106TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
106–31

AMENDING THE FAIR LABOR STANDARDS ACT OF 1938 TO PERMIT CERTAIN YOUTH TO PERFORM CERTAIN WORK WITH WOOD PRODUCTS

FEBRUARY 24, 1999.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. GOODLING, from the Committee on Education and the Workforce, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany H.R. 221]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 221) to amend the Fair Labor Standards Act of 1938 to permit certain youth to perform certain work with wood products, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE

The purpose of H.R. 221 is to amend the Fair Labor Standards Act of 1938 to allow certain youth to be employed under certain conditions in businesses where machinery is used to process wood products.

COMMITTEE ACTION

106TH CONGRESS

Representative Joseph R. Pitts introduced H.R. 221, along with 13 cosponsors, on January 6, 1999. The Committee on Education and the Workforce favorably reported the bill, without amendment, by voice vote, on February 10, 1999.

69–006

105TH CONGRESS

The Subcommittee on Workforce Protections held a hearing on April 21, 1998, on the effect of the Fair Labor Standards Act on Amish families. The following individuals testified at the hearing: the Honorable Joseph R. Pitts, Member of Congress, representing the 16th District of Pennsylvania; Mr. Christ Blank, Chairman of the Old Order Amish Steering Committee—National, Kinzers, Pennsylvania; and Mr. William Burkholder, owner of a sawmill, Centerville, Pennsylvania. Representative Pitts introduced H.R. 4257, with eight cosponsors, on July 16, 1998. On July 22, 1998, the Committee on Education and the Workforce ordered H.R. 4257 favorably reported, as amended, by voice vote. The House passed the bill, with an amendment in the nature of a substitute, by voice vote under suspension of the rules on September 28, 1998. The Senate took no action on the bill prior to the adjournment of the 105th Congress.

COMMITTEE STATEMENT AND VIEWS

BACKGROUND

The Fair Labor Standards Act of 1938 [1] (FLSA) restricts the employment of persons under the age of 18. The FLSA's restriction on child labor is very general: "No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce." [2] "Oppressive child labor" is defined as any employment in mining or manufacturing or "in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children * * * or detrimental to their health or well-being. * * *" [3] The Department of Labor has issued a series of "Hazardous Occupation Orders" which further delineate what constitutes "oppressive child labor" under the FLSA.[4]

Over the years, Congress has enacted a number of exceptions to the general restrictions on child labor in the FLSA and the Hazardous Occupation Orders. These exceptions address specific occupations and permit persons under the age of 18 to work in circumstances that would otherwise be prohibited. For example, the FLSA has been amended to allow persons under the age of 18 certain employment in agriculture [5] and newspaper delivery.[6] In 1996, the FLSA was amended to allow 16- or 17-year-old employees to work around certain scrap paper balers and compactors so long as those employees are not operating the baler or compactor and certain other precautions are taken.[7] In 1998, restrictions under the Department of Labor's Hazardous Occupation Order on the driving of motor vehicles by 17-year-old employees were amended by Public Law 105–334.

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[1] 29 U.S.C. § 201–219.
[2] 29 U.S.C. § 212(c).
[3] 29 U.S.C. § 203(l)(1) and (2).
[4] 29 C.F.R. § 570.50–570.68.
[5] 29 U.S.C. § 213(c).
[6] 29 U.S.C. § 213(d).
[7] 29 U.S.C. § 213(c)(5).

With regard to sawmills and places of employment with woodworking equipment, the FLSA prohibits any person under the age of 16 from working in manufacturing,[8] which the Department of Labor has determined includes sawmills and woodworking. In addition, Hazardous Occupation Order No. 4 (HO 4)[9] prohibits any 16- or 17-year-old from doing any work in a sawmill building, the log pond area, and the log storage yard. Outside of those areas, 16- or 17-year-olds may perform clerical and certain clean-up activities. Hazardous Order No. 5 (HO 5)[10] prohibits 16- or 17-year-olds from operating, assisting to operate, setting up, adjusting, repairing, oiling or cleaning power-driven woodworking machines. Woodworking machines are any fixed or portable power-driven machines that are used or designed for cutting wood or veneer.

The Department of Labor does currently permit an exception to the prohibition on working with woodworking machines for apprentices or student-learners, provided they are employed under specific conditions. An apprentice must be employed in a craft recognized as an apprenticeable trade that is registered with the Bureau of Apprenticeship and Training (BAT) at the Department of Labor or with a State agency approved by BAT. Student-learners must be enrolled in a course of study and training in a vocational training program sanctioned and monitored by the State.

The need for H.R. 221 grew out of a series of enforcement actions which the Department of Labor began initiating in 1996 against members of the Amish community for employing persons under the age of 18 in sawmills and small woodworking shops. As a result of these enforcement actions, several Amish shop owners and sawmill operators were assessed fines of several thousands of dollars. The enforcement actions also ended many of the employment opportunities for Amish youth under the age of 18.[11]

In the Amish community, youth conclude their formal education with the eighth grade and then progress to informal, hands-on education, working with their families to acquire vocational experience and practical skills in areas such as farming and carpentry. As Mr. Christ K. Blank, Chairman of the Old Order Amish Steering Committee—National, related to the Subcommittee on Workforce Protections in April 1998:[12]

> Typically, the Amish youth leave school at the end of the eighth grade, but their education does not stop there. Instead, they only begin to absorb in earnest, the knowledge and skills needed to earn a livelihood and support a family. Upon completion of the eight terms of elementary school, many Amish children are enrolled in an informal vocation class of learning by doing under parent and church supervision to further prepare them to enter into the adult work place. This informal vocational class is recognized by the United States Supreme Court ruling in

[8] 29 U.S.C. § 203(l).
[9] 29 C.F.R. § 570.54.
[10] 29 C.F.R. § 570.55.
[11] Hearing on the Effect of the Fair Labor Standards Act of 1938 on Amish Families before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, 105th Congress, Second Session, Serial No. 105–94, p. 6–10.
[12] Ibid.

Wisconsin v. *Yoder*, as an alternative to the compulsory school attendance laws.

Formal high school education beyond the eighth grade is contrary to Amish beliefs, which require school age children to learn by doing the skills directly relevant to their role as an adult in the Amish community. Mr. Blank described this aspect of the Amish culture to the Subcommittee: [13]

> At age 14, an Amish boy or girl is considered to be ready for a full course of training. A training that requires "learning by doing." This adolescent period is of utmost importance to our religious status. We must not tolerate idleness during these adolescent years, therefore we see a dire need that our youth learn a trade or remain occupied, preferably under supervision of a parent or church member. It is a long-standing Amish belief and tradition to instill good work ethics in our children at a young age and to start training a child at a fairly young age to become a self-supporting, respectful and law-abiding citizen. * * * We strongly believe the ages 14 through 17 to be a very tender receptive age in which to instill these long-standing Amish values and work ethics in our children. We believe that forced idleness in this age to be detrimental to our long-standing Amish way of raising our children and teaching them to become good productive citizens.

In the past, conflict between the Amish belief and practice of ending formal education at age 14 and thereafter undertaking "learning by doing," and the federal child labor laws which prohibit or restrict many types of employment by persons under the age of 18 was minimized by the Amish community's reliance on farming and agriculture as the primary vocation. As mentioned above, the FLSA includes provisions specific to agriculture relating to the employment of persons under the age of 18, which are less restrictive than those that would otherwise apply, particularly for work on family farms. Economic pressures over the years, including the rising cost of land, have forced many Amish families out of agricultural occupations. The need to generate income to purchase land and pay taxes and medical bills has forced more and more Amish families into other non-agricultural occupations such as woodworking and carpentry. Mr. Blank described these changes to the Subcommittee: [14]

> We recognize that, historically, the Child Labor laws have been more lenient on farm labor, especially a family farm. For many years our livelihood was based largely on agriculture and for many still is. However, due to many reasons beyond our control, the trend is gradually forcing more and more of our youth to learn other trades. We try to encourage an occupation where such youth is learning by doing by working at a place where his father or a member of the church is available to supervise him.

[13] Ibid.
[14] Ibid.

> Due to the high cost of our dwindling supply of farm land, more and more of our families are being forced to start small businesses such as woodworking shops, welding shops, sawmills, pallet shops, etc. This is in keeping with the Amish tradition of operating a family business so the family can work together.

The current child labor laws thus directly and significantly interfere with the ability of Amish families to carry out an important part of their beliefs, culture and lifestyle. The Amish belief that formal education should end at the age of 14 and that Amish youth should thereafter "learn by doing" is effectively undermined when these young people are prevented by federal labor law from being trained at that age in the workplaces and occupations that are most available to them within the Amish community.

Members of Congress and representatives of the Amish community have attempted to work with the Department of Labor to find a solution to the conflict between the child labor restrictions under the FLSA and the needs of the Amish to carry out their religious beliefs and lifestyle. Members of Congress met on several occasions with officials of the Department of Labor to request assistance in reaching a practical solution to the problem.[15] The conference report for the fiscal year 1998 appropriations bill for the Departments of Labor, Health and Human Services, and Education also urged the Department of Labor to resolve the child labor issues relating to the Amish community, while taking into account the special needs of the Amish.[16] Unfortunately the Department of Labor's response to these efforts has consistently been unwillingness to consider any changes in regulations and opposition to changes by legislation.

LEGISLATION

H.R. 221 is a reasonable and practical solution to the problem stemming from the Department of Labor's application of the child labor provisions of the FLSA to youth in the Amish community. The bill would amend the FLSA to allow Amish youth to work under certain conditions in sawmills and other workplaces where machinery is used to process wood products.

H.R. 221 would permit an individual who is at least 14 years of age and who is a member of a religious sect or division thereof whose established teachings do not permit formal education beyond the eighth grade to be employed inside or outside places of business where machinery is used to process wood products.

H.R. 221 provides a number of safety precautions pertaining to those persons under the age of 18 ("minor") who are permitted by the bill to work in sawmills and other workplaces containing power-driven woodworking equipment.

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[15] The efforts of Members of Congress to work with the Department of Labor to accommodate the needs of the Amish are described in letters dated August 7, 1997 and December 22, 1997 from Reps. Joseph Pitts, Mark Souder, John Peterson, and Phil English to John Fraser, Administrator, Wage and Hour Division and Alexis Herman, Secretary of Labor, respectively, and letter dated November 12, 1997 from Senator Arlen Specter to Alexis Herman, Secretary of Labor.

[16] Conference Report to accompany H.R. 2264, making appropriations for the Departments of Labor, Health and Human Services, and Education, and related agencies for the fiscal year ending September 30, 1998, and for other purposes, House Report No. 105–390, p. 68.

First, the minor may not, under any circumstances, operate or assist in the operation of power-driven woodworking machines.

Second, the minor must be supervised by an adult relative of the minor or by an adult member of the same religious sect or division of a sect as the minor.

Third, the minor must be protected from wood or other flying debris within the workplace by a barrier appropriate to the potential hazard of such wood particles or flying debris or by maintaining a sufficient distance from machinery in operation. The language of H.R. 221 is intended to provide safety but also flexibility: a sawmill cutting heavy trees into large boards would require a different type of barrier or a different distance to be maintained than would a woodworking shop which uses and cuts much smaller pieces of wood. The requirement for a barrier does not necessarily require that the minor be kept in a separate room or outside of the sawmill or workplace in which the woodworking equipment is located. The barrier used may be temporary, but it should be substantial enough to provide protection against injury to the minor from pieces of wood or other material which may be thrown in the course of cutting logs or other wood products.

Fourth, the minor must be required to use personal protective equipment to prevent exposure to excessive levels of noise and sawdust. Standards regarding exposure to sawdust and noise and the use of personal protective equipment to protect against harmful levels of exposure in the workplace have been established under the Occupational Safety and Health Act.[17] This provision of H.R. 221 is intended not to require new or additional standards but to reinforce the importance of those standards to individuals under the age of 18 for whom the bill applies.

During the Committee's markup of H.R. 221, Representative Lynn C. Woolsey offered an amendment that would have prevented an employer who employed an individual pursuant to H.R. 221 from utilizing the youth minimum wage under Section 6(g) of the FLSA. The FLSA allows any employer to pay a youth minimum wage of not less than $4.25 an hour to employees who are under 20 years of age during the first 90 consecutive calendar days after initial employment. Rep. Woolsey's amendment was defeated by vote by the Committee. The youth minimum wage was passed, on bipartisan basis, in 1996 and is available to all employers covered by the FLSA. There is no reason for singling out the Amish as the only employers who would not be allowed to use it.

A second amendment, sponsored by Representative Dale E. Kildee, would have conditioned the provisions of the bill on whether the employer prepared and submitted details reports to the Secretary of Labor on any work related injury or fatality of an employee under age 18. Since there was no definition of "work-related" in the amendment, any injury in or around the workplace occurring to an employee under age 18 requiring more than first aid would likely be covered. A strained ankle incurred outside a woodworking and having nothing to do with being around woodworking equipment would be covered by the Kildee amendment. If the em-

[17] 29 U.S.C. § 651–678. Regulations on exposure to dust and noise are at 29 U.S.C. § 1910.1000 and at 29 C.F.R. § 1910.95. Sawmills are generally regulated at 29 C.F.R. § 1910.265, and woodworking machinery is regulated at 29 C.F.R. § 1910.213.

ployer failed to submit a detailed report on the ankle injury to the Department of Labor, would potentially result in substantial retrospective liability from having employed the individual in the first place. The Department of Labor, under the authority of the Occupational Safety and Health Act, already has requirements for the recording and reporting of injuries or fatalities on the job.[18] These requirements for recording and reporting injuries and fatalities apply to employers of Amish employees in the same way they apply to all other employers. The Committee does not believe that Amish woodworking shops should be singled out for additional reporting requirements, particularly when there is no reasonable basis, such as improved safety, shown for this additional requirement.

In a letter dated February 9, 1999, to the Chairman of the Committee on Education and the Workforce on behalf of the Department of Labor, the Secretary of Labor expressed the Department's concerns that the protections provided in the legislation considered during the 105th Congress were inadequate.[19] However, the Department of Labor again offered no suggested changes to the legislation and, as described above, the Department of Labor has been unwilling over the past several years to provide a practical solution and accommodation for the Amish seeking to preserve their beliefs and lifestyle.

CONSTITUTIONALITY OF H.R. 221

Subsequent to House passage of H.R. 4257 in the 105th Congress, the U.S. Department of Justice sent a letter to Senator Specter regarding constitutional issues raised by H.R. 4257.[20] The identical letter, with updated references, was sent to Chairman Goodling on February 9, 1999.[21] The Department of Justice letter states that, in its view, the bill would "raise serious concerns under the Establishment Clause of the First Amendment to the Constitution." However, the Department of Justice also stated that "[o]ur views are necessarily tentative, because of several factual questions * * * as to which we do not have sufficient information."

The Committee believes that the legislation embodied in H.R. 4257 in the 105th Congress and H.R. 221 in the 106th Congress is constitutional.

The Department of Justice letter completely ignores the fact that, as described above, numerous exceptions and special provisions to the FLSA's general provisions have been enacted, including several that pertain to the application of the child labor restrictions. These exceptions and special provisions have all been designed to address particular circumstances where the general restrictions on child labor have created a particular burden and are deemed excessively restrictive to protect the well being of persons under the age of 18.

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[18] 29 U.S.C. § 657(c)(2).

[19] Letter dated February 9, 1999, from Alexis M. Herman, Secretary of Labor, U.S. Department of Labor, to the Honorable William F. Goodling, Chairman, Committee on Education and the Workforce, U.S. House of Representatives.

[20] Letter dated September 25, 1998, from L. Anthony Sutin, Acting Assistant Attorney General, U.S. Department of Justice, to the Honorable Arlen Specter, Chairman, Subcommittee on Labor, Health and Human Services, and Education. Committee on Appropriations, U.S. Senate.

[21] Letter dated February 9, 1999, from Dennis K. Burke, Acting Assistant Attorney General, U.S. Department of Justice, to the Honorable William Goodling, Chairman, Committee on Education and the Workforce, U.S. House of Representatives.

H.R. 221, in granting narrow and limited relief in one more such situation, is in line with many previous amendments to the FLSA. H.R. 221 is not special relief of a type granted to no other group in society. There is no reason to consider the Amish less deserving of carefully crafted relief than any secular group or occupation.

The fact that Congress has created numerous FLSA exceptions and special provisions for other groups and occupations is an important factor in whether the relief granted in H.R. 221 is an Establishment of Religion. In *Rojas* v. *Fitch,*[22] the exemption for religious employers from federal and state unemployment taxes was challenged as an unconstitutional Establishment of Religion. The Court of Appeals upheld the exemption, stating that, "the current exemption for religious employment * * * rests within the context of a variety of other exemptions, all of which appear to share a common secular purpose. Efficient administration of the unemployment compensation system is particularly enhanced through the exemptions for religion because it eliminates the need for government to review employment decisions made on the basis of religious rationales."[23] Similarly here, the provisions of H.R. 221 cannot be viewed separately from the many previous exemptions and special provisions in the FLSA that have been enacted since 1938 in order to address particular burdens or unnecessary restrictions imposed by the general provisions of the law.

The Department of Justice letter also shows little understanding or respect for the dilemma facing the Amish as they seek to maintain their religious lifestyle in changing circumstances. The Department of Justice letter dismisses the Amish tradition of "learning by doing" certain trades and occupations as simply a matter of economic choice by the Amish. But as the Supreme Court recognized in *Wisconsin* v. *Yoder*,[24] the Amish religion is tied to a whole lifestyle that cannot be easily separated between religious and secular aspects:[25]

> * * * As a result of their common heritage, Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a community separate and apart from the world and world influence. This concept of life aloof from the world and its values is central to their faith.
>
> A related feature of the Old Order Amish communities is their devotion to a life in harmony with nature and the soil, as exemplified by the simple life of the early Christian era that continued in America during much of our early national life. Amish beliefs require members of the community to make their living by farming or closely related activities. Broadly speaking, the Old Order Amish religion pervades and determines the entire mode of life of its adherents. * * *

Establishment Clause cases before the U.S. Supreme Court have covered a wide variety of factual settings, from aid to religious

[22] 127 F.3d 184 (1st Cir., 1997), cert. denied 118 S.Ct. 2341 (1998).
[23] 127 F.3d at 188.
[24] 406 U.S. 205, 92 S.Ct. 1526 (1972).
[25] 406 U.S. at 210.

schools to chaplains in state legislatures.[26] The only Supreme Court decision on an Establishment Clause challenge to a legislative exemption to an employment law of general application is *Church of Jesus Christ of Latter-Day Saints* v. *Amos*.[27] The *Amos* case involved a challenge to the exemption for religious organizations from Title VII's prohibition on discrimination on the basis of religion.[28] The Supreme Court upheld the exemption, finding that Congress had a permissible "secular legislative purpose" in granting the exemption: "It is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[29]

In its letters on H.R. 4257 and H.R. 221, the Department of Justice stated that it does not have sufficient factual basis on which to evaluate whether this "purpose" test, as stated in *Amos*, is met with regard to the Amish and the relief granted by H.R. 221. However, the Committee has developed such a factual record. As discussed above, the Amish community has, for a number of reasons, been forced to rely less on agriculture and more on other occupations, including sawmills and woodworking shops. As Mr. Blank testified in 1998 before the Subcommittee on Workforce Protections, the Amish belief in "learning by doing" is an integral part of Amish training and upbringing of young people. But such means of training within the Amish community is possible only if the trades and occupations of the Amish are available to these young people. For the Amish, prohibiting young people from practically learning the trades that are increasingly the trades and occupations which the Amish are dependent upon constitutes "significant governmental interference" with their lifestyle and religious mission.

H.R. 221 is distinguished from the legislative exemption that was challenged in *Amos* in that it does not apply to all religious organizations. H.R. 221 applies only if the individual involved is between the ages of 14 and 18 and "is a member of a religious sect or division thereof whose established teachings do not permit formal education beyond the eighth grade." In some cases the courts have suggested that any legislation that distinguishes among religious groups be subject to stricter scrutiny than would be the case if the legislation benefited all religious organizations. E.g., *Larson* v. *Valente,*[30] (holding unconstitutional a state law granting some religious organizations, but not others, exemption from registration and disclosure of charitable contributions); *Children's Healthcare* v. *Vladeck*,[31] (holding unconstitutional provisions of Medicare and Medicaid granting special payment conditions for Christian Science sanitoria).

Even in these cases, however, differentiating among religious groups is not per se unconstitutional; it simply triggered stricter scrutiny by the court as to whether Congress or the state legisla-

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[26] See "The Law of Church and State: Developments in the Supreme Court Since 1980" (January 9, 1998), CRS pub. 98–65A by David M. Ackerman.
[27] 483 U.S. 327, 107 S.Ct. 2862 (1987).
[28] 42 U.S.C. § 2000e–1.
[29] 483 U.S. at 335.
[30] 456 U.S. 228 (1982).
[31] 938 F.Supp 1466 (D.Ct. MN, 1996).

ture had a sound reason for differentiating among religious groups. The scope of the relief must be appropriate to the legislative purpose. For example, in *Vladeck*, the district court found that the legislative purpose of accommodating Christian Scientists in the Medicare and Medicaid programs was permissible and appropriate, but that by specifically naming Christian Science in the statute, Congress had foreclosed the same relief to other similarly situated religious groups: "there is no guarantee that a religious group in a similar situation to the Christian Scientists (i.e., a religious group believing in faith healing which has set up certain institutions to promote such healing) would receive similar accommodation from Congress." [32]

In contrast to the Medicare and Medicaid statutes, the exemption in H.R. 221 is available to any similarly situated religious group. Further, the scope of the relief from otherwise applicable child labor restrictions is directly related to the legislative purpose of relieving a conflict between the child labor regulations and the needs of those religious groups who believe that formal education should end after the eighth grade.

Finally the Department of Justice letter raises the concern that in order to be constitutional, H.R. 221 may not place Amish youth at "significant threat of harm." As is described above, H.R. 221 includes several protections to ensure that those youth who are permitted to train and work in workplaces in which they are now prohibited are not placed in any significant threat of harm.

CONCLUSION

The Committee agrees with the Department of Labor that the benefits of facilitating the cultural and religious traditions of the Amish must be balanced against the safety and welfare of the children. The Committee believes that this legislation strikes an appropriate balance between the cultural and safety issues surrounding the employment of Amish youth in certain businesses.

SUMMARY

H.R. 221 would amend the Fair Labor Standards Act of 1938 to allow teenagers to work in businesses where machinery is used to process wood products if they are: at least 14 years of age but under the age of 18; a member of a religious sect or division whose established teachings do not permit formal education beyond the eighth grade; supervised by an adult relative or an adult who is a member of the same religious sect or division; not allowed to operate or assist in the operation of power-driven woodworking machines; protected from flying debris or wood particles by a barrier appropriate to the potential hazard of such wood particles or flying debris or by maintaining a sufficient distance from machinery in operation; and protected from excessive levels of noise and sawdust by personal protective equipment.

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[32] 938 F.Supp at 1480.

SECTION-BY-SECTION ANALYSIS

SECTION 1. EXEMPTION

This provision would amend section 13(c) of the Fair Labor Standards Act of 1938 to specify that in the administration and enforcement of the child labor provisions of the Act, it shall not be considered oppressive child labor for an individual who is at least 14 but under the age of 18, and is a member of a religious sect or division thereof whose established teachings do not permit formal education beyond the eighth grade, to be employed inside or outside places of business where machinery is used to process wood products. The employment of such individual shall be permitted if the individual is supervised by an adult relative of the individual or is supervised by an adult member of the same religious sect or division as the individual; if the individual does not operate or assist in the operation of power-driven woodworking machines; if the individual is protected from wood particles or other flying debris within the workplace by a barrier appropriate to the potential hazard of such wood particles or flying debris or by maintaining a sufficient distance from machinery in operation; and if the individual is required to use personal protective equipment to prevent exposure to excessive levels of noise and sawdust.

EXPLANATION OF AMENDMENTS

The bill was ordered reported without amendment.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. This bill, H.R. 221, amends the Fair Labor Standards Act to permit certain youth to perform certain work with wood products. The bill does not prevent legislative branch employees from receiving the benefits of this legislation.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates. This bill amends the Fair Labor Standards Act to permit certain youth to perform certain work with wood products. As such, the bill does not contain any unfunded mandates and decreases federal mandates on the private sector.

ROLLCALL VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee Report to include for each record vote on a motion to report the measure or matter and on any amendment offered to the measure of matter the total number of votes cast for and against and the names of the Members voting for and against.

COMMITTEE ON EDUCATION AND THE WORKFORCE

ROLL CALL 1 **BILL** H.R. 221 **DATE** February 10, 1999
AMENDMENT NUMBER 1 **DEFEATED 21 - 22**
SPONSOR/AMENDMENT Ms. Woolsey / amendment regarding minimum wage

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. GOODLING, Chairman		X		
Mr. PETRI, Vice Chairman		X		
Mrs. ROUKEMA				X
Mr. BALLENGER		X		
Mr. BARRETT		X		
Mr. BOEHNER		X		
Mr. HOEKSTRA		X		
Mr. McKEON		X		
Mr. CASTLE		X		
Mr. JOHNSON		X		
Mr. TALENT		X		
Mr. GREENWOOD		X		
Mr. GRAHAM				X
Mr. SOUDER		X		
Mr. McINTOSH				X
Mr. NORWOOD		X		
Mr. PAUL		X		
Mr. SCHAFFER		X		
Mr. UPTON		X		
Mr. DEAL		X		
Mr. HILLEARY		X		
Mr. EHLERS				X
Mr. SALMON		X		
Mr. TANCREDO		X		
Mr. FLETCHER		X		
Mr. DEMINT		X		
VACANCY				
Mr. CLAY	X			
Mr. MILLER				X
Mr. KILDEE	X			
Mr. MARTINEZ	X			
Mr. OWENS	X			
Mr. PAYNE	X			
Mrs. MINK	X			
Mr. ANDREWS	X			
Mr. ROEMER	X			
Mr. SCOTT	X			
Ms. WOOLSEY	X			
Mr. ROMERO-BARCELO	X			
Mr. FATTAH	X			
Mr. HINOJOSA	X			
Mrs. McCARTHY	X			
Mr. TIERNEY	X			
Mr. KIND	X			
Ms. SANCHEZ	X			
Mr. FORD	X			
Mr. KUCINICH	X			
Mr. WU	X			
Mr. HOLT	X			
TOTALS	21	22		5

COMMITTEE ON EDUCATION AND THE WORKFORCE

ROLL CALL 2 **BILL** H.R. 221 **DATE** February 10, 1999
AMENDMENT NUMBER 2 **DEFEATED** 18 - 24
SPONSOR/AMENDMENT Mr. Kildee / requires Amish employers to file an additional report regarding accidents with the Department of Labor

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. GOODLING, Chairman		X		
Mr. PETRI, Vice Chairman		X		
Mrs. ROUKEMA		X		
Mr. BALLENGER		X		
Mr. BARRETT		X		
Mr. BOEHNER		X		
Mr. HOEKSTRA		X		
Mr. McKEON		X		
Mr. CASTLE		X		
Mr. JOHNSON		X		
Mr. TALENT		X		
Mr. GREENWOOD		X		
Mr. GRAHAM				X
Mr. SOUDER		X		
Mr. McINTOSH				X
Mr. NORWOOD		X		
Mr. PAUL		X		
Mr. SCHAFFER		X		
Mr. UPTON		X		
Mr. DEAL		X		
Mr. HILLEARY		X		
Mr. EHLERS		X		
Mr. SALMON		X		
Mr. TANCREDO		X		
Mr. FLETCHER		X		
Mr. DEMINT		X		
VACANCY				
Mr. CLAY	X			
Mr. MILLER	X			
Mr. KILDEE	X			
Mr. MARTINEZ				X
Mr. OWENS	X			
Mr. PAYNE				X
Mrs. MINK	X			
Mr. ANDREWS	X			
Mr. ROEMER	X			
Mr. SCOTT	X			
Ms. WOOLSEY	X			
Mr. ROMERO-BARCELO	X			
Mr. FATTAH	X			
Mr. HINOJOSA	X			
Mrs. McCARTHY	X			
Mr. TIERNEY	X			
Mr. KIND	X			
Ms. SANCHEZ				X
Mr. FORD				X
Mr. KUCINICH	X			
Mr. WU	X			
Mr. HOLT	X			
TOTALS	18	24		6

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

NEW BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 221 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 11, 1999.

Hon. WILLIAM F. GOODLING,
Chairman, Committee on Education and the Workforce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 221, a bill to amend the Fair Labor Standards Act of 1938 to permit certain youth to perform certain work with wood products.

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

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

H.R. 221—A bill to amend the Fair Labor Standards Act of 1938 to permit certain youth to perform certain work with wood products

H.R. 221 would amend the Fair Labor Standards Act (FLSA) to permit youths between the ages of 14 and 18 who are members of a religious sect or division that does not permit formal teaching beyond the eighth grade to be employed in the processing of wood products. Absent this legislation, certain Amish-owned sawmills could face fines for child labor law violations. CBO estimates these fines would be less than $30,000 each year. Therefore, enactment of this bill would result in a reduction of receipts from such fines, but the amount is likely to be insignificant. Nevertheless, pay-as-you-go procedures would apply.

H.R. 221 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not have any significant effects on the budgets of state, local, or tribal governments.

This estimate was prepared by Christina Hawley Sadoti (federal cost), Hester Grippando (revenues), Susan Sieg (impact on state,

local, and tribal governments), and Ralph Smith (impact on the private sector).

This estimate was approved by Paul N. Van de Water, Assistant Director for Budget Analysis.

STATEMENT OF OVERSIGHT FINDINGS OF THE COMMITTEE ON GOVERNMENT REFORM

With respect to the requirement of clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee has received no report of oversight findings and recommendations from the Committee on Government Reform and Oversight on the subject of H.R. 221.

CONSTITUTIONAL AUTHORITY STATEMENT

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress in the Constitution to enact the law proposed by H.R. 221. The Fair Labor Standards Act of 1938 has been determined, by the Supreme Court, to be within Congress' Constitutional authority. In *United States* v. *Darby,* 312 U.S. 100 (1941) and *OPP Cotton Mills, Inc., et al.* v. *Administrator of Wage and Hour Division of Department of Labor,* 312 U.S. 126 (1941), the Supreme Court found that the regulation of hours and wages of work to be within the scope of Congressional powers under Article 1, Section 8, Clause 3 of the Constitution of the United States. H.R. 221 amends the Fair Labor Standards Act of 1938. Because H.R. 221 modifies but does not extend the federal regulation of wage and hour laws, the Committee believes that the Act falls within the same scope of Congressional authority as the Fair Labor Standards Act of 1938.

COMMITTEE ESTIMATE

Clauses 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 221. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

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):

SECTION 13 OF THE FAIR LABOR STANDARDS ACT OF 1938

EXEMPTIONS

SEC. 13. (a) * * *

* * * * * * *

(c)(1) * * *

* * * * * * *

(6)(A) Subject to subparagraph (B), in the administration and enforcement of the child labor provisions of this Act, it shall not be considered oppressive child labor for an individual who—

(i) is at least 14 but under the age of 18, and

(ii) is a member of a religious sect or division thereof whose established teachings do not permit formal education beyond the eighth grade,

to be employed inside or outside places of business where machinery is used to process wood products.

(B) The employment of an individual under subparagraph (A) shall be permitted—

(i) if the individual is supervised by an adult relative of the individual or is supervised by an adult member of the same religious sect or division as the individual;

(ii) if the individual does not operate or assist in the operation of power-driven woodworking machines;

(iii) if the individual is protected from wood particles or other flying debris within the workplace by a barrier appropriate to the potential hazard of such wood particles or flying debris or by maintaining a sufficient distance from machinery in operation; and

(iv) if the individual is required to use personal protective equipment to prevent exposure to excessive levels of noise and saw dust.

MINORITY VIEWS

The Fair Labor Standards Act (FLSA), prohibits minors under the age of 16 from working in manufacturing operations, including saw mills. The Secretary of Labor (through Hazardous Occupations Order No. 4) also prohibits minors under 18 years of age from working in saw mill operations and the logging industry. In addition, Hazardous Occupations Order No. 5 specifically prohibits such youth from operating power driven wood-working machines. These protections serve two well known purposes: (1) to ensure that children are not employed in hazardous occupations and (2) to protect adult workers from unfair competition from child workers who do not yet have burden of supporting themselves.

H.R. 221 amends the FLSA by permitting 14- through 17-year-olds "to be employed inside or outside of places of business where machinery is used to process wood products,"[1] occupations in which their employment would otherwise be prohibited; provided that the minor "is a member of a religious sect or division thereof whose established teachings do not permit formal education beyond the eighth grade"[2] and the minor is supervised by an adult relative or "an adult member of the same religious sect or division"[3] as the minor. H.R. 221 promotes the employment of minors in hazardous occupations. It invites the displacement of adult workers by minors who do not yet face the burden of supporting themselves. And it distinguishes among citizens, advantaging some and disadvantaging others, on the basis of an individual's religious beliefs.

SAFETY AND HEALTH CONCERNS

Injury data collected over several decades consistently show that the lumber and wood products industry is particularly hazardous work for adults, let alone children. The 1996 occupational fatality rate of 25.6 work-related deaths per 100,000 workers was more than five times the national average "all private industry" rate of 5.1 per 100,000 workers and had actually increased over the 1995 rate. The occupational fatality rate in the lumber and wood products industry is higher than in either the construction industry or the trucking and warehousing industry. In 1996, 203 occupational fatalities occurred in the lumber and wood products industry. The frequency of all non-fatal injuries was almost twice as high in the lumber and wood products industry (14.2 per 100 full-time workers) as the national average for all industries (7.4 for every 100 workers).

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[1] See H.R. 221, Section 1, at "(6)(A)."
[2] Id., at "(6)(A)(ii)."
[3] Id., at "(6)(B)(i)."

Even for those workers who do not operate power-driven equipment, saw mills present significant occupational risks. The Occupational Safety and Health Administration has documented examples of workers who were crushed by falling loads, run over by front-end loaders, caught under a fork lift, and injured by rolling logs. One witness, testifying on behalf of this legislation, told of how he lost several fingers when, during a moment of inattention, he carelessly set his hand on a conveyor belt and the belt ran his hand into a saw.

Inexperience, smaller size, and lack of maturity all serve to make the potential risks faced by minors even greater than they are for adults. It is unreasonable to expect a fourteen year-old to maintain the kind of continuous safety concern we expect of adults.

The Department of Labor opposes the bill based on these safety concerns: "The Department of Labor is concerned that these conditions would not adequately protect the children's safety. Adult presence in the workplace would not be able to protect children from the split-second mistake that could cost them a finger, hand, or worse. Preventing children from operating machinery would still leave them at risk from forklifts, front-end loaders, falling loads, and rolling logs."

To ensure the Committee learns of injuries or fatalities that result from this legislation, Representative Kildee offered an amendment during the markup to require that employers report work-related injuries and deaths occurring to minors employed pursuant to H.R. 221 to the Department of Labor. The amendment is based upon a similar requirement contained in legislation enacted in the 104th Congress permitting 16- and 17-year-olds to load certain balers and compactors, Public Law 104–174, and is intended to ensure that specific information is readily available regarding the impact of this legislation on the health and safety of minors. If no injuries or fatalities occur to minors as a result of being employed inside or outside places of business where machinery is used to process wood products, the amendment places no additional burdens upon employers. However, in the event that minors are injured or killed as a result of the enactment of H.R. 221, Mr. Kildee's amendment, if adopted, would better enable policy makers to identify risks and to craft improvements to address those risks.

The Occupational Safety and Health Act already requires the reporting of injuries or fatalities on the job. However, as Mr. Kildee pointed out in Committee, identifying Amish youth on the basis of OSHA reports would not be possible. The purpose of Mr. Kildee's amendment is to ensure there is accurate, readily available information regarding the impact of H.R. 221 on the health and safety of minors. The Majority contends that Amish saw mills and woodworking shops should not be singled out for additional reporting requirements "when there is no reasonable basis, such as improved safety, shown for this additional requirement."

In fact, the amendment did not single out Amish saw mills or woodworking shops. H.R. 221 singles out the Amish be permitting employers, regardless of whether they are Amish, to employ Amish youth. Mr. Kildee's amendment only seeks to ensure that policy makers are sufficiently informed of the extent to which the newly authorized employment, in practice, may pose risks to the health

and safety of those youth. Clearly, the absence of such information adversely affects the ability of policy makers to develop effective policies to improve the safety of minors. As Mr. Kildee stated during the markup, "If minors are injured or killed as a result of enactment of H.R. 221, we have a responsibility to ensure that we are both aware of the fact and that we have the information necessary to develop the appropriate legislative response."

DISPLACEMENT OF ADULT WORKERS

H.R. 211 encourages the displacement of adult workers by hiring minors. On the basis of the child's religious beliefs, H.R. 221 permits certain children, as young as 14 years old, to be employed in occupational settings in which all other children have been excluded for more than 60 years. These children, unlike the adult workers with whom they will compete for jobs, do not yet face the burden of supporting themselves and a family. Rather, they continue to live in their parents' home and their financial needs remain the responsibility of their parents. As a consequence, these young workers are likely to be willing and able to work for substantially less money than the adults with whom they compete. This unfortunate aspect of the legislation is exacerbated by provisions of the Fair Labor Standards Act that permit the employment of those under 20-years of age for up to ninety days at $4.25 an hour, 90 cents an hour less than the minimum wage applicable to the overwhelming majority of adult workers.[4]

An amendment offered in Committee by Ms. Woolsey sought to mitigate the unfair impact that this legislation will have on those adults who are not Amish by requiring that minors employed pursuant to H.R. 221 be paid at least the minimum wage. Defeated on a party-line vote, the Majority contends "there is no reason for singling out the Amish as the only employers who would not be allowed to use it [the sub-minimum wage]." First, the Majority misrepresent their own bill. H.R. 221 permits any employer to employ Amish youth "inside or outside places of business where machinery is used to process wood products." Notwithstanding the Majority's disingenuous description of the bill, Ms. Woolsey's amendment does not discriminate against Amish employers, it benefits Amish youth. Second, Amish youth are the only one's for whom the protections of the child labor laws are being waived. If Amish youth are to be treated as adults for purposes of the child labor laws, they should also be treated as adults for purposes of the minimum wage law.

There are few, if any, employed in the lumber and wood products industry today at the minimum wage. For example the average hourly earnings for production workers in saw mills and planing mills in 1998 was $11.10 an hour, more than twice the minimum wage. There are even fewer employed at the sub-minimum wage. H.R. 221 expands the pool of eligible workers who may be employed at the sub-minimum wage. Further, by expanding that pool to children who are not self-supporting, it greatly increases the likelihood that the newly eligible workers will be willing to work for minimum or sub-minimum wages. This fact is not lost on the

[4] See section 6(g) of the Fair Labor Standards Act of 1938, 29 U.S.C. 206(g).

Amish, themselves, as was made clear in a National Public Radio report on May 30, 1998:

> NPR Reporter: But some Amish, like this eighteen-year-old who works in his father's wood shop making gazebos, admit that there are far less spiritual reasons for taking on the Labor Department.
>
> Unidentified Eighteen-Year-Old: There needs to be cut—cuts in the pricing somewhere and the children really help to do the family way of doing things.
>
> NPR Reporter: You can be more competitive if you have kids helping out in the shops?
>
> Eighteen-Year-Old: To an extent, that's the main point.

Not only are adult workers likely to be displaced as a consequence of enactment of H.R. 221, but the likely willingness of minors to work for lower wages than adults would otherwise accept is likely to suppress the wages adult workers will receive. In our view, displacing adult workers with minors is bad policy.

CONSTITUTIONAL ISSUES

The First Amendment provides that "Congress shall make no law respecting and establishment of religion."

The Supreme Court has developed two clear and well known tests to determine whether a statute may violate the establishment clause. The first, initially enunciated in *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), establishes a three pronged approach to the issue. To survive an establishment clause challenge, the law must: "(1) reflect a clear secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion."[5] The test established in *Lemon* was subsequently limited by *Larson* v. *Valente,* 456 U.S. 228 (1982) which established a more stringent test: "[W]hen we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." (456 U.S. 246). Under *Larson*, a law granting a denominational preference must be "closely fitted" to the furtherance of a "compelling government interest." (456 U.S. 255).

Advancing the employment opportunities of minors and adults of a specific religious persuasion does not obviously embody "a clear secular purpose."[6] H.R. 221 also requires the Department of Labor to make the determination that a particular group "has established teachings that do not permit formal education beyond eighth grade" and to then make a determination as to whether an employee, be it a minor or the minor's supervisor, is a bona fide member of that religious group. In effect, in order to administer this legislation, the Department of Labor must inquire of all workers re-

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[5] *Lee* v. *Weisman,* 505 U.S. 577, 585 (1992) (applying *Lemon*).

[6] A religious exemption would only meet the "clear secular purpose" if it has the purpose and effect of alleviating significant governmental interference with a religious organization's ability to "define and carry out its religious mission." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos,* 483 U.S. 327, 335, 339 (1987). See page 2, U.S. Department of Justice letter attached, which finds that there is insufficient support basis for determining H.R. 221 significantly interferes with the ability of the Amish to "define and carry out their religious missions."

garding their religious affiliation, if any. This appears to invite "excessive government entanglement with religion."

Leaving aside those issues, however, it appears obvious that, by affording employment opportunities to adults and minors whose religious tenets prohibit formal education beyond the eight grade, while denying similar opportunities to all others, H.R. 221 has a primary effect of advancing one set of religious beliefs while inhibiting the religious beliefs of others.

The Majority cite *Church of Jesus Christ of Latter-Day Saints* v. *Amos* (483 U.S. 327 (1987)) for the contention that H.R. 221 is permissible within the establishment clause. As the majority states, *Amos* involved a challenge to the exemption for religious organizations from Title VII's prohibition on discrimination on the basis of religion. We strongly concur in the views expressed by the Department of Justice (attached at the end of these views) that H.R. 221 does not appear to satisfy the test for permissible accommodations that would permit it to be sustained in accordance with the test established under *Lemon.* However, as *Amos* makes clear, *Larson,* not *Lemon,* is the applicable test to H.R. 221. Whereas Title VII's religious exemption, at issue in *Amos,* applies to all religions, the religious exemption created by H.R. 221 applies only to "a religious sect or division thereof whose established teachings do not permit formal education beyond the eight grade." As the Court stated in *Amos*:

> * * * *Larson* indicates that laws discriminating *among* religions are subject to strict scrutiny, and that laws "affording a uniform benefit to *all* religions" should be analyzed under *Lemon*.[7]

If H.R. 221 is difficult to justify under the more lenient test imposed by the *Lemon* decision, it is even more difficult to justify under the stricter *Larson* test. The only compelling interest that is identifiable basis of the legislative language is to promote the employment of certain youth "inside and outside of places of business where machinery is used to process wood products."

The Majority contends in this report that H.R. 221 is essential if the Amish belief in "learning by doing" is to be preserved. In fact, however, Amish are employed in a wide range of occupations. They work in construction, in machine shops, in retail stores, and in offices in addition to working on farms and in saw mills and woodworking shops. If, in fact, the child labor laws have become an impingement on the Amish belief in "learning by doing" as Amish youth begin to take up new kinds of employment, why are the child labor restrictions only lifted as they apply to businesses where machinery is used to process wood products?

Nor can it be said that H.R. 221 has been "closely fitted" to this compelling government interest. Historically, Amish youth have been employed on a full-time basis from the age of 14 on the family farm. However, farming opportunities have not kept pace with the growth in population and as a consequence Amish must increasingly find other forms of employment. No evidence has been presented to the Committee that the new jobs can only or must be ex-

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[7] *Church of Jesus Christ Latter-Day Saints* v. *Amos*, 483 U.S. 327, 338 (1987) (emphasis in the original).

clusively found in businesses where machinery is used to process wood products. Indeed, the fact that power machinery is used at all represents a compromise of traditional Amish beliefs. Rather, the core value that would seem to be at stake is ability of the Amish to employ their youth in a "community separate and apart from the world and world influence." The question to be asked with regard to H.R. 221 is whether it is closely fitted to further this end. The answer is that it is not.

H.R. 221 permits an Amish youth to be employed in any business where machinery is used to process wood so long as the youth is supervised by an adult relative or another adult member of the same religious sect or division. A business of 5,000 people, none of whom are Amish, would be able to employ Amish youth so long as it also employed one additional person of the same religious sect to supervise the youth. In short, H.R. 221 is not closely tailored to provide a limited exception for Amish family businesses. Rather, it seems intentionally designed to promote the employment opportunities of those of one religious belief over those who hold different beliefs.

If the compelling interest that H.R. 221 is suppose to serve is not readily identifiable and if H.R. 221 is not closely fitted to that interest, it is no surprise. No hearings were held on H.R. 221. Only a single hearing has been held on this legislation and that in the last Congress. The only witnesses at that hearing were the sponsor of the legislation, the Chairman of the Old Order Amish Steering Committee, and an Amish sawmill owner. No constitutional scholars presented testimony before the committee and virtually no testimony was received concerning the constitutional problems provoked by this legislation. In a report that was circulated but never filed to accompany the predecessor to H.R. 221, H.R. 4257, the Majority stated:

> The letter from the Deputy Secretary of Labor also conveyed, without elaboration, "that the Department of Justice has serious concerns about the constitutionality of the proposed legislation as drafted." Neither the Department of Justice nor anyone else has previously raised this objection.

The Majority has, of course, failed to provide the Department of Justice, or anyone else, with an opportunity to raise this objection. When it was learned that H.R. 221 was being scheduled for mark-up in the Committee, Mr. Owens, the ranking Democrat on the subcommittee on workforce protections, wrote the Chairman "to urge that a hearing be held in order that the Committee may consider the constitutional implications of H.R. 221 before the bill is marked-up." Regrettably, the Majority chose not to act upon Mr. Owens' request and, as a consequence, whether H.R. 221 furthers a compelling interest and whether it is closely fitted to that interest have never been seriously considered by the Committee.

There are, of course, two other obviously compelling interests also at stake: protecting the health and safety of minors and protecting adults from unfair competition from child labor. If the Majority is of the view that supervision by specific adults, the use of personal protective equipment, the prohibition against operating

machinery, and the requirement that there be a barrier or adequate distance to protect minors from flying debris are fully sufficient to protect the health and safety of minors, then there is no basis for restricting this legislation to only those who are members of certain religious sects. The fact that H.R. 221 only permits those of a certain religion to be employed in such hazardous settings as saw mills raises obvious constitutional problems.

Issues similar to those raised by H.R. 221 were raised in *Brock* v. *Wendell's Woodwork Inc.* (867 F.2d 196 (1989)). In that case, members of the Shiloh True Light Church of Christ provided home schooling for their children for one-half of a day and the children, some as young as nine and ten, were enrolled in "apprenticeship programs" for the other half. The apprenticeship programs included work at a woodworking enterprise and a large masonry contractor. The Secretary of Labor brought an action for violation of the child labor laws. The church members claimed an exemption from those laws under the free exercise clause of the First Amendment. The court found:

> * * * [T]hat the members of the True Light Church are sincerely convinced that they are rearing their children in a manner dictated by their religious beliefs. They sincerely believe that vocational training has spiritual as well as secular worth. There is nothing in the federal statutes, however, that prevents church members from arranging for some instruction of their children in vocational pursuits.
>
> When the means adopted to serve that end consist of employing children in commercial enterprises that compete with other employers fully subject to the labor laws, however, the religious beliefs of the church members cannot immunize the employers from enforcement of the federal statutes * * *
>
> * * * [W]e may not ignore the interest of competing employers who comply with the relevant labor laws and feel the need to be free from competition with employers who do not comply.
>
> It is no answer to this concern that the church members now concede that minimum wages should have been paid to the children. There is nothing to indicate that competing employers employ experienced adults at minimum entry level wages.
>
> In short, the interest of the United States in the even-handed application and enforcement of its labor laws must prevail over the interest of church members who attempt to transport a vocational training program into industrial and commercial environments where children, save for their ages, are indistinguishable from other employees.[8]

In a case involving the Amish, *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), the U.S. Supreme Court found that Wisconsin could not impose liability on Amish parents for failure to comply with the State's compulsory school attendance law. The Court held, "that

[8] *Brock* v. *Wendell's Woodwork, Inc.,* 867 F.2d 196, 198–9.

secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith * * *". (406 U.S. 218). The Court further concluded, "that accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society." (406 U.S. 233 (emphasis added)). Therefore, the State's interest in its system of compulsory education was not sufficiently compelling to be sustained in the face of the challenge that it violated the free exercise clause of the First Amendment.

In determining that the State's interest was not sufficiently compelling, the Court noted that compulsory education laws reflect "the movement to prohibit most child labor under age 16 that culminated in the provisions of the Fair Labor Standards Act of 1938. * * * [T]he 16-year education limit reflects, in substantial measure, the concern that children under that age not be employed under conditions hazardous to their health, or in work that should be performed by adults." (406 U.S. 228). The Court went on to note that the case before it "is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred." Unlike Wisconsin's compulsory education law, however, one of the principal issues raised by H.R. 221 is the health and safety of minors. A decision that the Majority selectively cites to buttress H.R. 221, *Wisconsin* v. *Yoder* serves only to further call into question the constitutionality of the legislation.

We believe that the significant threat to the safety of Amish minors raised by the Department of Labor, and the serious constitutional issues created by H.R. 221, require us to oppose this dangerous exemption to our country's most critical child protection law.

DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, February 9, 1999.

Hon. WILLIAM F. GOODLING,
Chairman, Committee on Education and the Workforce, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: This letter sets forth the views of the Department of Justice on H.R. 221, a bill to amend the Fair Labor Standards Act of 1938 ("FLSA") to permit certain minors to perform certain work with wood products. Our views necessarily are preliminary, because of several factual questions (discussed below) as to which we do not have sufficient information. Based on the information available to us at this time, however, H.R. 221 as drafted would, at the very least, raise serious concerns under the Establishment Clause of the First Amendment to the Constitution.

H.R. 221 would amend the FLSA's provisions on child labor to permit the employment of certain minors "inside or outside places of business where machinery is used to process wood products." H.R. 221, § 1 (proposing 29 U.S.C. § 213(c)(6)(A)). The FLSA prohibits minors under 16 years of age from working in manufacturing, including sawmill operations. See 29 U.S.C. § 212(a) (prohibiting shipment and delivery of goods produced in establishment employing "any oppressive child labor practice"); id § 203 (defining "oppressive child labor"). In addition, as permitted by the FLSA, see id., the Secretary of Labor has by order designated occupations in logging and sawmill operations as "hazardous occupations" and has prohibited the employment of persons under 18 years of age in such operations. 29 C.F.R. § 570.54 (Hazardous Occupations Order No. 4). H.R. 221 provides that it shall not be considered an oppressive child labor practice to employ in a sawmill operation an individual who is between the ages of 14 and 18 and who "is a member of a religious sect or division thereof whose established teachings do not permit formal education beyond the eighth grade."

It is a "principle at the heart of the Establishment Clause" that the government "should not prefer * * * religion to irreligion." *Board of Educ. of Kiryas Joel Village School Dist.* v. *Grumet,* 512 U.S. 687, 703 (1994); see also *Wisconsin* v. *Yoder,* 406 U.S. 205, 220–21 (1972) (noting that "an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause"). Thus, as a general rule the government may not exempt religious adherents from obligations by which nonadherents must abide; instead, exemptions from otherwise generally applicable prohibitions must be drawn on a religion-neutral basis in order to pass muster under the Establishment Clause. See, e.g., *Texas Monthly, Inc.* v. *Bullock,* 489 U.S. 1 (1989); *Kiryas Joel,* 512 U.S. at 703–05.[1]

The exemption in H.R. 221 would permit children in certain religious sects or divisions to be employed in places of business where other children may not be employed. This preference for religion over "irreligion" would violate the Establishment Clause, unless it could be defended as a permissible accommodation of religious exercise. A statutory exception exclusively for religion may be a permissible accommodation where, inter alia, the exception has the purpose and effect of "alleviat[ing] significant governmental interference with the ability of religious organizations to define and carry out their religious missions," *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos,* 483 U.S. 327, 335, 339 (1987), or of otherwise removing "a signifi-

[1] In Texas Monthly, for example, the Court invalidated a sales-tax exemption provided exclusively to religious periodicals. The plurality reasoned that "when government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, * * * it 'provide[s] unjustifiable awards of assistance to religious organizations' and cannot but 'conve[y] a message of endorsement' to slighted members of the community." 489 U.S. at 15 (quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos,* 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in the judgment)). A government may, of course, provide such benefits to religious adherents when such persons are included in a broader class of similarly situated beneficiaries, defined in secular terms and reflecting some legitimate secular aim. See Texas Monthly, 489 U.S. at 15–17 (plurality opinion) (scope of beneficiary class must reflect legitimate "secular aim," and not have the "purpose or effect of sponsoring certain religious tenets or religious belief in general").

cant state-imposed deterrent to the free exercise of religion," Texas Monthly, 489 U.S. at 15 (plurality opinion); see also *Kiryas Joel,* 512 U.S. at 705 (noting that "the Constitution allows the State to accommodate religious needs by alleviating *special* burdens" on religious belief and practice) (emphasis added).

It is not apparent, based on the limited facts of which we are aware, how H.R. 221 would satisfy this part of the test for permissible accommodations. As we understand it, the Amish religion forbids or strongly discourages formal education beyond the eighth grade. Accordingly, the Supreme Court has held that states must, in certain circumstances, permit Amish children to be excused from compulsory educational requirements for older teenagers, *Wisconsin* v. *Yoder,* supra. This accommodation, as we understand it, alleviates what otherwise would be a governmentally imposed burden on the exercise of the Amish religion. We are not aware of any congressional finding or understanding that the Amish religion also requires or strongly encourages its minors to work in sawmills. It may be that the Amish religion encourages or requires that children work alongside other members of the community, in order to instill in the children certain work ethics and values of self-reliance that are an important part of an Amish education.[2] And it also may be the case that many adults in Amish communities work in sawmills. But, unless it is the case that the FLSA prohibition on employing children in sawmills significantly burdens the religious exercise of those within the community, or significantly interferes with the ability of the Amish "to define and carry out their religious missions," *Amos,* 483 U.S. at 335—as opposed to simply imposing an economic burden on the Amish community—the exemption would not appear to satisfy the requirement of the accommodation doctrine that the preference for religion alleviate a significant government-imposed burden on religious mission or exercise. Federal law does not, of course, wholly prevent the Amish from instructing their children in vocational pursuits—it merely prohibits children from working in a discrete number of dangerous environments. Whether this imposes a burden on religion, and if so, whether and under what circumstances that burden is "significant" or "special," will depend upon factual circumstances that we are in no position to evaluate.

Moreover, assuming that the FLSA child-labor prohibition does impose a significant burden on religious exercise in some cases, any statutory exemption should be crafted in a manner that is directly related to the alleviation of that burden. As presently drafted, a necessary condition for invoking the exemption from the FLSA in H.R. 221 would be a minor's connection to a religious sect or division with certain prohibitions on formal education; the exemption therefore would not be tailored to the question whether or not the FLSA's child labor prohibitions would, in any particular case, impose a burden on religious exercise, or on the community's religious mission, where a minor already has been exempted from certain of a state's compulsory education requirements.

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[2] See *Brock* v. *Wendell's Woodwork, Inc.,* 867 F.2d 196, 198 (4th Cir. 1989) (describing another religious sect that "sincerely believe[s] that vocational training [by members of the sect] has spiritual as well as secular worth").

Because we lack sufficient information, we are unable to conclude with any certainty whether the child labor laws relating to sawmills significantly burden Amish religious exercise.[3] Even if such laws do impose such a significant burden, however, H.R. 221 would raise two other potential Establishment Clause problems. First, the exemption would be triggered, not by an individual's religious belief or exercise, but instead, by an individual's membership in a certain religious sect or division. The Establishment Clause prohibits the government—except upon an extraordinary showing—from favoring certain religious sects, or favoring religious belief that comports with that of established religious sects. See *Larson* v. *Valente,* 456 U.S. 228 (1982); *Kiryas Joel,* 512 U.S. at 706–07 ("whatever the limits of permissible legislative accommodations may be, * * * it is clear that neutrality as among religions must be honored"); See also *Frazee* v. *Illinois Department of Employment Security,* 489 U.S. 829, 834 (1989) ("Undoubtedly, membership in an organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious beliefs, but we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."). It may be that all or most of the minors who would satisfy the proposed exemption do belong to particular religious sects or divisions. But the Constitution does not permit the government to make such affiliation a condition of receiving preferential treatment. The exemption, if it is to pass constitutional muster, must at the very least be extended to cover other persons who can make a sincere claim that their religious exercise is significantly burdened by the child labor law at issue but who do not belong to designated or defined religious sects or divisions. See e.g., *Wilson* v. *NLRB,* 920 F.2d 1282 (9th Cir. 1990), cert denied, 505 U.S. 1218 (1992); *Davis* v. *State,* 451 A.2d 107, 112–14 (Md. 1982); *Dalli* v. *Board of Educ.,* 267 N.E. 2d 219, 223 (Mass. 1971). Moreover, insofar as the exemption is designed to relieve a burden on individuals' religious exercise, there would not appear to any grounds for extending the exemption to cover members of defined sects or divisions who do not sincerely believe the relevant tenets of those sects or divisions.

Second, even if the exemption would lift a significant (or "special," *Kiryas Joel,* 512 U.S. at 705) government-imposed burden on religion, nevertheless the exemption might raise serious, independent constitutional concerns were it to result in any significant

[3] Of course, if a minor or a religious community were able to demonstrate that the child labor provisions of the FLSA imposed a substantial burden on religious exercise, then the Religious Freedom Restoration Act ("RFRA") would require the government to grant an exemption or otherwise alleviate such burden, unless the government could demonstrate that imposition of the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000bb–1. See also id. § 2000bb–2(1) (RFRA applies to any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States"); *id.* § 2000bb–3(a) (RFRA "applies to all Federal * * * law, and the implementation of that law, whether statutory or otherwise"); In re *Young* 141 F.3d 854, 857–63 (8th Cir.) (RFRA constitutional as applied to the federal government and to federal law), cert, denied sub nom. *Christians* v. *Crystal Evangelical Free Church,* 119 S. Ct. 43 (1998). *Cf. Wendell's Woodwork,* 867 F.2d at 198–99 (applying analogous test where challenge to child labor laws was brought under the Free Exercise Clause); *Reich* v. *Shiloh True Light Church of Christ* 85 F.3d 616 (mem.), 1996 WL 228802, at *3 (4th Cir. 1996) (same).

threat of harm to the health of minors. The Court has reasoned that a religious accommodation may be constitutionally problematic if it "burdens nonbeneficiaries markedly." Texas Monthly, 489 U.S. at 15 (plurality opinion); see also *Estate of Thornton* v. *Caldor, Inc.,* 472 U.S. 703, 709–10 (1985) (invalidating religious preference that did not lift government-imposed burden and that imposed "significant" and "substantial" burdens on nonbeneficiaries). We do not have sufficient information to determine whether the sponsors intend that the "beneficiaries" of the exemption include the exempted minors themselves. However, at least insofar as Congress's principal intent is to alleviate a significant burden on the Amish religious communities' ability to "define and carry out their religious missions," *Amos,* 483 U.S. at 335—rather than to alleviate a significant burden on the religious exercise of Amish minors, as such—then the constitutional analysis may well be affected by any resulting threat of harm to the health of the exempted minors.[4]

Finally, we should note one additional concern that the proposal would raise, even if the basic exemption were a permissible accommodation. The proposal would permit an exemption for child labor in sawmill operations only where, inter alia, "the individual is supervised by an adult relative of the individual or is supervised by an adult member of the same religious sect or division as the individual." Proposed § 213(c)(6)(B)(i). This would, in essence, require sawmill operations to hire, as supervisors of the excepted minors, "member[s] of the same religious sect or division as the [minors]." The Religion Clauses of the First Amendment prohibit the government from requiring such sect-based discrimination, and, more generally, from establishing religious tests as a condition of employment. See *Larson; McDaniel* v. *Paty,* 435 U.S. 618 (1978); *Torcaso* v. *Watkins,* 367 U.S. 488, 492–93 (1961).[5]

Thank you for the opportunity to present our views on this matter. If we may be of additional assistance, we trust that you will not hesitate to call upon us. We also stand prepared to assist the Department of Labor in further discussions on these issues. The Office of Management and Budget has advised that there is no ob-

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[4] For related discussion in the context of Free Exercise claims, see *Prince* v. *Massachusetts,* 321 U.S. 158, 166–67 (1944) ("The right to practice religion freely does not include liberty to expose * * * the child * * * to ill health or death."); *id.* at 170–71 (rejecting Free Exercise challenge to child labor law restriction); *Yoder,* 406 U.S. at 230 (emphasizing in the Free Exercise context that "[t]his case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred"); *id.* at 234 (reemphasizing that "[t]he record strongly indicates that accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child") *id.* at 233–34 ("To be sure, the power of a parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child"). See also *Wendell's Woodwork,* 867 F.2d at 199 (in addition to the interest in protecting children's health, "we may not ignore the interest of competing employers who comply with the relevant labor laws and feel the need to be free from competition with employers who do not comply").

[5] See also, e.g., *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter,* 492 U.S. 573, 591 (1989) (quoting *Everson* v. *Board of Educ.,* 330 U.S. 1, 15–16 (1947)) ("Neither a state nor the Federal Government may * * * pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance."); *Employment Division* v. *Smith,* 494 U.S. 872, 877 (1990) (the government "may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status or lend its power to one or the other side in controversies over religious authority or dogma").

jection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,

DENNIS K. BURKE,
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cc: The Honorable William Clay, Ranking Minority Member.

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