayer for students to recite.

And the *Engels v. Vitale* case came about because parents in New York challenged a prayer written by the New York education board. Those Christian, Jewish and Unitarian parents did not want their children subjected to State-sponsored devotions. The high

court agreed that the scheme amounted to a government promotion of religion.

The following year, 1963, the Supreme Court handed down another important ruling involving public schools, in Abington Township School District, the court declared that school-sponsored Bible reading and recitation of the Lord's Prayer was unconstitutional.

It is important to remember that these decisions of the Supreme Court did not remove prayer from public school. The court removed only government-sponsored worship. The public school students always had and have a right to pray on their own.

And, also, the Supreme Court did not rule against the official prayer and Bible reading cases in public schools out of hostility to religion. Rather, the justices held that these practices were examples of unconstitutional government sponsorship of religion, violating the establishment clause.

Nothing in the 1962 or 1963 rulings makes it unlawful for public school students to pray or read the Bible or say grace over their own food on a voluntary basis. Later decisions have made this even clearer. In 1990, the high court ruled specifically that high school students may form clubs that meet during non-instructional time to pray, read religious text or discuss religious topics, if other student groups are allowed to meet.

The high court also made it clear time and time again that objective study about religion in public schools is legal and appropriate. Many public schools offer courses in comparative religion, Bible as literature or the role of religion in the world in U.S. history. As long as the approach is objective, balanced and non-devotional, these classes have been approved.

In short, public schools' approach to religion must have a legitimate educational purpose, not a devotional one. Public schools should not be in the business of preaching to students or trying to persuade them to adopt certain religious beliefs. Parents, not school officials, are responsible for overseeing a young person's religious upbringing. This is not a controversial principal. In fact, most parents would demand these basic rights.

Mr. Chairman, my amendment is narrowly drafted so it addresses only those instances when sectarian prayers are composed and recited by a government official in a public school, thereby falling into a category of government-sponsored religion, which has consistently been deemed unconstitutional by our highest court.

We shouldn't require the victims of this practice to foot the bill for correcting a clear constitutional violation. So I would urge my colleagues to support the amendment.

I yield back.

Chairman SENSENBRENNER. For what purpose does the gentleman from Indiana seek recognition?

Mr. HOSTETTLER. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. HOSTETTLER. Mr. Chairman, I rise in opposition to the amendment. Let me reiterate the purpose of the underlying legislation and the amendment in the nature of a substitute.

The amendment in the nature of a substitute, as well as the underlying bill, is not—the purpose is not to eliminate the establishment clause cases from being adjudicated. In fact, it is just the op-

posite. It will allow for more adjudication of establishment clause cases to go forward and, as a result of that, the establishment clause doctrine may be made more clearly than is the case today.

The gentleman from Virginia eloquently elaborates on all the various cases, several of the various cases that make up the jurisprudence in this area that testimony from constitutional scholars before the Subcommittee told us was one of the most unclear areas of jurisprudence that there is in constitutional law.

And so the question ultimately is for the individuals involved in the cases to take the cases to court. The gentleman's amendment is unnecessary, because as he related earlier on in his discussion of the amendment, that, for example, in 1962, prior to the enactment of the attorney's fee shifting statute put in place in 1976, the Court found that the voluntary recitation of a prayer composed by school officials was unconstitutional.

Prior to the attorney's fee shifting bill passed in 1976, the United States Supreme Court found in 1963 that the voluntary reading of scripture during a public school formal setting was a violation of the establishment clause and was ended as a result of that.

So the legislation does not end the remedies that are available to plaintiffs that wish to stop what the court ultimately deems is an unconstitutional act. But this amendment would continue the chilling effect, the demise of which is the purpose of the underlying legislation.

It is my desire that these cases actually go to court and that behind closed doors, the ACLU and others do not get the government entity, the school board, the county commissioners or whoever, to capitulate with the chilling effect of the specter of attorney's fees and damages. These cases should go to court.

This amendment offered by the gentleman from Virginia would continue this process of allowing these cases to be determined behind closed doors and not in the sunshine of the Federal courthouse and that is why I oppose the amendment and ask my colleagues likewise to oppose it.

Yield back the balance of my time.

Chairman SENSENBRENNER. The question is on the Scott amendment to the Hostettler amendment in the nature of a substitute.

Those in favor will say "aye."

Opposed, "no."

The noes appear to have it. The noes have it.

Rollcall is requested. Those in favor of the Scott amendment in the second-degree to the Hostettler amendment in the nature of a substitute will, as your names are called, answer, "aye"; those opposed, "no."

And the clerk will call the role.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no.

Mr. Smith?

Mr. SMITH. No.

The CLERK. Mr. Smith, no.

Mr. Gallegly?

[No response.]

The CLERK. Mr. Goodlatte?
[No response.]
The CLERK. Mr. Chabot?
Mr. CHABOT. No.
The CLERK. Mr. Chabot, no.
Mr. Lungren?
[No response.]
The CLERK. Mr. Jenkins?
Mr. JENKINS. No.
The CLERK. Mr. Jenkins, no.
Mr. Cannon?
Mr. CANNON. No.
The CLERK. Mr. Cannon, no.
Mr. Bachus?
Mr. BACHUS. No.
The CLERK. Mr. Bachus, no.
Mr. Inglis?
[No response.]
The CLERK. Mr. Hostettler?
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler, no.
Mr. Green?
Mr. GREEN. No.
The CLERK. Mr. Green, no.
Mr. Keller?
Mr. KELLER. No.
The CLERK. Mr. Keller, no.
Mr. Issa?
[No response.]
The CLERK. Mr. Flake?
[No response.]
The CLERK. Mr. Pence?
[No response.]
The CLERK. Mr. Forbes?
Mr. FORBES. No.
The CLERK. Mr. Forbes, no.
Mr. King?
Mr. KING. No.
The CLERK. Mr. King, no.
Mr. Feeney?
[No response.]
The CLERK. Mr. Franks?
Mr. FRANKS. No.
The CLERK. Mr. Franks, no.
Mr. Gohmert?
[No response.]
The CLERK. Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye.
Mr. Berman?
Mr. BERMAN. Aye.
The CLERK. Mr. Berman, aye.
Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?

Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye.
Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye.
Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye.
Ms. Lofgren?
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren, aye.
Ms. Jackson Lee?
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee, aye.
Ms. Waters?
[No response.]
The CLERK. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Mr. Weiner?
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye.
Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye.
Ms. Sánchez?
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez, aye.
Mr. Van Hollen?
Mr. VAN HOLLEN. Aye.
The CLERK. Mr. Van Hollen, aye.
Mrs. Wasserman Schultz?
Ms. WASSERMAN SCHULTZ. Aye.
The CLERK. Mrs. Wasserman Schultz, aye.
Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Members who wish to cast or change their vote? The gentleman from California, Mr. Issa.
Mr. ISSA. No.
The CLERK. Mr. Issa, no.
Chairman SENSENBRENNER. The gentleman from Florida, Mr. Feeney.
Mr. FEENEY. No.
The CLERK. Mr. Feeney, no.
Chairman SENSENBRENNER. The gentleman from California, Mr. Lungren.
Mr. LUNGREN. No.
The CLERK. Mr. Lungren, no.
Chairman SENSENBRENNER. The gentleman from California, Mr. Gallegly.
Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no.

Chairman SENSENBRENNER. The gentleman from Texas, Mr. Gohmert.

Mr. GOHMERT. No.

The CLERK. Mr. Gohmert, no.

Chairman SENSENBRENNER. The gentleman from South Carolina, Mr. Inglis.

Mr. INGLIS. No.

The CLERK. Mr. Inglis, no.

Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? If not, the clerk will report.

The CLERK. Mr. Chairman, there are 12 ayes and 19 nays.

Chairman SENSENBRENNER. The amendment is not agreed to.

Are there further amendments in the second-degree to the amendment in the nature of a substitute offered by the gentleman from Indiana, Mr. Hostettler?

For what purpose does the gentlewoman from Texas, Ms. Jackson Lee, seek recognition?

Ms. JACKSON LEE. Mr. Chairman, I have an amendment at the desk, No. 334, as altered.

Chairman SENSENBRENNER. The clerk will report the altered version of 334.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

The CLERK. "Amendment to the amendment in the nature of a substitute to H.R. 2679, offered by Ms. Jackson Lee of Texas. Page 2, strike lines 15 through"——

[The amendment offered by Ms. Jackson Lee follows:]

AMENDMENT TO H.R. 2679

OFFERED BY MS. JACKSON-LEE OF TEXAS

Page 2: strike lines 16 through18 and insert ''fees shall be awarded under this subsection with respect to a claim described in subsection (b) of section nineteen hundred and seventy nine to the same extent such fees are available to the prevailing party in an action based on a claim that private property has been taken without just compensation in violation of the Fifth Amendment to the United States Constitution.''.

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

The gentleman from North Carolina, does he wish to reserve a point of order?

Okay, the gentlewoman from Texas is recognized for 5 minutes.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. It has been interesting to listen to this debate and, again, it is important—several points and I guess the first would be that maybe Mr. Hostettler and myself agree at least that the freedom of expression and the freedom of speech and the freedom of religion is crucial and an imperative responsibility of this Judiciary Committee of this Congress and certainly of the Constitution.

My amendment is simple. It simply provides that attorney's fees may be awarded to a prevailing party in cases brought under the establishment clause pursuant to 42 USC 1988 to the same extent as such fees may be awarded to a prevailing party in cases as alleged and an unconstitutional taking of private property in violation of the fifth amendment to the United States Constitution.

I think the distinguished gentleman from Indiana is well aware that this Committee, in a bipartisan manner, joined in making sure that those provisions stood, one, the protection of constituents against unconstitutional taking and that attorney's fees will be granted.

We know that attorney's fees are not awarded in establishment clause cases or any other civil rights cases as a punitive measure. Rather, in any case where the government violates its citizens' civil or constitutional rights, the award of attorney's fees is reasonable compensation for the expenses of litigation awarded at the discretion of the court for having the right to have your grievance presented in a court of law.

In fact, after intensive fact-finding, Congress determined that the amount of attorney's fees awarded after review by the court are adequate to attract competent counsel, but do not produce windfalls to attorneys.

Mr. Chairman, the very basis of this bill closes the courthouse door to deserving litigants whose rights have been denied. H.R. 2679 is contrary to good public policy because it reduces enforcement of constitutional rights. It has a chilling effect on those who have been barred by the government.

It makes it exceedingly difficult for plaintiffs to avail themselves of the services of attorneys experienced and skilled in constitutional litigation and it prevents attorneys from acting in the public good.

My good friend, Mr. Nadler, recounted for us the history of the civil rights litigation. Might I just insert personal views of what happened? Many, many lawyers who go unnamed were part of the army of battlers and counsel during the civil rights era, if you will. The more well known was the NAACP legal defense fund and Thurgood Marshall. But many, many lawyers toiled in the vineyard against all odds, with no resources, representing constituents in cases that were either won or lost, those who defend Martin King and the FCLC members who were constantly incarcerated.

If these kinds of prohibitions had been completely in place, certainly, their fees were not of any great consequence. But if we do not grow in the understanding that rights of individuals were con-

tinuously denied if we did not allow them to be availed of legal counsel.

We do not, in this legislation, present ourselves in a way that allows rights to be protected. When it comes to the award of attorney's fees in taking cases or any other type of civil rights cases, we are denying that access if we deny meager minimal attorney's fees.

We should not tolerate when the protections provided by the establishment clause is at stake.

Mr. Chairman, my amendment necessarily affirms that freedom of religion is at least as important as private property. After all, what is religion if not a reflection upon the eternal and the divine and, as well, one's personal view.

Our Constitution, which is the envy of the world, each of us is free to ponder and to seek an opportunity to be protected by that Constitution and now this particular legislation denies us the protection.

My amendment presents a difficult choice between material possessions and spiritual comfort, but it is an amendment that raises the hypocritical question. Why are you taking away attorney's fees to allow someone to petition for their right to freedom of religion, why then is that more important than protecting the rights, material rights of individuals?

I would hope my colleagues would support this amendment. And I yield back my time.

Chairman SENSENBRENNER. The gentleman from Indiana, Mr. Hostettler.

Mr. HOSTETTLER. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. HOSTETTLER. Mr. Chairman, I rise in opposition to the amendment. The amendment effectively guts the bill. Under the bill now, property rights owners can, of course, receive attorney's fees when appropriate. This legislation does not eliminate attorney's fees recoupment by wronged parties.

The legislation, if I can refocus our attention, we seem to have been talking about a lot of things that have very little to do with establishment clause cases and I guess that is appropriate, given the fact that establishment clause cases have no true meaning with regard to what the court will decide from one day or another.

But this has to do with not eliminating access to our Federal court system, but by empowering access to our Federal court system. In our Subcommittee hearing, the witness for the minority essentially claimed that the attorney's fees awards need to stay in place so that these cases do not go into court.

The gentleman, Mark Stern, in testifying for the minority, said, "The end to the litigation came only after he," a particular school board member, "was safely reelected and the school newspapers began to speculate on what the attorney's fees would be if the lawsuit was successful. It is a good thing that the fee statute exists, for it serves to provide a tangible disincentive for the manipulation of the Constitution for short-term advantage of unprincipled public officials. Eliminate that disincentive, and the inevitable, perhaps the desired result would be more open defiance of well settled constitutional principle."

Well, you can't have well-settled constitutional principle if you are not allowed to go to the courthouse, and that is what this amendment would do. It would gut the bill and would continue to allow the chilling effect on establishment clause cases to be felt by individuals that have been alleged of violating the establishment clause of the Constitution.

This legislation needs to go through so that, in fact, the courthouse door can be open and that extortion and coercive measures used by some to keep these cases out of court will go to court.

But, in fact, that may be the reason why there is such opposition to this legislation and that is because these cases will actually go to court. And if they go to court, in fact, the Supreme Court may find, especially as a result of the change in the Supreme Court, most recently, with the additions of Chief Justice Roberts and Justice Alito, that many of these cases, such as the McCreary County case in Kentucky, which was found in 2005 in favor of the ACLU, in *McCreary County v. ACLU*, that these cases may be, in fact, found in the opposite situation, that, in fact, McCreary County may be able to keep their Ten Commandments in place.

But we will never know this if this sort of Damocles continues to hang over the heads of these public officials that say let's capitulate, let's not allow this case to go to court, and let's give in to what these folks want.

These cases should be allowed to go to court so that the jurisprudence can be matured and that these folks can have their day, according to the Constitution.

And I yield back the balance of my time, while I ask that Members defeat the amendment.

Chairman SENSENBRENNER. The gentlewoman from California, for what purpose do you seek recognition?

Ms. LOFGREN. To strike the last word.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. LOFGREN. I think that the amendment offered by my colleague, Ms. Jackson Lee, is fair. It simply says that fees that will be awarded under one of the amendments will be the same as another amendment. And I think to say that the first amendment is less valuable than the fifth amendment, surely, we would not want to say that as a Committee, and I would yield to the gentlelady.

Ms. JACKSON LEE. I thank the distinguished gentlelady. She has captured the essence and the intent and purpose of the amendment. And then I would also say to my colleague, who has made his argument, he is focusing on the government, I guess, the recipient of the lawsuit. He is not focusing on the petitioner.

In addition, it needs to be clarified that under the fee structure that we are speaking of, it is the proponent of the victor that gets the attorney's fees, if you prevail. And so if you prevail, you would get attorney's fees. That means, of course, that there has been a determination that you have been treated unjustly.

And, therefore, are we suggesting that what we will do is we will take away attorney's fees, so that we can block those who have been treated without justice from getting justice.

That I don't understand, particularly as sacred a right as freedom of religion and the first amendment is, freedom of expression. We hold that to be very, very sacred. And if someone is coerced or

if someone is denied their view of having a free right to participate and practice their religion, they take it to court in a fair-minded manner against any entity and they prevail, under our structure, they get attorney's fees.

I don't understand why we have made the ACLU the whipping boy, if you will, of a system of justice which we have created under the constitutional system.

I ask my colleagues to support this amendment, and I yield back.

Ms. LOFGREN. I would just say that if this amendment does not prevail, that I hope the next amendment will come from the other side to remove attorney's fees in taking cases under the fifth amendment. And I would yield back.

Chairman SENSENBRENNER. The question is on the Jackson Lee amendment in the second-degree to the amendment in the nature of a substitute by the gentleman from Indiana, Mr. Hostettler.

Those in favor will say "aye."

Those opposed will say "no."

The noes appear to have it. The noes have it, and the amendment is not agreed to.

Are there further amendments?

The Chair did not hear the gentlewoman say "aye," but we will accommodate her request. Those in favor of the Jackson Lee——

Ms. JACKSON LEE. I am in the delirious. Thank you, Mr. Chairman. I would appreciate if I could——

Chairman SENSENBRENNER. I can understand that.

The question is on the Jackson Lee amendment to the Hostettler amendment in the nature of a substitute. Those in favor will, as your names are called, answer, "aye"; opposed, "no."

And the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no.

Mr. Smith?

Mr. SMITH. No.

The CLERK. Mr. Smith, no.

Mr. Gallegly?

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no.

Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

[No response.]

The CLERK. Mr. Lungren?

Mr. LUNGREN. No.

The CLERK. Mr. Lungren, no.

Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no.

Mr. Cannon?

[No response.]

The CLERK. Mr. Bachus?

Mr. BACHUS. No.

The CLERK. Mr. Bachus, no.

Mr. Inglis?
[No response.]
The CLERK. Mr. Hostettler?
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler, no.
Mr. Green?
Mr. GREEN. No.
The CLERK. Mr. Green, no.
Mr. Keller?
Mr. KELLER. No.
The CLERK. Mr. Keller, no.
Mr. Issa?
Mr. ISSA. No.
The CLERK. Mr. Issa, no.
Mr. Flake?
Mr. FLAKE. No.
The CLERK. Mr. Flake, no.
Mr. Pence?
[No response.]
The CLERK. Mr. Forbes?
Mr. FORBES. No.
The CLERK. Mr. Forbes, no.
Mr. King?
Mr. KING. No.
The CLERK. Mr. King, no.
Mr. Feeney?
Mr. FEENEY. No.
The CLERK. Mr. Feeney, no.
Mr. Franks?
Mr. FRANKS. No.
The CLERK. Mr. Franks, no.
Mr. Gohmert?
[No response.]
The CLERK. Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye.
Mr. Berman?
Mr. BERMAN. Aye.
The CLERK. Mr. Berman, aye.
Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye.
Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye.
Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye.
Ms. Lofgren?
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren, aye.
Ms. Jackson Lee?
Ms. JACKSON LEE. Aye.

The CLERK. Ms. Jackson Lee, aye.
Ms. Waters?
[No response.]
The CLERK. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Mr. Weiner?
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye.
Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye.
Ms. Sánchez?
[No response.]
The CLERK. Mr. Van Hollen?
Mr. VAN HOLLEN. Aye.
The CLERK. Mr. Van Hollen, aye.
Mrs. Wasserman Schultz?
Ms. WASSERMAN SCHULTZ. Aye.
The CLERK. Mrs. Wasserman Schultz, aye.
Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? The gentleman from Ohio, Mr. Chabot.
Mr. CHABOT. No.
The CLERK. Mr. Chabot, no.
Chairman SENSENBRENNER. The gentleman from Utah, Mr. Cannon.
Mr. CANNON. No.
The CLERK. Mr. Cannon, no.
Chairman SENSENBRENNER. The gentleman from Texas, Mr. Gohmert.
Mr. GOHMERT. No.
The CLERK. Mr. Gohmert, no.
Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? If not, the clerk will report.
The CLERK. Mr. Chairman, there are 11 ayes and 19 nays.
Chairman SENSENBRENNER. And the amendment is not agreed to. Are there further second-degree amendments?
Mr. NADLER. Mr. Chairman?
Chairman SENSENBRENNER. The gentleman from New York, Mr. Nadler.
Mr. NADLER. Thank you. I have an amendment at the desk, the last one.
Chairman SENSENBRENNER. The clerk will report the amendment.
The CLERK. "Amendment to the amendment in the nature of a substitute to H.R. 2679, offered by Mr. Nadler. Page 1, line 17, insert 'except in a case involving declaration of an official religion' after 'religion.' Page 3, line 4, insert 'except in a case involving a declaration of an official religion' after 'relief.'"

[The amendment offered by Mr. Nadler follows:]

Amendment to the Amendment

In the nature of a Substitute

to H.R. 2678~~9~~

Offered by Nadler 2

Page 1, line 17, insert ",except in a case involving a declaration of an official religion" after "religion".

Page 3, line 4, insert "except in a case involving a declaration of an official religion" after "relief".

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman. I won't take 5 minutes.

We have had many debates in this Committee about what constitutes an establishment of religion. Let's get to the heart of the matter. I don't think anyone would argue that it would be proper for a State to enact a declaration, to enact legislation declaring an official religion.

If there is one thing we can all agree on, it is that there should not be a particular established church that receives all the legal benefits of such recognition to the exclusion and detriment of all others.

I hope that cooler heads would prevail, but there is no shortage of people in this place who like to argue that this is a Christian nation. If this bill passes, you better just hope that some other denomination doesn't mean you to say that.

Whatever people may think about monuments or graduation prayers, I hope there isn't a single Member of this Committee who would seriously argue that government should be allowed to declare an official faith and that an average citizen should not have the right to have the court right that wrong if some State or local government should be foolish enough to do so.

So this amendment simply says that if there were a case of some government unit, city, State, involving a declaration of an official

religion and if you prevailed in court that that was established religion, you could still get attorney's fees and damages, if any.

I would hope that this amendment would be obvious in its acceptability. I thank you. I yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from Indiana, Mr. Hostettler.

Mr. HOSTETTLER. Mr. Chairman, to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. HOSTETTLER. Mr. Chairman, I rise in opposition to the amendment because it is not clear to anyone what is an establishment and especially not the Supreme Court, given their determinations on two cases regarding the posting of the Ten Commandments on public property.

This is, once again, an attempt to gut the bill. The establishment clause is actually—the courts are actually saying that the States, in some cases, are going one step farther——

Mr. NADLER. Would the gentleman yield?

Mr. HOSTETTLER.—that they are, in fact, establishing a religion. And given that that jurisprudence is muddied, once again, avoiding the legal extortion that arises under that muddied understanding, even by the Supreme Court, of the establishment clause, is the basis for the bill that we are considering.

I ask my colleagues——

Mr. NADLER. Would the gentleman yield?

Mr. HOSTETTLER. I will yield to the gentleman.

Mr. NADLER. I don't think you have read the amendment. The amendment doesn't talk about the establishment of religion. It talks about a declaration of an official religion. I think if any State or city council declared that Hinduism or Methodism or whatever is the official religion, that is what we are talking about, and I can't see how you could fail to support this amendment.

Mr. HOSTETTLER. Reclaiming my time. The fact is that the courts have decided that the Ten Commandments on public property is not only a declaration of religion, but is an establishment of religion, a much more proactive part on the part of the State to impose a religious doctrine, to establish a religion.

And given the fact that the Court has said that establishment in Texas is not constituted by the Ten Commandments on public property, but that establishment is constituted as a result of the Ten Commandments on public property in Kentucky is the case, the amendment should be defeated, because the Court—because it guts the bill and it allows those individuals once more to say that the Court will probably find that a declaration of religion has been made, when, in fact, the Court may not find that a declaration of religion has been made. And that is why it should be defeated.

Mr. SCOTT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Mr. Chairman, move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, the amendment would appear to be unnecessary, because you couldn't think of a jurisdiction actually declaring a religion to be the official religion. However, I am aware

of at least one State party platform, the Texas Republican platform, that actually declares this to be a Christian nation.

And, therefore, if the legislators actually followed through on that, this amendment would actually be necessary. I would hope that we would adopt the amendment in case that happens.

I yield back.

Chairman SENSENBRENNER. The question is on agreeing to the amendment——

Mr. VAN HOLLEN. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Maryland, Mr. Van Hollen.

Mr. VAN HOLLEN. Thank you, Mr. Chairman. This is an amazing——

Chairman SENSENBRENNER. For what purpose do you——

Mr. VAN HOLLEN. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. VAN HOLLEN. This is an amazing exercise and it comes under the rubric, I understand, of the American values agenda, and I can't think of anything that turns American history on its head more than what we are working on on these piece of legislation.

If you go back to the founding of the country, the fact of the matter is so many people came here to escape religious prosecution in England. I mean, I urge all of you to read the laws in the early colonies.

People came here to escape the Church of England and its insistence that people follow the dictates of the Church of England.

Then many of the earlier settlers who came here to the colonies, although they were freed of the Anglican church, they did impose, in many of the early colonies, State religions. The first Virginia charter in 1606 established the Anglican church. Another law passed then specifically disenfranchised Catholics and enforced the expulsion within 5 days of a priest coming to the colony.

In Connecticut, congregationalism, under its famous instrument, the Saybrook Platform, became the State religion. The whole purpose of the first amendment was to address the whole issue of establishing religions and to say people are free to choose their own religions or, if they want to, to choose not to belong to any particular religion.

And here, the very language of the bill acknowledges the fact that that is what our Constitution says and, yet, we want to take away the ability of people who prevail in court. These are people who win their cases.

You may disagree with the substance of court decisions, that is a whole other debate. But the fact of the matter is they prevailed in bringing a case to defend their constitutional rights. And I would just read from the language of the bill itself. It says you are going to "limit the relief where the deprivation consists of a violation of a prohibition in the Constitution against the establishment of religion."

Now, this amendment may well gut the bill, if your intention is to say we can now have States pass laws establishing official religions. I thought that is what the whole first amendment was about, to say in this country, based on the history of the first American settlers here and their efforts to escape religious prosecution in

England and other homelands, that you are free here to choose. You can't have States passing laws establishing religion.

And, by God, if a State passes a law saying that—infringing on that right and you bring a lawsuit and the courts decide you are right—and don't forget, these are individuals bringing cases against the State. We keep talking about the power of the Federal Government and the power of State governments. They are the ones with the resources.

They are the ones with the resources. They are the ones you are saying to be—and you want to take away the right of an individual who prevails in defending their religious freedom and religious liberty to not collect any of their fees.

It is just unbelievable and it is Orwellian that this would fall under the umbrella of American values, when it is just directly contrary to the whole history of this country with respect to the issue of freedom of religion. It is unbelievable.

Thank you, Mr. Chairman.

Chairman SENSENBRENNER. Does the gentleman yield back? The gentleman yields.

The question is on the amendment to the amendment in the nature of a substitute. Those in favor will say, "aye."

Opposed, "no."

The noes appear to have it.

Rollcall will be ordered. Those in favor of the amendment to the amendment in the nature of a substitute will, as your names are called, answer, "aye"; those opposed, "no."

And the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no.

Mr. Smith?

Mr. SMITH. No.

The CLERK. Mr. Smith, no.

Mr. Gallegly?

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no.

Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no.

Mr. Lungren?

Mr. LUNGREN. No.

The CLERK. Mr. Lungren, no.

Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no.

Mr. Cannon?

[No response.]

The CLERK. Mr. Bachus?

Mr. BACHUS. No.

The CLERK. Mr. Bachus, no.

Mr. Inglis?

Mr. INGLIS. No.
The CLERK. Mr. Inglis, no.
Mr. Hostettler.
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler, no.
Mr. Green?
[No response.]
The CLERK. Mr. Keller?
Mr. KELLER. No.
The CLERK. Mr. Keller, no.
Mr. Issa?
Mr. ISSA. No.
The CLERK. Mr. Issa, no.
Mr. Flake?
Mr. FLAKE. No.
The CLERK. Mr. Flake, no.
Mr. Pence?
[No response.]
The CLERK. Mr. Forbes?
Mr. FORBES. No.
The CLERK. Mr. Forbes, no.
Mr. King?
Mr. KING. No.
The CLERK. Mr. King, no.
Mr. Feeney?
Mr. FEENEY. No.
The CLERK. Mr. Feeney, no.
Mr. Franks?
Mr. FRANKS. No.
The CLERK. Mr. Franks, no.
Mr. Gohmert?
Mr. GOHMERT. No.
The CLERK. Mr. Gohmert, no.
Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye.
Mr. Berman?
Mr. BERMAN. Aye.
The CLERK. Mr. Berman, aye.
Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye.
Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye.
Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye.
Ms. Lofgren?
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren, aye.
Ms. Jackson Lee?
Ms. JACKSON LEE. Aye.

The CLERK. Ms. Jackson Lee, aye.
Ms. Waters?
[No response.]
The CLERK. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Mr. Weiner?
[No response.]
The CLERK. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye.
Ms. Sánchez?
[No response.]
The CLERK. Mr. Van Hollen?
Mr. VAN HOLLEN. Aye.
The CLERK. Mr. Van Hollen, aye.
Mrs. Wasserman Schultz?
Ms. WASSERMAN SCHULTZ. Aye.
The CLERK. Mrs. Wasserman Schultz, aye.
Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Members who wish to cast or change their vote? The gentleman from Wisconsin, Mr. Green.
Mr. GREEN. No.
The CLERK. Mr. Green, no.
Chairman SENSENBRENNER. The gentleman from Utah, Mr. Cannon.
Mr. CANNON. No.
The CLERK. Mr. Cannon, no.
Chairman SENSENBRENNER. The gentleman from New York, Mr. Weiner.
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye.
Chairman SENSENBRENNER. The gentleman from Massachusetts, Mr. Meehan?
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan, aye.
Chairman SENSENBRENNER. Further Members who wish to cast or change their votes? If not, the clerk will report.
The CLERK. Mr. Chairman, there are 12 ayes and 20 nays.
Chairman SENSENBRENNER. And the amendment is not agreed to.
Are there further amendments to the bill?
Ms. JACKSON LEE. Mr. Chairman?
Chairman SENSENBRENNER. For what purpose does the gentlewoman from Texas, Ms. Jackson Lee, seek recognition?
Ms. JACKSON LEE. I have an amendment at the desk.
Chairman SENSENBRENNER. The clerk will report the amendment.
Ms. JACKSON LEE. It is 332, with changes.

The CLERK. "Amendment to the amendment in the nature of a substitute to H.R. 2679——

Mr. COBLE. Mr. Chairman, point of order.

The CLERK.—offered by Ms. Jackson Lee of Texas. Page 2, strike lines 12 through 17."

[The amendment offered by Ms. Jackson Lee follows:]

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AMENDMENT TO H.R. 2679 to ANS

OFFERED BY MS. JACKSON-LEE OF TEXAS

Page 2, strike lines ~~16~~ 13 through ~~18~~ 17.

Chairman SENSENBRENNER. The gentlewoman from Texas is recognized for 5 minutes.

Mr. COBLE. I will withdraw, Mr. Chairman.

Ms. JACKSON LEE. I thank the distinguished Chairman. I could capture the words of Mr. Van Hollen, who indicated a certain degree of disbelief. Again, I think it is simple to note, Mr. Chairman, that all this amendment attempts to do is to keep the courthouse door open by striking the provision that prevents attorney's fees from being rendered to those who are petitioning for their rights.

A simple question and a simple answer. Do I have the right to go into the nation's courthouses to defend against religious persecution and denial of my religious right? If that is the case, whether my religion be of many of different faiths or non-faith, it is my perspective and my right under the freedom of religion clause, the first amendment, to be able to petition the courts.

And so, this amendment strikes that section on attorney's fees, and I would ask my colleagues to support it.

I yield back.

Chairman SENSENBRENNER. The Chair is informed that there are three votes on the floor. Without objection, the Committee stands recessed until 5:45.

[The prepared statement of Mr. King follows:]

PREPARED STATEMENT OF THE HONORABLE STEVE KING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IOWA

Mr. Chairman, I urge support for H.R. 2679, the "Public Expression of Religion Act of 2005." This bill prevents American taxpayers from having to subsidize judicial activism, encouraged by liberal groups bringing establishment clause cases. Today, taxpayers are being forced to pay for the lawyers of the ACLU who demand the removal of religious text and imagery from the public square. These organizations attempt to make public policy through the courts, instead of Congress where such actions belong.

How many times will we stand silent as intolerant organizations such as the ACLU strong-arm the American people into removing cherished symbols of our nation's heritage and faith? These actions are not compelled by the Constitution or supported by the will of the people. *"To compel a man to subsidize with his taxes*

the propagation of ideas which he disbelieves and abhors is sinful and tyrannical." Thomas Jefferson said that, and contrary to the ACLU, I believe that what our founding fathers believed in and stood for is still relevant today.

American taxpayers currently have to pay for ACLU "victories." ACLU press releases, sadly I must say, tout quite a record. For example:

The County of Los Angeles was recently forced to remove a tiny cross from its official seal, symbolizing the founding of the city by missionaries. The removal of this cross is costing the county around $1 million, as it would entail changing the seal on some 90,000 uniforms, 6,000 buildings, and 12,000 county vehicles.

In San Diego, the ACLU forced the Boy Scouts out of Balboa Park because of the organizations religious beliefs, and taxpayers were required to pay $950,000 in legal fees and court costs to the ACLU.

In Barrow County, Georgia, the ACLU received $150,000 from taxpayers after a federal judge ordered the county to remove a framed copy of the Ten Commandments from a hallway in the County Courthouse.

In Redlands, California, the city council was forced into changing its official seal, but didn't have the funds to revise every symbol that contained the old seal. Now Rolands residents see blue tape covering the tiny cross on city trucks, while some firefighters have taken drills to remove the cross from their badge.

These are just a few examples of the kinds of cases the American taxpayer is forced to subsidize. Americans should not be compelled to pay the lawyers who remove historic American symbols. The Public Expression of Religion Act would stop this action. I am glad to be a co-sponsor of this bill, and I urge support for its passage.

Thank you, Mr. Chairman.

[Recess.]

Chairman SENSENBRENNER. It is now 5:45 p.m. The Committee will be in order.

The Chair notes the presence of five Members, which is not a working quorum. Without objection, the Committee stands adjourned.

[Whereupon, at 5:46 p.m., the Committee was adjourned.]

BUSINESS MEETING
(continued)
THURSDAY, SEPTEMBER 7, 2006

The Committee met, pursuant to notice, at 10:07 a.m., in Room 2141, Rayburn House Office Building, the Honorable F. James Sensenbrenner, Jr. (Chairman of the Committee) presiding.

Chairman SENSENBRENNER. The Committee will be in order. A working quorum is present.

Pursuant to notice, I call up the bill H.R. 2679, the "Public Expression of Religion Act," for purposes of markup.

When the Committee met and began consideration of this legislation on July 26, the Chair had moved that the Committee favorably recommend H.R. 2679 to the House and the bill was considered as read and open for amendment at any point.

An amendment in the nature of a substitute had been offered by the gentleman from Indiana, Mr. Hostettler, to which several second-degree amendments were offered and rejected.

When the Committee adjourned, pending was the secondary amendment offered by the gentlewoman from Texas, Ms. Jackson Lee, to the Hostettler amendment in the nature of a substitute.

The Committee will now resume consideration of the Jackson Lee amendment.

Are there any further Members who wish to speak on the amendment who have not previously been recognized?

Mr. SCOTT. Parliamentary inquiry, Mr. Chairman.

Chairman SENSENBRENNER. State your inquiry.

Mr. SCOTT. Could you state again what the pending business is?

Chairman SENSENBRENNER. The pending business is consideration of the Jackson Lee amendment, and the only Member who has been recognized on this amendment is Ms. Jackson Lee.

The question is on agreeing to the Jackson Lee amendment in the second degree, the amendment in the nature of a substitute.

All in favor will say "aye."

Opposed, "no."

The noes appear to have it. The noes have it, and the amendment in the second degree in the nature of a substitute is not agreed to.

Are there any further second-degree amendments to the Hostettler amendment in the nature of a substitute?

For what purpose does the gentleman from Virginia seek recognition?

Mr. SCOTT. Mr. Chairman, I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. "Amendment to the Hostettler amendment in the nature of a substitute to H.R. 2679, offered by Mr. Scott of Virginia. On the first page, line 13, strike 'the' and insert 'except in the case of' "——

[The amendment offered by Mr. Scott follows:]

H.L.C.

AMENDMENT TO THE HOSTETTLER AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 2679 OFFERED BY MR. SCOTT OF VIRGINIA

On the first page, line 13, strike "The" and insert "Except in a case where the court finds that the defendant knowingly obeyed a lawful order of the court, the".

Page 2, line 15, insert "except in a case where the court finds that the defendant knowingly obeyed a lawful order of the court," before "no fees".

Page 3, line 4, insert ", except in a case where the court finds that the defendant knowingly obeyed a lawful order of the court" after "relief"

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September 6, 2006 (5:29 p.m.)

Chairman SENSENBRENNER. Without objection, the amendment is considered as read and the gentleman from Virginia is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, this amendment says that, if the clerk had continued, "except in the case where the court finds that the defendant knowingly obeyed." It deals with court orders, enforcing court orders.

Mr. Chairman, my amendment seeks to provide an exception to the bill, where the establishment claims involve violation of a court order by the government.

Mr. Chairman, 30 years ago, Congress recognized the importance of passing a law to ensure that those who suffer violations of their

constitutional rights or unconstitutional discrimination will be able to obtain legal representation to vindicate their civil rights.

This bill would rescind the ability of victims whose rights have been found to have been violated under the color of law from receiving attorney's fees and costs. This means that only the most fortunate of our society will be able to enforce their civil rights and seek redress when these rights are violated.

It means less fortunate citizens can only do so if they raise enough money. When the cost of private enforcement becomes too great, there will not be any private enforcement and then our constitutional guarantees will be reduced to hollow pronouncements of the average American, because only the wealthy will be able to seek enforcement.

This is bad public policy and it creates bad precedent. Yet, the bill goes even further. The bill would defy victims whose rights have been found to have been violated under the color of law by a court and whose rights continue to be violated, even after a court order, from the ability to see remedies other than those provided for in the bill, namely, injunctive and declaratory relief.

But, clearly, if an entity violates the law in the first place and knowingly does so even after injunctive or declaratory relief has been ordered by a court, then some other remedy is necessary to enforce those rights.

Moreover, a plaintiff who is required to go to court once in order to seek relief from the initial violation and then a second time in order to bring the continued violation, which may constitute contempt of court, to the court's attention should be not required to do so at their own expense.

If the plaintiff has already won the first case, with no attorney's fees, and then the defendant doesn't comply and the plaintiff has to go back to court, that plaintiff should be eligible for appropriate remedies and attorney's fees.

The court cannot enforce its own order if it is not aware of the contempt. This bill would charge the plaintiff with the duty of bringing the contempt to the court's attention and then hit the plaintiff with the attorney's fees.

Now, that is not only poor policy, but bad precedent and it is extremely unfair. My amendment would remedy the wrong.

Mr. Chairman, I ask unanimous consent, there is a typographical error in the amendment, where it says "obeyed," on three different occasions, "it should be disobeyed."

Chairman SENSENBRENNER. Without objection.

Mr. SCOTT. I would ask unanimous consent to make that correction.

Chairman SENSENBRENNER. Without objection.

Mr. SCOTT. I yield back.

Chairman SENSENBRENNER. The gentleman from Indiana, Mr. Hostettler.

Mr. HOSTETTLER. Mr. Chairman, move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. HOSTETTLER. Mr. Chairman, I rise in opposition to the amendment. The amendment should be rejected not only because it is unnecessary, but because it invites confusion.

As written, the base bill already provides a court with the full array of means to enforce its own orders. The base text limits only "the remedies with respect to a claim under this section," namely, 42 USC 1983.

If State or local officials violate a lawful order of the court, including, for example, an injunction, the court can hold them in contempt of court. Contempt of court is a remedy available, completely separate and apart from 42 USC 1983.

Contempt of court, according to Black's Law Dictionary, is "conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment."

Depending on the nature of the violation, the officials may be held in civil or criminal contempt or court and have appropriate sanctions imposed on them, including paying the costs of the other side's attorney's fees.

This bill leaves those remedies, which are subject to slightly different rules in different State and Federal jurisdictions, untouched.

The Supreme Court discussed the power to punish for contempt in *Chambers v. NASCO*, stating that, "Courts of justice are universally acknowledged to be vested by their very creation with power to impose submissions to their lawful mandates. These powers are governed not by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."

The Court noted that a court can "impose, as part of the fine, attorney's fees representing the entire costs of the litigation." This case law remains completely untouched under this bill, which only amends two Federal statutes and leaves completely untouched current judicially applied rules governing sanctions and remedies for the violation of lawful court orders.

So this amendment is unnecessary. But beyond that, this amendment is bad policy, because it implies that Congress wants the Federal statutory rules of attorney's fees to apply in place of existing background rules already applied by State and Federal courts.

That is not the intent of this bill and this amendment should be rejected.

And I yield back.

Mr. SCOTT. Would the gentleman yield?

Mr. HOSTETTLER. Yes, yes.

Mr. SCOTT. Did I understand you to say that notwithstanding the language at the bottom of page 2, that attorney's fees in the case covered by this amendment would be available to the plaintiff?

Mr. HOSTETTLER. Reclaiming my time. Those are rules with regard to the section of the law that we are amending. They do not apply to the issue of injunctions and contempt of court citations.

The section of law that we are amending creates a statutory regime to allow for the awarding of attorney's fees, without——

Mr. SCOTT. Prohibiting the awarding of attorney's fees.

Mr. HOSTETTLER. Yes, yes. Well, it covers the statute that allows awarding it. It removes that. It does not, however, change the rules of court action to say—it allows injunctions. It continues to allow injunctions.

The legislation continues to allow the court to do that which the plaintiff seeks to have happen and that is the cessation of the ac-

tivity that is under question. It does not change the rules of the court regarding contempt.

Mr. SCOTT. Would the gentleman yield?

Mr. HOSTETTLER. Yes.

Mr. SCOTT. The language on the bottom of page 2 says that "notwithstanding other provisions of law, the court shall not award reasonable attorney's fees and expenses to attorneys to the prevailing party on a claim of injury consisting of the violation of a prohibition in the Constitution against the establishment of religion or against the United States or any agency," and so on.

It says that "the claim of injury consisting of a violation of a prohibition in the Constitution against the establishment of religion."

Mr. HOSTETTLER. Right.

Mr. SCOTT. If that is the claim and you are trying to enforce that claim, this statute says you can't get attorney's fees.

Mr. HOSTETTLER. The claim—reclaiming my——

Mr. SCOTT. The rule of courts cannot—can the rule of court overrule the statute?

Mr. HOSTETTLER. Reclaiming my time. The claim is with regard to the constitutional question. The claim is not with regard to a contempt citation.

The contempt citation is independent and the courts and the Supreme Court have held that. The contempt citation is not what is being altered here.

Mr. SCOTT. Will the gentleman yield?

Mr. HOSTETTLER. Yes, I will yield.

Mr. SCOTT. Then my amendment would not offend your version of what you think the present law is.

Mr. HOSTETTLER. No. Reclaiming my time. You say that if they disobey an order. This is unnecessary, because they can already allow for attorney's fees as a result of——

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. CONYERS. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from Michigan seek recognition?

Mr. CONYERS. I rise to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CONYERS. Because I just wanted to ask the gentleman from Indiana, the author of the bill, is it true that proponents of this amendment of yours and maybe yourself is to stop extortion by the American Civil Liberties Union and other civil rights organizations which use the threat of attorney fees to force governmental entities to remove religious symbols from public places?

And I would yield to the author for any enlightenment.

Mr. HOSTETTLER. Will you repeat the question?

Mr. CONYERS. Yes. Is it true that this legislation has been stated by its proponents that its objective is to stop extortion by the American Civil Liberties Union and other civil rights organizations which use the threat of attorney fees to force governmental entities to remove religious symbols from public places?

Mr. HOSTETTLER. If the gentleman will yield.

Mr. CONYERS. Of course.

Mr. HOSTETTLER. I am not exactly sure what all outside groups have said about the legislation.

Mr. CONYERS. But you haven't said that.

Mr. HOSTETTLER. But it is my desire—you said other civil liberties organizations. It is my desire that these cases go to court.

The situation now is that the ACLU comes in and, with this tactic, and even testimony before the Subcommittee said this, that testimony before the Committee is the desire for this statute to be in place is so the cases don't go to court, so that they can settle out of court.

And my desire is to remove this impediment to these cases actually going to court.

Mr. CONYERS. So is this description accurate that is being asserted, that the supporters of the amendment are saying about it?

Mr. HOSTETTLER. I don't know what—you will have to ask the supporters of the amendment.

Mr. CONYERS. You are not one of them?

Mr. HOSTETTLER. I am probably the prime supporter of the amendment.

Mr. CONYERS. Yes. Well, is this accurate or not? You can say "yes" or "no." It won't matter that much.

Mr. HOSTETTLER. I don't understand. Explain——

Mr. CONYERS. You don't understand the question, okay.

I yield to the gentleman from Virginia.

Mr. SCOTT. Thank you. I thank the gentleman for yielding.

As I understand the sponsor's response, the amendment would clarify present law, would be consistent with present law, and, therefore, just to make sure that people understand it, my position would be it ought to be adopted.

In addition to that, in cases like this, where you have had to go back to back to court to get somebody to enforce the law, you have not only the original violation, but continued violation.

The plaintiff has had their rights violated. You have in the bill denied any compensatory damages. The contempt of court or whatever those are would go to the court, not to the plaintiff.

And so you have allowed, throughout this entire process, continuing violations of constitutional rights, without any effective remedy, other than, after you get to court, to have them just stop.

It seems to me that at least attorney's fees ought to be clearly available the second time you have to go to court to make somebody finally obey the law.

And I would hope, Mr. Chairman, that we would adopt the amendment. And thank the gentleman for yielding.

Mr. HOSTETTLER. Will the gentleman yield?

Mr. CONYERS. I would be happy to yield.

Mr. HOSTETTLER. In your scenario, with regard to contempt of an action, what stops current processes from being in contempt and the defendant not paying the attorney's fees and being in contempt of court in that fashion today?

Mr. SCOTT. Will the gentleman yield?

Mr. CONYERS. Yes.

Mr. SCOTT. Under present law, you can get damages and attorney's fees.

Mr. HOSTETTLER. Right.

Mr. SCOTT. But not on your own dime. And this bill would require you to come forth, raise the money before you can even get the court to have them stop what may be an obvious flagrant violation.

Mr. HOSTETTLER. Will the gentleman yield?

Mr. CONYERS. Yes.

Mr. HOSTETTLER. But today, not all of these cases—for example, the most recent Supreme Court case with regard to the Ten Commandments, whereby the plaintiff, the initial plaintiff had to pay all the attorney's fees, because the case was found on the part of Governor Perry.

So you are suggesting that somehow, in the future, injunctions by the courts will be disobeyed, it still is allowed today. It is the same scenario today that individuals——

Chairman SENSENBRENNER. The time of the gentleman from Michigan has expired.

The question is on agreeing to the Scott amendment to the Hostettler amendment in the nature of a substitute.

Those in favor will say "aye."

Opposed, "no."

The noes appear to have it.

Rollcall is ordered. Those in favor of the Scott amendment in the second degree to the Hostettler amendment in the nature of a substitute will, as your names are called, answer "aye," those opposed, "no."

And the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no.

Mr. Smith?

Mr. SMITH. No.

The CLERK. Mr. Smith, no.

Mr. Gallegly?

[No response.]

Mr. Goodlatte?

[No response.]

Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no.

Mr. Lungren?

Mr. LUNGREN. No.

The CLERK. Mr. Lungren, no.

Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no.

Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no.

Mr. Bachus?

Mr. BACHUS. No.

The CLERK. Mr. Bachus, no.

Mr. Inglis?

Mr. INGLIS. No.

The CLERK. Mr. Inglis, no.
Mr. Hostettler?
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler, no.
Mr. Green?
[No response.]
Mr. Keller?
Mr. KELLER. No.
The CLERK. Mr. Keller, no.
Mr. Issa?
Mr. ISSA. No.
The CLERK. Mr. Issa, no.
Mr. Flake?
[No response.]
Mr. Pence?
[No response.]
Mr. Forbes?
Mr. FORBES. No.
The CLERK. Mr. Forbes, no.
Mr. King?
Mr. KING. No.
The CLERK. Mr. King, no.
Mr. Feeney?
Mr. FEENEY. No.
The CLERK. Mr. Feeney, no.
Mr. Franks?
Mr. FRANKS. No.
The CLERK. Mr. Franks, no.
Mr. Gohmert?
[No response.]
Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye.
Mr. Berman?
[No response.]
Mr. Boucher?
[No response.]
Mr. Nadler?
[No response.]
Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye.
Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye.
Ms. Lofgren?
[No response.]
Ms. Jackson Lee?
[No response.]
Ms. Waters?
[No response.]
Mr. Meehan?
[No response.]
Mr. Delahunt?
[No response.]

Mr. Wexler?
[No response.]
Mr. Weiner?
Mr. WEINER. Pass.
The CLERK. Mr. Weiner, pass.
Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye.
Ms. Sánchez?
[No response.]
Mr. Van Hollen?
[No response.]
Mrs. Wasserman Schultz?
[No response.]
Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Members who wish to cast or change their votes?
The gentleman from Indiana, Mr. Pence?
Mr. PENCE. No.
The CLERK. Mr. Pence, no.
Chairman SENSENBRENNER. The gentleman from New York, Mr. Weiner?
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye.
Chairman SENSENBRENNER. Further Members who wish to cast or change their vote?
If not, the clerk will report.
The CLERK. Mr. Chairman, there are five "ayes" and 17 "nays."
Chairman SENSENBRENNER. And the amendment is not agreed to.
Are there further amendments?
If there are no further amendments, the question is on agreeing to the Hostettler amendment in the nature of a substitute.
All in favor will say "aye."
Opposed, "no."
The ayes appear to have it. The ayes have it. The amendment is agreed to.
A reporting quorum is present. The question occurs on——
Mr. SCOTT. Mr. Chairman?
Chairman SENSENBRENNER. For what purpose does the gentleman from Virginia seek recognition?
Mr. SCOTT. To ask unanimous consent for a number of letters to be introduced in the record, including correspondence from the American Civil Liberties Union, the American Humanist Association, the American Jewish Committee, Americans United for Separation of Church and State, Anti-Defamation League, Baptist Joint Committee, Jewish Council for Public Affairs, Lawyers Committee for Civil Rights Under Law, Legal Momentum, National Council of Jewish Women, National Partnership for Women and Families, National Women's Law Center, People for the American Way, Secular Coalition of America, Interface Alliance, Union of Reformed Judaism, American Trial Lawyers Association, and the Leadership Conference on Civil Rights.

Chairman SENSENBRENNER. Without objection.
Mr. SCOTT. Thank you.
[The letters follow:]

WASHINGTON
LEGISLATIVE OFFICE

July 25, 2006

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KENNETH B. CLARK
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ADVISORY COUNCIL

RICHARD ZACKS
TREASURER

RE: THE PUBLIC EXPRESSION OF RELIGION ACT (H.R. 2679)

Dear Representative,

On behalf of the American Civil Liberties Union (ACLU), and its hundreds of thousands of members, activists, and fifty-three affiliates nationwide, we urge you to oppose H.R. 2679, the "Public Expression of Religion Act of 2005." This bill would bar damages and awards of attorneys' fees to prevailing parties asserting their fundamental constitutional rights in cases brought under the Establishment Clause of the First Amendment to the U.S. Constitution.[1] H.R. 2679 would limit the longstanding remedies available in cases brought under the Establishment Clause under 42 U.S.C. 1988, which provides for attorneys' fees and costs in *all* successful cases involving constitutional and civil rights violations.

H.R. 2679 Shuts the Courthouse Doors.
If this bill were to become law, Congress would, for the first time, single out one area protected by the Bill of Rights and prevent its full enforcement. The only remedy available to plaintiffs bringing Establishment Clause lawsuits would be injunctive relief. This prohibition would apply even to cases involving illegal religious coercion of public school students or blatant discrimination against particular religions.

Congress has determined that attorneys' fee awards in civil rights and constitutional cases, including Establishment Clause cases, are necessary to help prevailing parties vindicate their civil rights, and to enable vigorous enforcement of these protections. The Senate Judiciary Committee has found these fees to be "an integral part of the remedies necessary to obtain . . . compliance."[2] The Senate emphasized that "[i]f the cost of private enforcement actions becomes too great, there will be no private enforcement.

[1] The Establishment Clause of the First Amendment requires the separation of church and state. *See* U.S. CONST. amend. I, cl. 1.

[2] S. REP. NO. 94-1011, at 5 (1976), *reprinted in* 1776 U.S.C.C.A.N. 5908, 5913.

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."[3]

Unfortunately, H.R. 2679 would turn the Establishment Clause into a hollow pronouncement. Indeed, the very purpose of this bill is to make it more difficult for citizens to challenge violations of the Establishment Clause. It would require plaintiffs who have successfully proven that the government has violated their constitutional rights to pay their legal fees -- often totaling tens, if not hundreds, of thousands of dollars. Few citizens can afford to do so, but more importantly, citizens should not be required to do so where there is a finding that our government has engaged in unconstitutional behavior.

The elimination of attorneys' fees for Establishment Clause cases would deter attorneys from taking cases in which the government has violated the Constitution; thereby leaving injured parties without representation and insulating serious constitutional violations from judicial review. This effectively leaves religious minorities unable to obtain counsel in pursuit of their First Amendment rights under the Establishment Clause.

H.R. 2679 Denies Just Compensation.
Despite proponents' assertions to the contrary, attorneys' fees are not awarded in Establishment Clause cases as a punitive measure. Rather, as in any case where the government violates its citizens' civil or constitutional rights, the award of attorneys' fees is reasonable compensation for the expenses of litigation awarded at the discretion of the court. After intensive fact-finding, Congress determined that these fees "are adequate to attract competent counsel, but . . . do not produce windfalls to attorneys."[4] HR. 2679 is contrary to good public policy -- it reduces enforcement of constitutional rights; it has a chilling effect on those who have been harmed by the government; and it prevents attorneys from acting in the public's good. The award of fees in Establishment Clause cases is not a means for attorneys to receive unjust windfalls -- it is designed to assist those whose government has failed them.

H.R. 2679 Favors Enforcement of the Free Exercise Clause Over the Establishment Clause.
Among the greatest religious protections granted to American citizens are the Establishment Clause and the Free Exercise Clause.[5] The right to practice religion, or no religion at all, is among the most fundamental of the freedoms guaranteed by the Bill of Rights. Religious liberty can only truly flourish when a government protects the Free Exercise of religion while prohibiting government-sponsored endorsement, coercion and funding of religion. H.R.

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[3] *Id.* at 6.

[4] S. REP. NO. 94-1011, at 6 (1976), *reprinted in* 1776 U.S.C.C.A.N. 5908, 5913.

[5] The Free Exercise clause of the First Amendment guarantees the right to practice one's religion free of government interference. *See* U.S. CONST. amend. I, cl. 2.

2679 creates an arbitrary congressional policy in favor of the enforcement of the Free Exercise Clause, while simultaneously impeding individuals wronged by the government under the Establishment Clause.

Through the denial of attorneys' fee awards under H.R. 2679, plaintiffs will be able to afford the expense of litigation only when they are seeking to protect certain constitutional rights but not others. This bad congressional policy serves to create a dangerous double standard by favoring cases brought under the Free Exercise Clause, but severely restricting cases under the Establishment clause.

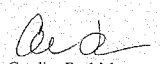
Proponents of this bill have been spreading the urban myth that religious symbols on gravestones at military cemeteries will be threatened without passage of H.R. 2679. The supposedly "threatened" religious markers on gravestones has become a red-herring – *indeed it is an urban myth* -- that has been invoked as a reason for the denial of attorneys' fees in Establishment Clause cases. It should be noted – in light of the wildly inaccurate statements that have repeatedly been made – that religious symbols on soldiers' grave markers in military cemeteries (including Arlington National Cemetery) are entirely constitutional.

Religious symbols on personal gravestones are vastly different from government-sponsored religious symbols or sectarian religious symbols on government- owned property. Gravestones and the symbols placed upon them are the choice of individual service members and their families. The ACLU would in fact vigorously defend the first amendment rights of all veteran Americans and service members to display the religious symbol of their choosing on their gravestone.

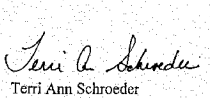
If the Constitution is to be meaningful, every American should have equal access to the federal courts to vindicate his or her fundamental constitutional rights. The ability to recover attorneys' fees in successful cases is an essential component of the enforcement of these rights, as Congress has long recognized. The bill is a direct attack on the religious freedoms of individuals, as it effectively shuts the door for redress for all suits involving the Establishment Clause. We urge members of Congress to oppose H.R. 2679.

If you have any questions, please contact Terri Schroeder, Senior Lobbyist at (202) 675-2324.

Sincerely,



Caroline Fredrickson
Director



Terri Ann Schroeder
Senior Lobbyist

AMERICAN HUMANIST ASSOCIATION

July 25, 2006

Oppose H.R. 2679, the Public Expression of Religion Act

Dear Representative,

The American Humanist Association strongly urges you to oppose the Public Expression of Religion Act of 2005 (H.R. 2679), which would bar courts from awarding attorney's fees to prevailing parties bringing suit under the Establishment Clause of the First Amendment. We urge you to vote against this bill, which would severely discourage or outlaw litigation over government practices that violate the First Amendment.

If passed, the Public Expression of Religion Act would prevent concerned citizens from exercising their constitutionally protected rights in court. The bill purports 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." However, these litigants are only awarded attorney's fees if their claims are found valid and thus unconstitutional; under current law, the "frivolous lawsuits" commonly cited in attempts to reduce attorney's fees are *not* funded by taxpayer dollars but rather are financed by the losing litigants. Further, though supporters have argued that groups such as the American Civil Liberties Union have reaped enormous compensation from such suits, the reality is that the awarding of attorney's fees is essential to maintaining a fair judicial system; these suits often involve a substantial amount of time and effort that is simply not feasible for most attorneys to undertake on a pro bono basis. The bill would actually create a far more chilling effect in its restriction of challenges to First Amendment freedoms.

If the Public Expression of Religion Act passes it will set a precedent for future restrictions on the ability to gain attorney's fees and costs for constitutional violations that are unpopular with any particular political majority at the moment. The current system does not reimburse attorney's fees for unsubstantiated cases, and it maintains the impartiality of our courts by allowing the judiciary to interpret constitutional concerns as laid out in the Constitution. Please do not allow the legislature to influence the judicial process for political gain.

Humanists are particularly concerned about this bill because it targets religious minorities and nontheists in their attempts to maintain the separation of church and state by severely reducing attorney's abilities to represent them in judicial actions. The threat of lawsuits under the Establishment Clause does not and never has had a "stifling effect" on religious practices; religion is an integral part of many Americans' lives, and we Humanists support the personal expression of religion. What we do not support, however, is governmentally sanctioned religion that infringes on our First Amendment rights. The current laws support a system of checks and balances to ensure that all Americans have the freedom to express themselves without coercion.

The AHA urges you to maintain every American's right to an impartial and accessible judicial system and vote NO on H.R. 2679.

Sincerely,

Melvin S. Lipman

Mel Lipman
AHA President

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Oppose H.R. 2679, the "Public Expression of Religion Act"

June 22, 2006

Dear Chairman Chabot and Ranking Member Nadler,

I write to you on behalf of Americans United for Separation of Church and State to share our opposition to H.R. 2679, the "Public Expression of Religion Act." Americans United represents more than 75,000 individual members throughout the fifty states and the District of Columbia, as well as cooperating clergy, houses of worship, and other religious bodies committed to preserving religious liberty. H.R. 2679 is an extreme and unwise proposal that will deter Americans from seeking to enforce in the federal courts their fundamental constitutional rights to worship freely and to make decisions about religion for themselves and their families, without interference or coercion from the government. This ill-conceived measure will also set a broader precedent for abolishing court-awarded attorney's fees in all civil-rights cases, thus undermining the system that Congress carefully wrought to ensure that those who suffer unconstitutional discrimination will be able to obtain legal representation to vindicate their civil rights. Accordingly, Americans United opposes H.R. 2679 and urges your careful deliberation on this matter.

H.R. 2679 would prohibit the federal courts from awarding reasonable attorney's fees and costs to parties who prevail in actions brought to enforce their rights under the Establishment Clause of the First Amendment to the U.S. Constitution, and it would limit the remedies available to Establishment Clause plaintiffs to injunctive relief, thus barring federal courts from awarding either damages or other equitable relief to parties who prevail on Establishment Clause claims. If passed, H.R. 2679 would thus, for the first time since the enactment of the Civil Rights Attorney's Fees Awards Act of 1976, eliminate an entire category of civil-rights claims from those for which federal courts can award attorney's fees and costs, and it would in many cases deprive plaintiffs of any effective remedy for substantial constitutional violations.

The Public Expression of Religion Act Would Substantially Impair the Ability of Americans to Enforce Their Religious-Freedom Rights under the Establishment Clause

Congress recognized the importance of the remedy of fee shifting to the enforcement of civil-rights laws when it passed the 1976 Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988:

> 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.

S. Rep. No. 94-1011, at 6 (1976). Indeed, the enactment of the fee-shifting provision was not an expansion of civil-rights plaintiffs' rights but instead was merely a codification of pre-existing practice that Congress viewed as especially important: Responding to an earlier Supreme Court ruling that courts could no longer award attorney's fees to a prevailing party unless specifically authorized to do so by federal statute (*see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975)), Congress recognized that the fee-shifting provision "creates no startling new remedy — it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorney's fees which had been going on for years." S. Rep. No. 94-1011, at 6. The "Public Expression of Religion Act" would thus eliminate an important remedy that has been recognized by statute for three decades and by court practice for far longer.

This turnabout would have a substantial effect on the ability of Americans who have suffered violations of their right to religious freedom to seek redress in the courts because they will be unable to afford counsel to represent them. Indeed, the Act would make it difficult for victims of Establishment Clause violations even to obtain representation from lawyers who might otherwise be willing to represent them *pro bono* because those lawyers would no longer be able to recoup their actual, out-of-pocket expenses — which can often total tens or even hundreds of thousands of dollars.

Although the bill's sponsors claim that the Act would "eliminate the chilling effect on the constitutionally protected expression of religion by State and local officials," few, if any, Establishment Clause plaintiffs seek to challenge personal religious expression by governmental officials. Rather, most Establishment Clause plaintiffs simply seek to ensure that government does not coerce them or their children to participate in religious activities that conflict with their own sincerely held beliefs. Many plaintiffs are like the parents in Dover, Pennsylvania, who courageously challenged a decision by their school board to require their ninth-grade students to listen in a biology class to a statement by school administrators disparaging the scientific theory of evolution and encouraging them to accept "intelligent design," a religious view of the origins of life. As one of these plaintiffs, Steven Stough, said, "I have joined this lawsuit because I believe that religious education is a personal matter whose instructional component is best reserved for home or at a church of one's choice. It is my responsibility for the direction of my daughter's religious instruction not the public high school."

But without the availability of attorney's fees, parents like Mr. Stough would not be able to afford the cost of hiring a lawyer: The court in the Dover case found that the plaintiffs were entitled to a reasonable fee award of which more than $250,000 represented the plaintiffs' attorneys' actual, out-of-pocket expenses to bring the case. Had the "Public Expression of Religion Act" been the law of the land, the parents of Dover, Pennsylvania, might well never have been able to vindicate their right to direct the religious upbringing of their children without interference by the local school board, for they simply could not have afforded the expenses for the case, much less any attorney's fees, for litigation that required the full-time commitment of a half dozen lawyers for more than a year.

And the problem is far more serious in most other cases. Although the Dover plaintiffs were represented *pro bono* by institutional civil-rights litigators and a large law firm, many Establishment Clause plaintiffs rely on lawyers who work in small private practices. Indeed, the bulk of constitutional tort litigation is brought by local, small-firm lawyers. *See* Stewart J. Schwab, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 768-69 (1988). So while large law firms and institutional civil-rights litigators may continue to represent Establishment Clause plaintiffs even in the absence of a fee-shifting statute, the majority of Establishment Clause violations will go unredressed because the small-firm lawyers who typically litigate them will be unable to afford to take the cases.

Again, the issue is not one of lawyers' profits: Just as the most well-established civil-rights organizations and largest law firms can ill afford to pay the litigation costs for major cases, so too must most small firms and solo practitioners decline to provide representation in more modest cases when they have no ability to cover the out-of-pocket expenses required even in cases where the law is clear and the civil-rights violation egregious.

Compounding the problem is the Act's limitation on the relief available to Establishment Clause plaintiffs. In most other classes of civil litigation, plaintiffs who win their cases receive money damages from the defendant and are able to use a portion of those damages to pay their lawyers. But in Establishment Clause cases, like most civil-rights cases, prevailing parties are usually entitled only to injunctive relief, not damages, and thus receive no funds from the litigation to pay their lawyers. Not content to deny Establishment Clause plaintiffs the fee-shifting protections that Congress has wisely provided, the "Public Expression of Religion Act" would eliminate the possibility of money damages even in the incredibly rare case where Establishment Clause plaintiffs might be able to show a compensable injury, thus denying them the protection of a damages remedy that is available for every other class of legally cognizable injury.

What is more, the Act would forbid federal courts from awarding prevailing Establishment Clause plaintiffs any equitable relief other than injunctive relief, leaving no remedy at all for plaintiffs who allege that the government has violated their constitutional rights by disbursing their tax dollars to fund religious activity. For when government funds have already been illegally spent, the only legal remedy available is "recoupment," or return of the funds to the government treasury. As Judge Richard Posner recently explained, the legal claim of taxpayers who complain that the government has spent money in violation of the Establishment Clause "would be moot * * * if the district court could make no order that would compensate them in whole or in part for the injury consisting of the improper expenditure." *Laskowski v. Spellings*, 443 F.3d 930, 933-34 (2006). But because those plaintiffs' injury "can be rectified simply by the restoration of the money" to the government treasury from whence it came, the court can provide "meaningful relief." *Id.* at 934. In eliminating the ability of federal courts to order this type of restitution — "a standard remedy and one ordered in public-law as well as private-law cases" (*id.*) — the "Public Expression of Religion Act" would abolish the only remedy in cases where taxpayers' tax dollars have been spent in violation of the Establishment

Clause. Further, because "[a]bsence of remedy is absence of right," (Karl N. Llewellyn, THE BRAMBLE BUSH 94 (1960)), the Act would eviscerate a bedrock constitutional principle that the framers of the Constitution considered essential to religious freedom. For "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* MADISON: WRITINGS 29, 31 (Jack N. Rakove ed., Library of Am. 1999) (1785).1

The Public Expression of Religion Act Might Perversely Lead to More Establishment Clause Litigation, Further Clogging the Dockets of the Federal Courts

The fee-shifting provision in 42 U.S.C. § 1988 levels the playing field between private citizens and the government in constitutional tort litigation by encouraging private lawyers to take meritorious cases and by increasing the potential costs of litigation to government defendants. It thus deters government from committing many egregious civil-rights violations just the way that damages remedies deter unlawful action in the ordinary run of tort and contract cases. While eliminating attorney's fees would surely reduce the number of Establishment Clause claims being brought, even in cases where the law is most clearly on the plaintiff's side, it would also ensure that those cases that are filed will be more costly and more time-consuming to litigate because the government defendants will have no incentive to settle or to mitigate the costs of litigation, but instead will view as "costless" a fight to defend even the most overt violations of individuals' rights to religious freedom, and so will clog the courts with cases that should be readily resolved.

Unlike private parties, government has virtually unlimited resources with which to litigate cases and can use those resources to drag out litigation. Indeed, government defendants in Establishment Clause cases may not have to spend even one penny of their own money on litigation if, as is becoming increasingly frequent, they are represented for free by a faith-based law firm committed to encouraging public officials to violate citizens' Establishment Clause rights. For example, the Thomas More Law Center provided free representation to the defendants in *Kitzmiller v. Dover Area School District*, leading the school board to conclude that, even though the school district's regular lawyer had warned that the district would lose the case, it should still fight a costless battle to force the school board members' preferred faith on students without regard to the students or their parents' religious beliefs. After the school district lost the case, as its lawyer warned it would, the court held that it was liable to the plaintiffs for their attorney's fees and costs. That award was essential not just because it made it possible for the Dover parents to bring the case, but because it provides a greater incentive to other school boards in the future to avoid the same wrongdoing that the Dover school board committed, or at least to settle early those cases they cannot win, rather than compounding the violations of

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1 *See also* THOMAS JEFFERSON, *A Bill for Establishing Religious Freedom*, *in* JEFFERSON: WRITINGS 346, 346 (Merrill D. Peterson ed., Library of Am. 1984) (1784) ("That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness * * *.").

parents and students' constitutional rights, and compounding costs to everyone, by fighting lost causes to the bitter end.

Just weeks after the *Kitzmiller* decision, for instance, several California parents filed an Establishment Clause challenge to their school district's decision to teach a course on intelligent design and asked a federal court to issue a temporary restraining order prohibiting the school district from offering the course. *See Hurst v. Newman*, No. 1:06-CV-00036 (C.D. Cal.). Recognizing that its actions were unlawful and that it would likely owe substantial attorney's fees and costs to the plaintiffs if it continued to fight, the school board gratefully accepted the plaintiffs' offer to waive their right to request attorney's fees in exchange for the school district canceling the unconstitutional class — a quick and amicable resolution of the case that would not have been possible if the availability of attorney's fees had not been a deterrent to the school board tying up the courts and dividing the community over its dogged but futile pursuit of a plainly unconstitutional policy.

And in Florida, the prospect of attorney's fees had a similar salutary effect: A school district was sued by parents who objected on Establishment Clause grounds to the district's decision to hold several high school graduations in a church, with students accepting their diplomas and having their commencement photos taken beneath a large cross. Although a federal district judge preliminarily found that the parents were likely to win their case on the merits, the school board initially planned to fight the case all the way through a full trial. But with the specter of a mounting bill for the parents' legal fees on the horizon, the school district ultimately thought better of that plan, promising to hold future graduations in secular locations in exchange for an agreement by the parents' attorneys to charge the district only half the fees that they had accrued up to that point. Again, but for the threat of a fee award, justice to the parents would have been delayed and judicial resources would have been squandered. Indeed, without the possibility of being liable for attorney's fees, governmental entities like the Florida and California school districts just described will have every incentive to engage in straightforwardly illegal conduct, infringing the religious freedom of the public — and most especially children, who are most likely to have their complaints about religious discrimination and coercion fall on deaf ears unless their families have recourse in the federal courts.

In Dover, the belief that fighting was costless led the school board to adopt "an imprudent and ultimately unconstitutional policy." *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 765 (M.D. Pa. 2005). Indeed, the court characterized the board's decision as one of "breathtaking inanity" and decried the school board's decision to defend the policy in court, asserting that "[t]he students, parents, and teachers of the Dover Area School District deserved better than to be dragged into this legal maelstrom, with its resulting utter waste of monetary and personal resources." *Id.* Actually making it costless for the government to defend Establishment Clause violations will reproduce that sad state of affairs everywhere.

*****

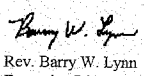
In passing the Civil Rights Attorney's Fees Awards Act, Congress recognized that rights are meaningless unless individual citizens are able to enforce them against the government:

> If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. No. 94-1011, at 2 (1975). Abolishing attorney's fees in Establishment Clause cases would not simply increase plaintiffs' cost to file these cases; it would render the Establishment Clause — a critical safeguard for religious freedom embodied in the First Amendment of the U.S. Constitution — a dead letter. As the federal courts have consistently acknowledged, the Establishment Clause works in tandem with the Free Exercise Clause to protect Americans' right to practice their religion as they choose. *See, e.g.*, *Venters v. City of Delphi*, 123 F.3d 956, 969 (7th Cir. 1997) (Free Exercise and Establishment Clauses "embody 'correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom [of religion]'") (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 40 (1947) (Rutledge, J., dissenting)). So although the avowed purpose of the "Public Expression of Religion Act" is to protect the religious expression of state and local officials, its effect would be to undermine the religious liberty of all Americans.

If you have any questions regarding this legislation or would like further information on any other issues of importance to Americans United, please contact Aaron D. Schuham, Legislative Director, at (202) 466-3234, extension 240.

Sincerely,



Rev. Barry W. Lynn
Executive Director

**PROTECT OUR CONSTITUTIONAL RIGHTS:
VOTE AGAINST H.R. 2679, PUBLIC EXPRESSION OF
RELIGION ACT OF 2005**

July 25, 2006

Dear House Judiciary Committee member:

On behalf of the Civil Rights Section of the Association of Trial Lawyers of America, we strongly urge you to vote against H.R. 2679, "Public Expression of Religion Act of 2005." This bill strikes a serious blow against the religious liberties protected under the Establishment Clause of the US Constitution and it sets a precedent for the erosion of other valued constitutional rights.

H.R. 2679 unfairly strips one set of plaintiffs - plaintiffs that bring claims of an Establishment Clause violation - of the important and longstanding civil remedies provided for under Sections 1979 and 722(b) of the Revised Statutes of the United States (42 U.S.C. 1983; 42 U.S.C. 1988(b)). As a result, the bill not only leaves religious minorities without a real means of protecting their constitutional rights, but also encourages state and local sponsored religious activities for the majority without an opportunity for adequate redress, and fosters the suppression of religious liberty for all others. At the core of our Democracy is the principle of religious freedom (i.e., separation of church and state) and the fact that the Establishment Clause forbids the government from forcing a single religious point of view on all Americans. Under the proposed legislation, however, that constitutional mandate and the foundation of our system of government are eviscerated, and religious minorities pay the price.

The current remedial scheme under H.R. 2679 of "limited to injunctive relief" simply does not work. There are countless instances when injunctive relief would not adequately remedy the harm one suffers when a state-actor imposes a religious point of view on a community. One obvious example is forced prayer in school. Once the prayer is read and an individual is harmed, there is nothing injunctive relief can do to redress that harm. In addition, the current draft of the bill does not afford additional protections to a plaintiff if the defendant state-actor breaches a court-imposed injunction. Thus, a state-actor is free from consequence if it does nothing to fulfill the injunctive relief granted and a plaintiff's harm is left without a remedy.

Not only would the remedial scheme under H.R. 2679 inadequately redress a victim's harm, but the effect of it will deter individuals from bringing causes of action for Establishment Clause violations. The proposed legislation does not permit a plaintiff to be awarded attorney's fees, even if he seeks the only civil remedy available – injunctive relief - and is successful. It is expensive to bring a

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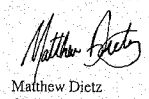
civil action against the government, so if a victim of an Establishment Clause violation is stripped of the fee-shifting provision under Section 1988(b) it is unlikely that he will even bring a claim in the first place. Moreover, the whole purpose of including a fee-shifting provision under Section 1988(b) is to provide victims with limited means an opportunity to have their day in court and protect their constitutional rights against a defendant with limitless resources.

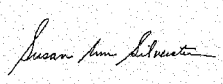
Finally, we ask that you vote against H.R. 2679, because it is a dangerous precedent. The proposed legislation would set the stage for future limitations on the remedies available for civil rights actions under Section 1983. If today we cite certain factors to distinguish the constitutional protections afforded under the Establishment Clause from other constitutional rights, it is just a matter of time before another group claims that one of the remaining constitutional rights is somehow distinguishable and proposes to subject it to limitation. The bottom line is that Section 1983 is the sole mechanism by which a citizen can protect his constitutional rights against unlawful state-action, thus it is imperative that we avoid any legislation that seeks to curtail the extent and potency of the civil actions provided for under that statute.

We strongly urge you to protect the constitutional rights of religious minorities and all Americans: oppose H.R. 2679.

Very Truly Yours,



Matthew Dietz
Civil Rights Section Chair, 2006-2007
Association of Trial Lawyers of America



Susan Ann Silverstein
Civil Rights Section Chair, 2005-2006
Association of Trial Lawyers of America

Leadership Conference on Civil Rights

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Disability Rights Education and Defense Fund, Inc.
COMPLIANCE/ENFORCEMENT COMMITTEE CHAIRPERSON
Karen K. Narasaki
Asian American Justice Center
EXECUTIVE DIRECTOR
Wade J. Henderson
(*Deceased)

June 21, 2006

Dear Judiciary Committee Member,

On behalf of the Leadership Conference on Civil Rights (LCCR), the nation's oldest, largest, and most diverse civil and human rights coalition, we urge you to oppose the "Public Expression of Religion Act of 2005" (H.R. 2679). H.R. 2679 would bar attorney's fees to parties who prevail in cases brought under the Establishment Clause of the First Amendment to the U.S. Constitution. It would also make injunctive relief the only remedy available in such cases.

H.R. 2679 is unprecedented. It would, for the first time, single out one area of constitutional protections under the Bill of Rights and prevent its full enforcement. It would greatly undermine the ability of citizens to challenge Establishment Clause violations, as legal fees often total tens or even hundreds of thousands of dollars, making it difficult to impossible for most citizens to pursue their rights without the possibility of recovering attorney's fees. In addition, because a prevailing party would not even be able to recoup court costs, it would prevent most attorneys from even taking cases on a *pro bono* basis.

By deterring attorneys from taking Establishment Clause cases, H.R. 2679 would leave many parties whose rights have been violated without legal representation. As such, it would effectively insulate serious constitutional violations from judicial review. It would become far easier for government officials to engage in illegal religious coercion of public school students or in blatant discrimination against particular religions.

If the rights guaranteed under the U.S. Constitution are to be meaningful, every American must have full and equal access to the federal courts to enforce them. The ability to recover attorney's fees in successful cases has long been an essential component of this enforcement, as Congress has recognized in the past. As such, we strongly urge you to oppose H.R. 2679.

Thank you for your consideration. If you have any questions, please contact Rob Randhava, LCCR Counsel, at 202-466-6058 or randhava@civilrights.org.

Sincerely,

Wade Henderson
Executive Director

Nancy Zirkin
Deputy Director

NCJW®

National Council of Jewish Women

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July 25, 2006

The Honorable F. James Sensenbrenner
Chairman, House Judiciary Committee
CC: All Members, House Judiciary Committee

Dear Chairman Sensenbrenner:

On behalf of the 90,000 members, volunteers, and supporters of the National Council of Jewish Women (NCJW), I am writing in opposition to the "Public Expression of Religion Act" (H R 2679). This bill would eliminate compensation of attorneys' fees for individuals who bring legal challenges under the Establishment Clause, even in cases in which they prevail. Effectively, it would prevent low-income Americans from defending their constitutional rights, reserving this protection only for those wealthy enough to afford litigation.

All Americans should have the same ability to defend their constitutionally-protected rights, regardless of economic status. Organizations that donate legal services to help those whose rights have been violated will be discouraged from this pro bono work if they cannot recoup a portion of their financial expenditures. Instead of protecting religious liberty, this bill seriously compromises it by limiting access to the courts.

For over a century, NCJW has been at the forefront of social change, raising its voice on important issues of public policy. Inspired by our Jewish values, NCJW has been, and continues to be, an advocate for religious liberty with a strong belief that the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain our democratic society.

I urge you to oppose legislation that would limit an individual's ability to defend the liberties provided by the Constitution and the Bill of Rights. Please demonstrate your reverence for those documents and the values they represent by voting against the "Public Expression of Religion Act".

Sincerely,

Phyllis Snyder

Phyllis Snyder
NCJW President

Oppose H.R. 2679, the "Public Expression of Religion Act"

June 22, 2006

Dear Representative,

We write to urge you **to oppose the "Public Expression of Religion Act of 2005" (H.R. 2679).** This bill would bar the award of attorney's fees to prevailing parties asserting their fundamental constitutional rights in cases brought under the Establishment Clause of the First Amendment to the U.S. Constitution. This bill would limit the longstanding remedies available under 42 U.S.C. 1988 (which provides for attorneys fees and costs in successful cases involving constitutional and civil rights violations) in cases brought under the Establishment Clause. If this bill were to become law, the only remedy available to plaintiffs bringing Establishment Clause lawsuits would be injunctive relief. As a result, Congress would, for the first time, single out one area of constitutional protections under the Bill of Rights and prevent its full enforcement.

Religious expression is not threatened by the enforcement of the Establishment Clause, but is protected by it. The Establishment Clause promotes religious freedom for all by protecting against government sponsorship of religion. While the signers of this letter may differ on the exact parameters of the Establishment Clause or even on the outcome of particular cases, we all believe that the Establishment Clause together with the Free Exercise Clause, protects religious freedom. The purpose of this bill, however, is to make it more difficult for citizens to challenge violations of religious freedom. But with legal fees often totaling tens — if not hundreds — of thousands of dollars, few citizens can afford to do so. Most attorneys cannot afford to take cases, even on a pro bono basis, if they are barred from recouping their fees and out-of-pocket costs if they ultimately prevail. The elimination of attorney's fees for Establishment Clause cases would deter attorneys from taking cases in which the government has violated the Constitution, thereby leaving injured parties without representation and insulating serious constitutional violations from judicial review.

This bill raises serious constitutional questions and would set a dangerous precedent for the vindication of all civil and constitutional rights. If the right to attorney's fees is taken away from plaintiffs who prove violations of the Establishment Clause, other fundamental rights are likely to be targeted in the future. What will happen when rights under the Free Exercise Clause are targeted? Can we imagine a day when citizens cannot enforce their longstanding free speech rights, or bring a case under the constitution to challenge the government's use of eminent domain to take their property, simply because they cannot hire an attorney to represent them? Surely, these and other fundamental rights might not be far behind once Congress opens the door to picking and choosing which constitutional rights it wants to protect and which ones it wants to disfavor.

If the Constitution is to be meaningful, every American should have equal access to the federal courts to vindicate his or her fundamental constitutional rights. The ability

to recover attorney's fees in successful cases is an essential component for the enforcement of these rights, as Congress has long recognized. We urge you to protect the longstanding ability of Americans to recoup their costs and fees when faced with basic constitutional violations and urge you in the strongest terms to oppose H.R. 2679.

Sincerely,

American Civil Liberties Union
American Humanist Association
American Jewish Committee
Americans United for Separation of Church and State
Anti-Defamation League
Baptist Joint Committee
Jewish Council For Public Affairs (JCPA)
Lawyers' Committee for Civil Rights Under Law
Legal Momentum
National Council of Jewish Women
National Partnership for Women & Families
National Women's Law Center
People For the American Way
Secular Coalition for America
The Interfaith Alliance
Union for Reform Judaism

The American Jewish Committee
Office of Government and International Affairs
1156 Fifteenth Street, N.W., Washington, D.C. 20005 www.ajc.org 202-785-4200 Fax 202-785-4115 E-mail ogia@ajc.org

July 25, 2006

Re: Public Expression of Religion Act of 2005 (H.R.2679)

The Honorable James Sensenbrenner
Chairman
The Honorable John Conyers, Jr.
Ranking Member
House Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman and Representative Conyers,

On behalf of the American Jewish Committee (AJC), the nation's oldest human relations organization with over 150,000 members and supporters represented by 32 regional offices, I write to express our strong opposition to the Public Expression of Religion Act of 2005 (H.R.2679).

H.R.2679 would deter citizens with legitimate grievances from defending their most basic civil rights in court by limiting long-standing remedies available under 42 U.S.C. 1988. Among other things, H.R.2679 would bar judges from ordering state or local governments to reimburse the attorney's fees of plaintiffs whose Establishment Clause rights have been proven to be violated, and would make injunctive relief the only remedy available in such cases.

Access to the federal courts is fundamental to the ability of Americans to vindicate their constitutional rights. With legal fees often totaling as much as hundreds of thousands of dollars, few victims of religious discrimination can afford to bear the costs of a lawsuit when the government violates their constitutional rights. Even blatant instances of coerced prayer in a public school or other religious discrimination will seldom be challenged in court if a single citizen must face the legal resources of a city.

Proponents of H.R.2679 argue that some municipalities currently settle out-of-court rather than risk paying attorney's fees for frivolous lawsuits. Whatever the merits of this assertion, there is no constitutional claim that may not occasionally lead to frivolous lawsuits. Moreover, at the end of the day, the courts have generally proved adept at filtering out frivolous claims at an early point in litigation, before substantial legal costs

can be incurred. Balanced against these realities is the undeniable fact that this bill would deter Americans with legitimate Establishment Clause grievances from asserting their rights in court. Further, once claims under one clause of the First Amendment have been insulated from meaningful remedy, the entire Bill of Rights is at risk.

The ability to seek appropriate remedies, including damages and attorney's fees, is crucial if citizens are to be able to vindicate their constitutional rights in court. Please protect the longstanding ability of Americans to seek damages, and to recoup costs and fees, when faced with basic constitutional violations. For the aforementioned reasons, the American Jewish Committee strongly opposes H.R.2679.

Thank you for considering our views on this important matter.

Respectfully,

Richard Foltin

Richard T. Foltin
Legislative Director and Counsel

BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY

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

September 5, 2006

Dear Representative,

The Baptist Joint Committee for Religious Liberty (BJC) urges you to vote NO on HR 2679, the so-called "Public Expression of Religion Act." 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 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 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 H.R. 2679 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 H.R. 2679. 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

June 19, 2006

Representative Steve Chabot
129 Cannon House Office Building
Washington D.C. 20515

Dear Representative Chabot:

We at the Friends Committee on National Legislation are alarmed at the introduction of H.R. 2679, the "Public Expression of Religion Act of 2005." The bill, which has been referred to the House Judiciary Committee's Subcommittee on the Constitution, would effectively deny access to the courts for individuals wishing to protect their religious rights.

As members of a minority religion whose foremothers and forefathers came to this country to escape the religious intolerance of the English government, Quakers cherish the U.S. Constitution's protections of religion from the dictates of government. The Bill of Rights was written to protect individuals, not the government or its officials. These rights are articulated and guaranteed to balance the playing field *against* government officials acting in their official capacities.

Proposing an ironic twist, H.R. 2679 would turn the "no establishment of religion" clause on its ear, protecting government officials against individuals.

Cases protesting government actions under the establishment clause rarely involve money. The object is almost always to get the school district, or the registrar's office, or some other local or state official, to carry out regulations and programs in a constitutionally sound manner, without giving preference to a particular religious view or affiliation. Because these cases usually involve no monetary damages, they do not generate funds with which to pay the lawyers.

If the "Public Expression of Religion Act" becomes law, individuals who seek to protect their First Amendment rights against the establishment of religion would be barred from collecting damages or attorneys fees. Denying attorney's fees would effectively deny access to the courts for individuals wishing to protect their religious rights.

We urge you to reject H.R. 2679 and support individual rights guaranteed by the First Amendment.

Sincerely,

Ruth Flower
Legislative Director

September 5, 2006

The Honorable F. James Sensenbrenner, Jr.
Chairman
The Honorable John Conyers, Jr.
Ranking Member
House Committee on the Judiciary
United States House of Representatives
Washington, DC 20510

Dear Chairman Sensenbrenner and Representative Conyers:

The Jewish Council for Public Affairs (JCPA) is the umbrella organization for the organized Jewish community. Our membership includes 13 national Jewish agencies and 125 Jewish Community Relations Councils. On behalf of the organized Jewish community, I urge you to oppose the "Public Expression of Religion Act of 2005" (HR 2679). As Jews, members of a religious minority in the United States, we are particularly sensitive to the relationship between religion and state in this nation.

The Public Expression of Religion Act (PERA) prevents judges from awarding attorney's fees in Establishment Clause cases. This restriction severely limits the ability of Americans to bring suit against the government or public officials when their religious liberties have been compromised. Lawsuits are very expensive. The passage of this bill would essentially prohibit all but the very wealthy from protecting their rights. Regardless of economic status, all Americans should have the ability to protect their liberties and challenge unconstitutional actions.

JCPA policy calls for a clear separation between religion and government. "In our increasingly pluralistic society, a clear division between religion and state remains the best way to preserve and promote the religious rights and liberties for all Americans, including the Jewish community." PERA compromises this separation and threatens to infringe on the rights of many Americans by making it prohibitively expensive and thus practically impossible, to challenge an official's or jurisdiction's actions.

I strongly urge you to oppose this legislation and protect the ability of millions of Americans to live in a society that respects religious freedom and liberty.

Sincerely,

Hadar Susskind
Washington Director
Jewish Council for Public Affairs

cc:

Representative Bachus
Representative Berman
Representative Boucher
Representative Cannon
Representative Chabot
Representative Colbe
Representative Delahunt
Representative Feeney
Representative Flake
Representative Forbes
Representative Gallegly
Representative Gohmer
Representative Goodblatte
Representative Green
Representative Hyde
Representative Hostettler
Representative Inglis
Representative Issa
Representative Jackson Lee
Representative Jenkins
Representative Keller
Representative King
Representative Lofgren
Representative Lungren
Representative Meehan
Representative Nadler
Representative Pence
Representative Sanchez
Representative Schiff
Representative Scott
Representative Smith
Representative Van Hollen
Representative Wasserman Schultz
Representative Waters
Representative Watt
Representative Weiner
Representative Wexler

The Rev. Dr. Gwynne M. Guibord,
Chair
Ecumenical Officer, Episcopal Diocese of Los Angeles, Los Angeles, CA
Ms. Sumeet Kaur-Bal,
Vice Chair-at-large
Entertainment Weekly, New York, NY
Mr. Marvin Chiles,
Vice Chair-at-large
The Interfaith Alliance of Oklahoma City, Oklahoma City, OK
Rabbi Jack Moline,
Vice Chair-at-large
Agudas Achim Congregation of Northern Virginia, Alexandria, VA
Mr. Alexander Forger, *Secretary*
Oak Springs Farms, LLC, New York, NY
Rabbi David Gelfand, *Treasurer*
The Jewish Center of the Hamptons, East Hampton, NY
Imam W. Mahdi Bray
Muslim American Society Freedom Foundation, Washington, DC
The Rev. Dr. Amos C. Brown
Third Baptist Church, San Francisco, CA
Rev. Dr. Joan Brown Campbell
Chautauqua Institution, Chautauqua, NY
Ms. Norma Curtis Cohen
The Interfaith Alliance of Nassau County, Manhasset, NY
The Rev. Dr. David Currie
Texas Baptists Committed, San Angelo, TX
Ms. Denise Davidoff
Former Moderator, Unitarian Universalist Association, Norwalk, CT
The Rt. Rev. Jane Holmes Dixon,
Immediate Past President
Retired Suffragan Bishop, Episcopal Diocese of Washington, Washington, DC
Mr. Arun Gandhi
Co-founder, MK Gandhi Institute for Nonviolence, Memphis, TN
Dr. Maher H. Hathout
Spokesperson, Muslim Public Affairs Council, Los Angeles, CA
The Rev. Leonard B. Jackson
Director Emeritus
First African Methodist Episcopal Church, Los Angeles, CA
Bishop Frederick C. James
Director Emeritus
The African Methodist Episcopal Church, Columbia, SC
The Rev. T. Kenjitsu Nakagaki
New York Buddhist Church, New York, NY
The Rev. Dr. Albert M. Pennybacker, *Past President*
Consultant, Religious Relationships & Public Policy, Lexington, KY
The Rev. Dr. Staccato Powell
Quest, West Chester, PA
The Rev. Gardner Taylor,
Director Emeritus, Brooklyn, NY
Mr. William P. Thompson,
Director Emeritus, LaGrange, IL
The Rev. Dr. Herbert Valentine,
Founding Chair, Philadelphia, PA
Mr. Foy Valentine,
Director Emeritus, *Dallas, TX*
The Rev. Dr. J. Philip Wogaman,
Past Chair, Washington, DC

The Interfaith Alliance
1331 H Street, NW Suite 1100
Washington, DC 20005
www.interfaithalliance.org

PROTECT THE ENFORCEMENT OF THE FIRST AMENDMENT AND THE RIGHTS OF RELIGIOUS MINORITIES: REJECT H.R. 2679

July 25, 2006

Dear Representative:

As the president of The Interfaith Alliance, I am writing to urge you to **oppose H.R. 2679, "The Public Expression of Religion Act of 2005."** The Interfaith Alliance is a nonpartisan, grassroots organization that represents more than 185,000 members. We are committed to promoting the positive and healing role of religion in public life. While we fully support the public expression of religion, we cannot support restrictions on the enforcement of the Bill of Rights which was designed to protect all Americans, regardless of their religious beliefs.

Americans of all faiths – Buddhists, Hindus, Sikhs, Muslims, Christians and Jews – and those who profess no faith – must have the right to practice their religion and raise challenges when they feel that there is a specific violation of the clause in the First Amendment which guarantees that "Congress shall make no law respecting an establishment of religion."

And when government has acted in an unconstitutional manner, citizens seeking their constitutional rights must not be required to pay the government's legal fees because that would make it difficult if not impossible for those individuals to successfully challenge the illegal behavior.

If passed, H.R. 2679 would eliminate damages and awards of attorneys' fees for individuals or groups in successful cases brought to ensure their constitutional rights under the Establishment Clause of the First Amendment to the U. S. Constitution. This would effectively prevent the full enforcement of the First Amendment's prohibition on the establishment of religion by federal, state, and local governments.

Religious freedom as guaranteed by the First Amendment includes both the Free Exercise Clause and the Establishment Clause. One without the other would render religious freedom a hollow phrase. H. R. 2679 would create a double standard with enforcement of Free Exercise cases being protected by guarantees of attorney fees but Establishment Clause cases being denied the same relief.

- MORE -

The Interfaith Alliance considers H. R. 2679 to be an attack on the religious freedoms guaranteed to every American by the Constitution. In the name of religious freedom, we urge you to oppose "The Public Expression of Religion Act of 2005." It is bad for the Constitution. It is bad for religion.

If there is anything that we at The Interfaith Alliance can do to assist you in this important matter, please do not hesitate to contact Preetmohan Singh, Senior Policy Analyst, at 202-639-6370.

Sincerely,

Welton Gaddy

Rev. Dr. C. Welton Gaddy
President, The Interfaith Alliance

Chairman SENSENBRENNER. And now the question is shall the motion to report the bill, H.R. 2679, favorably, as amended, be agreed to?

Those in favor will say "aye."

Opposed, "no."

The ayes appear to have it. The ayes have it, and the bill is reported favorably, as amended.

Without objection, the bill will be reported favorably to the House in the form of a single amendment in the nature of a substitute, incorporating the amendments adopted.

Without objection, the staff is directed to make any technical and conforming changes. And all Members will be given 2 days, as provided by the House rules, in which to submit additional dissenting, supplemental or minority views.

[Intervening business.]

[Whereupon, at 3:46 p.m., the Committee was adjourned.]

DISSENTING VIEWS

H.R. 2679, the "Public Expression of Religion Act of 2006," [PERA] undermines the ability of all Americans to seek court protection against violations of their rights under the Establishment Clause of the First Amendment of the U.S. Constitution. If passed, this legislation would, for the first time, strip our nation's oldest civil rights law, the Civil Rights Act of 1871,[1] of important remedies currently available to individuals whose religious liberty, protected by the Constitution, has been violated by the government.[2] This legislation would undermine a critical enforcement mechanism that has successfully safeguarded our liberties for more than a century.

PERA is opposed by numerous religious and civil liberties organizations including: Rev. Dr. C. Welton Gaddy, President, The Interfaith Alliance; Rev. Barry W. Lynn, Executive Director, Americans United for the Separation of Church and State; Richard Foltin, Legislative Director and Counsel, American Jewish Committee; K. Hollyn Hollman, General Counsel, Baptist Joint Committee for Religious Liberty; Wade Henderson, Executive Director, and Nancy Zirkin, Deputy Director, Leadership Conference on Civil Rights; Matthew Dietz, Chair 2006–2007, and Susan Ann Silverstein, Chair 2005–2006; Civil Rights Section, Association of Trail Lawyers of America; Phyllis Snyder, President, National Council of Jewish Women; Hadar Susskind, Washington Director, Jewish Council for Public Affairs; Ruth Flower, Legislative Director, Friends Committee on National Legislation; American Civil Liberties Union, American Humanist Association, American Jewish Committee, Americans United for the Separation of Church and State, Anti-Defamation League, Baptist Joint Committee, Jewish Council for Public Affairs, Lawyers Committee for Civil Rights under Law, Legal Momentum, National Council of Jewish Women, National Partnership for Women & Families, National Women's Law Center, People For the American Way, Secular Coalition for America, The Interfaith Alliance, Union for Reform Judaism; and, Caroline Frederickson, Director and Terri Ann Schroeder, Senior Lobbyist, American Civil Liberties Union.

For these reasons, and those discussed below, we respectfully dissent.

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[1] 42 U.S.C. 1983.

[2] "Although [§1983] has been recodified and relatively recently amended, it has not been substantially altered since 1871. It does not appear that it has been amended so as to limit the type of damages available to litigants who choose to utilize its provisions regarding particular constitutional issues." *Memorandum to the House Judiciary Committee from Kenneth R. Thomas, Legislative Attorney, American Law Division, Congressional Research Service* (July 15, 2006)(citations omitted)(On file with Committee).

A. Background

Representative John Hostettler introduced H.R. 2679, the "Public Expression of Religion Act of 2006," on May 25, 2006. This bill will limit remedies under 42 U.S.C. § 1983, and attorneys' fees under 42 U.S.C. § 1988, available to prevailing plaintiffs alleging violations of their rights guaranteed by the Establishment Clause of the Constitution.[3] An amendment in the nature of a substitute offered by Rep. Hostettler, and adopted during the Full Committee markup, expanded the coverage of the legislation to include actions against the United States. It also would permit declaratory relief, which the original bill, inexplicably, would have prohibited.[4] The sponsor's substitute also made the coverage of the bill retroactive to include cases pending on the date of enactment.

The stated intent of the legislation is to stop what its proponents have described as "extortion" by the American Civil Liberties Union, and other civil rights organizations, which allegedly use the threat of attorneys' fees to force governmental entities to remove religious symbols from public places.[5]

These fees are only awarded when a plaintiff prevails—when a court has found that a person "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 ... ."[6]

Section 1983 has been the premier enforcement mechanism for violations of constitutional rights. The establishment clause is just one of the many civil rights protected by §1983. PERA would single out a specific class of people who are attempting to protect their rights guaranteed under the Establishment Clause for different, adverse treatment under the law.

B. The Legislation Is Far Broader Than Has Been Represented

Proponents have focused on cases involving the use of religious symbols or other forms of religious expression such as the use of a cross on a city seal or the Mt. Soledad cross that was the subject of legislation passed by the House on July 19, 2006,[7] or school graduation prayers.[8]

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[3] U.S. Const. amend I. The Establishment Clause states, "Congress shall make no law respecting an establishment of religion ... ."

[4] Hostettler amendment in the nature of a substitute to H.R. 2679, §§ 2(a) and 3(a).

[5] PERA Hearing, at 6 (Statement of Rep. Hostettler).

[6] 42 U.S.C. 1983.

[7] "An Act to preserve the Mt. Soledad Veterans Memorial in San Diego, California, by providing for the immediate acquisition of the memorial by the United States." H.R. 5683 (109th Cong., 2d Session). Other potential cases are specified in the bill as reported, by adding a definition of "a claim or injury consisting of a violation of a prohibition in the Constitution against the establishment of religion" to include, but not to be limited to, cases against the United States involving religious symbols or text on veterans' memorials or federal buildings, the official seal of the United States, U.S. currency, or the pledge or allegiance, the chartering of Boy Scout units by components of the armed forces, by other public entities, or the use of public facilities by the Boy Scouts. Hostettler amendment in the nature of a substitute to H.R. 2679, § 3(b). The definition was also added to the section pertaining to cases brought under 42 U.S.C. 1983. *Id.* § 2(b).

[8] Public Expression of Religion Act, *Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary, U.S. House of Representatives, 109th Cong., 2d Session, Serial*

. THERE IS NO THREAT TO RELIGIOUS SYMBOLS ON INDIVIDUAL GRAVE MARKERS.

Some have argued that religious symbols on individual grave markers at veterans' cemeteries are also at risk. For example, Rees Lloyd, testifying on behalf of the American Legion, stated,

> 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 twenty-two 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.[11]

In fact, no one has ever challenged the validity of religious symbols on the grave markers of individual veterans, chosen by those individuals or their families. No witness, no proponent of this legislation, has been able to point to a single such case.

The ACLU has stated,

> Religious symbols on personal gravestones are vastly different from government-sponsored religious symbols or sectarian religious symbols on government- owned property. Gravestones and the symbols placed upon them are the choice of individual service members and their families. The ACLU would in fact vigorously defend the first amendment rights of all veteran Americans and service members to display the religious symbol of their choosing on their gravestone.[12]

Mr. Rees also stated that "I don't think for a minute that there is anything in the law today that will protect us from such suits by terrorists or their sympathizers and their right to get attorney fees because you can't give it to the ACLU and deny it to Osama bin Laden."[13] Granting, arguendo, the impossible proposition that Osama bin Laden might seek to bring a §1983 action in Federal Court, were Congress to take this argument seriously, it would have to revoke every legal right or benefit to avoid the possibility that a terrorist, or a terrorist sympathizer, might also make use of that benefit.

D. VETERANS' ORGANIZATIONS DO NOT RISK PAYING FEE AWARDS IF THEY INTERVENE IN ESTABLISHMENT CLAUSE CASES.

In his testimony, Mr. Lloyd stated that he advises his clients in the American Legion to refrain from filing briefs as amici curiae, or lobbying local elected officials, "because of the threat of attorney fees being imposed, including on us if we have the audacity to in-

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No. 109–118 at 4–5 (June 22, 2006) (Statement of Representative. Hostettler) (Hereinafter "PERA Hearing).

[11] PERA Hearing, at (Testimony of Rees Lloyd).

[12] Letter to Memebers of the House of Representatives from Caroline Fredrickson and Terri Ann Schroeder (July 24, 2006).

[13] PERA Hearing at 164.

tervene in such cases and fight the ACLU in protection of our veterans memorials because we run the risk because we run the risk then of having those fees shifted to us."[14] As Marc Stern explained,

> 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 F3d 1281, 1288 (9th Cir. 2004), citing *Independent Flight Attendants* v. *Zipes*, 491 U.S. 761 (1989). Zipes also holds that fee shifting statues should be read in uniform fashion, such that §1988 would generally not permit intervenor liability.[15]

We are concerned not only that Congress might legislate based on a flawed reading of the law, but that members of the American Legion may refrain from asserting their views in court on matters of importance to their members in the mistaken belief that they face large penalties if the other side prevails.

E. ATTACK ON THE ESTABLISHMENT CLAUSE

Much of the testimony, and statements from the proponents, takes issue, not with the §1983, or with longstanding remedies available under §1988, but rather with the law of the Establishment Clause itself. While Members are certainly free to disagree with the interpretations of the Constitution by the courts, we believe it is inappropriate to cut off access to the courts, or remedies for people who have been found by the courts to have had their legal rights violated.

For example, Mathew Staver told the Committee that "Establishment Clause jurisprudence is the most unpredictable and confusing area of the law. There have been and remain sharp differences between the Justices of the United States Supreme Court and lower court judges over the meaning of the Establishment Clause."[16]

Representative Hostettler cited a letter to public educators in Indiana from the Indiana Civil Liberties Union, which threatened legal action if they held prayers at graduations, in violation of clear and unambiguous Supreme Court precedent announced only the year before the ICLU letter was written.[17]

F. AWARDS OF ATTORNEYS' FEES IN CIVIL RIGHTS CASES ARE A VITAL TOOL IN CIVIL RIGHTS ENFORCEMENT

Federal civil rights laws, including the "Civil Rights Attorney's Fees Awards Act of 1976," permit awards of attorneys" fees.[18]

H.R. 2679 will bar the awarding of fees, as well as monetary damages, only in cases where the prevailing party had demonstrated a violation of § 1983 only with respect to the Establishment Clause of the First Amendment.

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[14] Id. at 11.

[15] Letter from Marc D. Stern, Assistant Executive Director, American Jewish Congress, to Sen Sam Brownback (August 8, 2006).

[16] PERA Hearing, at 36 (testimony of Mathew Staver).

[17] PERA Hearing, at 4–5 (statement of Representative Hostettler). *Lee* v. *Weisman,* 505 U.S. 577 (1992). Representative Scott offered an amendment to except from the bill's restrictions cases involving sectarian prayer conducted by a governmental official in a public school. The amendment was rejected on a strict party-line vote.

[18] 42 U.S.C. § 1988(b), provides:

Ironically, this Committee crafted, and the President signed, legislation reauthorizing the Voting Rights Act which expanded the attorneys' fees provision of that statute to include "reasonable expert fees, and other reasonable litigation expenses." [19]

This Committee's Report noted,

> In amending Section 14 of the VRA to explicitly include the recovery of expert costs as part of attorneys fees, the Committee seeks to update the Voting Rights Act of 1965 to comport with other Federal civil rights laws. Early in 1991, the Supreme Court held in *West Virginia Hospitals, Inc.* v. *Casey* that 'Fees for services rendered by experts in civil rights litigation may not be shifted to the losing party as part of 'a reasonable attorneys fee' under Sec. 1988.' Later that same year, Congress 'amended the Civil Rights Act of 1964 to strengthen and improve Federal civil rights laws,' including providing for the recovery of expert fees as part of attorneys fees. In amending the Civil Rights Act of 1964, Congress specifically 'recognized that evidence from one or more expert witnesses is critical to trying an employment discrimination case.' The Committee finds the same to be true in the context of voting discrimination cases pursued under the relevant provisions of the VRA. The Committee received substantial testimony indicating that much of the burden associated with either proving or defending a Section 2 vote dilution claim is established by information that only an expert can prepare. *In harmonizing the Voting Rights Act of 1965 with other Federal civil rights laws, the Committee also seeks to ensure that those minority voters who have been victimized by continued acts of discrimination are made whole.*[20]

Fees and damages are also necessary in cases where an injunction would be an inadequate form of relief, because the violation is not ongoing. In cases, such as the Mt. Soledad case (which was decided under California law), where the government resisted enforcement of the court's ruling for 15 years, fees and damages help to ensure that governmental officials do not flout the law.[21] Contempt of court citations may penalize recalcitrant officials, but they in no way make the plaintiffs whole, nor do they assist those private parties in pursing the enforcement of their rights under the Constitution.

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[19] H.R. 9, § 6(105th Cong.) The "Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006," amending § 14(e) of the Voting Rights Act of 1965 (42 U.S.C. 19731(e)).

"In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 40302 of the Violence Against Women Act of 1994, 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."

[20] H. Rpt. 109–478, at 64–65 (2006) (emphasis added) (citations omitted).

[21] PERA Hearing at 167 (testimony of Marc Stern).

CONCLUSION

The Establishment Clause of the Constitution has long been a source of strong and heartfelt disagreement. These disagreements can, at times, get extremely emotional. Whatever form these disagreements take, we do not believe that dismantling our nation's oldest civil rights law is an appropriate course of action.

The Civil Rights Acts have been to important a tool in protecting the fundamental liberties for which this nation has always stood. We believe it would be a mistake, and a dangerous precedent, to begin the process of dismantling those laws.

For these reasons, we respectfully dissent.

DESCRIPTION OF AMENDMENTS OFFERED BY DEMOCRATIC MEMBERS

1. Amendment offered by Representative Jerrold Nadler (#2)

Description of amendment: The Nadler amendment sought to except from the bill's restrictions on relief and fees cases involving religious coercion.

The amendment was defeated by a vote of 10 to 17. Ayes: Representatives CONYERS, NADLER, SCOTT, WATT, LOFGREN, JACKSON LEE, WEINER, SCHIFF, SANCHEZ, and WASSERMAN SCHULTZ. Nays: Representatives COBLE, SMITH, CHABOT, LUNGREN, JENKINS, CANNON, BACHUS, INGLIS, HOSTETTLER, KELLER, PENCE, FORBES, KING, FEENEY, FRANKS, GOHMERT, and SENSENBRENNER.

2. Amendment offered by Representative SCOTT (#3)

Description of amendment: The Scott amendment sought to except from the bill's restrictions cases involving sectarian prayer conducted by a governmental official in a public school.

The amendment was defeated by a vote of 12 to 19. Ayes: Representatives CONYERS, BERMAN, NADLER, SCOTT, WATT, LOFGREN, JACKSON LEE, WEINER, SCHIFF, SANCHEZ, VAN HOLLEN, and WASSERMAN SCHULTZ. Nays: Representatives COBLE, SMITH, GALLEGLY, CHABOT, LUNGREN, JENKINS, CANNON, BACHUS, INGLIS, HOSTETTLER, GREEN, KELLER, ISSA, FORBES, KING, FEENEY, FRANKS, GOHMERT, and SENSENBRENNER.

3. Amendment offered by Representative JACKSON LEE (#4)

Description of amendment: Representative JACKSON LEE's amendment sought to allow attorneys' fees in cases alleging violations of the Establishment Clause to the same extent that such fees would be permitted in an action alleging the taking of private property without just compensation in violation of the Fifth Amendment.

The amendment was defeated by a vote of 11 to 19. Ayes: Representatives CONYERS, BERMAN, NADLER, SCOTT, WATT, LOFGREN, JACKSON LEE, *Weiner*, SCHIFF, VAN HOLLEN, and WASSERMAN SCHULTZ. Nays: Representatives COBLE, SMITH, GALLEGLY, CHABOT, LUNGREN, JENKINS, CANNON, BACHUS, HOSTETTLER, GREEN, KELLER, ISSA, FLAKE, FORBES, KING, FEENEY, FRANKS, GOHMERT, and SENSENBRENNER.

4. Amendment offered by Representative NADLER (#5)

Description of amendment: The Nadler amendment sought to except from the bill's restrictions cases involving a declaration of an official religion."

The amendment was defeated by a vote of 12 to 20. Ayes: Representatives CONYERS, BERMAN, NADLER, SCOTT, WATT, LOFGREN, JACKSON LEE, MEEHAN, WEINER, SCHIFF, VAN HOLLEN, and WASSERMAN SCHULTZ. Nays: Representatives COBLE, SMITH, GALLEGLY, CHABOT, LUNGREN, JENKINS, CANNON, BACHUS, INGLIS, HOSTETTLER, GREEN, KELLER, ISSA, FLAKE, FORBES, KING, FEENEY, FRANKS, GOHMERT, and SENSENBRENNER.

5. Amendment offered by Representative JACKSON LEE (#6)

Description of amendment: Ms. Jackson Lee's amendment sought to restore prevailing plantiff attorney's fees.

The amendment was defeated by a voice vote.

6. Amendment offered by Representative SCOTT (#7)

Description of amendment: Mr. Scott's amendment sought to provide an exception to the bill, where the establishment claims involve violation of a court order by the government.

The amendment was defeated by a vote of 5 to 17. Ayes: Representatives CONYERS, SCOTT, WATT, WEINER, and SCHIFF. Nays: Representatives COBLE, SMITH, CHABOT, LUNGREN, JENKINS, CANNON, BACHUS, INGLIS, HOSTETTLER, KELLER, ISSA, PENCE, FORBES, KING, FEENEY, FRANKS, and SENSENBRENNER.

JOHN CONYERS JR.
BOBBY SCOTT.
MAXINE WATERS.
BILL DELAHUNT.
LINDA T. SANCHEZ.
DEBBIE WASERMAN SCHULTZ.
JERROLD NADLER.
MELVIN L. WATT.
SHEILA JACKSON LEE.
ROBERT WEXLER.
CHRIS VAN HOLLEN.

○