1998

# Session Law 98-412

Florida Senate & House of Representatives

# Florida Legislature On-Line Sunshine

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## H 3201: Religious Freedom Restoration Act

**H 3201 GENERAL BILL/CS/1ST ENG by Governmental Operations (GRC); Starks; (CO-SPONSORS) Byrd; Ball; Feeney; Bloom; Wallace (Similar CS/S 0296, Compare H 3203, H 4189, CS/S 0298)**

Religious Freedom Restoration Act; creates "Religious Freedom Restoration Act of 1998"; provides that government shall not substantially burden exercise of religion; provides exceptions; provides definitions; provides for attorney's fees & costs; provides applicability & construction. EFFECTIVE DATE: 06/17/1998.

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|---|---|---|
| 11/14/97 | HOUSE | Prefiled |
| 12/17/97 | HOUSE | Referred to Governmental Operations (GRC) |
| 02/27/98 | HOUSE | On Committee agenda-- Governmental Operations (GRC), 03/05/98, 10:15 am, 413C |
| 03/03/98 | HOUSE | Introduced, referred to Governmental Operations (GRC) -HJ 00018; On Committee agenda-- Governmental Operations (GRC), 03/05/98, 10:15 am, 413C --Temporarily deferred |
| 03/06/98 | HOUSE | On Committee agenda-- Governmental Operations (GRC), 03/12/98, 1:30 pm, 413C --Temporarily deferred |
| 04/01/98 | HOUSE | On Committee agenda-- Governmental Operations (GRC), 04/07/98, 10:00 am, 413C |
| 04/07/98 | HOUSE | Comm. Action:-Unanimously CS by Governmental Operations (GRC) -HJ 00558 |
| 04/13/98 | HOUSE | CS read first time on 04/13/98 -HJ 00555; Pending Consent Calendar -HJ 00558 |
| 04/14/98 | HOUSE | Objection filed |
| 04/16/98 | HOUSE | Placed on Governmental Responsibility Council Calendar -HJ 00689 |
| 04/24/98 | HOUSE | Placed on General Calendar; Read second time -HJ 01115; Amendment pending -HJ 01116; Pending amendment failed -HJ 01353; Amendment(s) adopted -HJ 01354 |
| 04/28/98 | HOUSE | Read third time -HJ 01544; CS passed as amended; YEAS 114 NAYS 5 -HJ 01545 |
| 04/28/98 | SENATE | In Messages |
| 05/01/98 | SENATE | Received, referred to Judiciary; Governmental Reform and Oversight -SJ 01816; Immediately withdrawn from Judiciary; Governmental Reform and Oversight -SJ 01642; Substituted for CS/SB 296 -SJ 01642; Read second and third times -SJ 01642; CS passed; YEAS 38 NAYS 0 -SJ 01642 |
| 05/01/98 | HOUSE | Ordered enrolled -HJ 02400 |
| 06/01/98 | | Signed by Officers and presented to Governor |
| 06/17/98 | | Became Law without Governor's Signature; Chapter No. 98-412 |

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BILL TEXT: (Top)

hb3201(View As: HTML, As Printed)
hb3201c1(View As: HTML, As Printed)
hb3201e1(View As: HTML, As Printed)
hb3201er(View As: HTML, As Printed)

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AMENDMENTS: (Top)

By Representatives Starks and Trovillion

A bill to be entitled

An act relating to religious freedom; creating the "Religious Freedom Restoration Act of 1998"; providing that government shall not substantially burden the exercise of religion; providing exceptions; providing definitions; providing for attorney's fees and costs; providing applicability; providing construction; providing an effective date.

WHEREAS, it is the finding of the Legislature of the State of Florida that the framers of the Florida Constitution recognizing free exercise of religion as an unalienable right secured its protection in s. 3, Art. I of the State Constitution, and

WHEREAS, laws which are "neutral" toward religion may burden the free exercise of religion as surely as laws intended to interfere with the free exercise of religion, and

WHEREAS, governments should not substantially burden the free exercise of religion without compelling justification, and

WHEREAS, the compelling interest test as set forth in certain federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests, and

WHEREAS, it is the intent of the Legislature of the State of Florida to establish the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972), to guarantee its application in all cases where free exercise of religion is substantially burdened, and to provide a claim or defense to

persons whose religious exercise is substantially burdened by government, NOW, THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. Short title.--This act may be cited as the "Religious Freedom Restoration Act of 1998."

Section 2. Definitions.--As used in this act:

(1) "Government" or "state" includes any branch, department, agency, instrumentality, or official or other person acting under color of law of the state, a county, special district, municipality, or any other subdivision of the state.

(2) "Demonstrates" means to meet the burden of going forward with the evidence and of persuasion.

(3) "Exercise of religion" means the exercise of religion under s. 3, Art. I of the State Constitution.

(4) "Incarcerated" means confined within any correctional facility in the state.

Section 3. Free exercise of religion protected.--

(1) The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:

(a) Is in furtherance of a compelling governmental interest; and

(b) Is the least restrictive means of furthering that compelling governmental interest.

(2) The government shall not substantially burden an incarcerated person's exercise of religion, even if the burden

results from a rule of general applicability, except that government may substantially burden an incarcerated person's exercise of religion only if the burden:

(a) Is in furtherance of a substantial penological interest; and

(b) Is the least restrictive means of furthering that substantial penological interest.

(3) A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief.

Section 4. Attorney's fees and costs.--The prevailing party in any action or proceeding to enforce a provision of this act is entitled to reasonable attorney's fees and costs to be paid by the government.

Section 5. Applicability; construction.--

(1) This act applies to all state law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this act.

(2) State law adopted after the date of the enactment of this act is subject to this act unless such law explicitly excludes such application by reference to this act.

(3) Nothing in this act shall be construed to authorize the government to burden any religious belief.

(4) Nothing in this act shall be construed to circumvent the provisions of chapter 893, Florida Statutes.

(5) Nothing in this act shall be construed to affect, interpret, or in any way address that portion of s. 3, Art. I of the State Constitution prohibiting laws respecting the establishment of religion.

(6) Nothing in this act shall create any rights by an employee against an employer if the employer is not a governmental agency.

Section 6. This act shall take effect upon becoming a law.

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HOUSE SUMMARY

Creates the "Religious Freedom Restoration Act of 1998." Defines terms for purposes of the act. Provides that government may not substantially burden a person's exercise of religion, or the exercise of religion of a person incarcerated within a correctional facility within the state, even if the burden results from a rule of general applicability. Provides an exception in which government may substantially burden such persons' exercise of religion only if it demonstrates that the application of the burden to the person is in furtherance of a compelling governmental interest, or a substantial penological interest, and is the least restrictive means of furthering the compelling governmental interest or substantial penological interest. Provides for attorney's fees and costs. Provides applicability. Provides construction.

By the Committee on Governmental Operations and
Representatives Starks, Byrd, Ball, Feeney and Bloom

A bill to be entitled

An act relating to religious freedom; creating the "Religious Freedom Restoration Act of 1998"; providing that government shall not substantially burden the exercise of religion; providing exceptions; providing definitions; providing for attorney's fees and costs; providing applicability; providing construction; providing an effective date.

WHEREAS, it is the finding of the Legislature of the State of Florida that the framers of the Florida Constitution recognizing free exercise of religion as an unalienable right secured its protection in s. 3, Art. I of the State Constitution, and

WHEREAS, laws which are "neutral" toward religion may burden the free exercise of religion as surely as laws intended to interfere with the free exercise of religion, and

WHEREAS, governments should not substantially burden the free exercise of religion without compelling justification, and

WHEREAS, the compelling interest test as set forth in certain federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests, and

WHEREAS, it is the intent of the Legislature of the State of Florida to establish the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972), to guarantee its application in all cases where free exercise of religion is substantially burdened, and to provide a claim or defense to

persons whose religious exercise is substantially burdened by government, NOW, THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. Short title.--This act may be cited as the "Religious Freedom Restoration Act of 1998."

Section 2. Definitions.--As used in this act:

(1) "Government" or "state" includes any branch, department, agency, instrumentality, or official or other person acting under color of law of the state, a county, special district, municipality, or any other subdivision of the state.

(2) "Demonstrates" means to meet the burden of going forward with the evidence and of persuasion.

(3) "Exercise of religion" means an act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief.

Section 3. Free exercise of religion protected.--

(1) The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:

(a) Is in furtherance of a compelling governmental interest; and

(b) Is the least restrictive means of furthering that compelling governmental interest.

(2) A person whose religious exercise has been burdened in violation of this section may assert that

violation as a claim or defense in a judicial proceeding and obtain appropriate relief.

Section 4. Attorney's fees and costs.--The prevailing party in any action or proceeding to enforce a provision of this act is entitled to reasonable attorney's fees and costs to be paid by the government.

Section 5. Applicability; construction.--

(1) This act applies to all state law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this act.

(2) State law adopted after the date of the enactment of this act is subject to this act unless such law explicitly excludes such application by reference to this act.

(3) Nothing in this act shall be construed to authorize the government to burden any religious belief.

(4) Nothing in this act shall be construed to circumvent the provisions of chapter 893, Florida Statutes.

(5) Nothing in this act shall be construed to affect, interpret, or in any way address that portion of s. 3, Art. I of the State Constitution prohibiting laws respecting the establishment of religion.

(6) Nothing in this act shall create any rights by an employee against an employer if the employer is not a governmental agency.

Section 6. This act shall take effect upon becoming a law.

**STORAGE NAME**: h3201s1.go
**DATE**: April 7, 1998

**HOUSE OF REPRESENTATIVES**
**COMMITTEE ON**
**GOVERNMENTAL OPERATIONS**
**BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

**BILL #**: CS/HB 3201

**RELATING TO**: Religious Freedom Restoration Act

**SPONSOR(S)**: Committee on Governmental Operations, Representative Starks and others

**COMPANION BILL(S)** SB 296 (i)

**ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE**.
(1) GOVERNMENTAL OPERATIONS YEAS 4 NAYS 0
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I SUMMARY:

This bill addresses the standard by which the courts judge an individual's claim alleging state interference with free exercise of religion, and establishes a new cause of action for it infringement. CS/HB 3201 will require that any alleged interference with religious free exercise be judged according to whether the state's action is in furtherance of a compelling state interest, and, if so, whether that interest is met by the least intrusive means possible.

The effect of this Act in Florida could parallel the experience with the federal Religious Freedom Restoration Act of 1993 (RFRA). RFRA produced a broadened capacity for legal action against the state for alleged infringement upon free exercise of religion Proponents of RFRA had affirmed this effect as indicative of a greater protection for religious practice Conversely, the greater deference to the subjective claims of individuals that RFRA provided, over even facially neutral state laws, created concerns that the basic regulatory and security functions of government could be adversely affected

The Department of Corrections has expressed its concern that the heightened standard of review will give inmates greater latitude in asserting unreasonable demands which conflict with a correctional institution's need for order and security Supporters of the Act assert, however, that the "compelling interest" standard of scrutiny will accommodate objective penological considerations.

The fiscal impact of this bill is indeterminate. The degree of possible fiscal impact will vary according to the extent of increased litigation.

II. SUBSTANTIVE RESEARCH.

A PRESENT SITUATION:

**Religious Freedom Under the U.S. and Florida Constitutions**

**I. Florida Courts Tend to Follow Federal Rulings**

Section 3, Article I of the Florida Constitution states

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution

The application of s 3, Article I by Florida courts has largely paralleled the Federal law regarding the application of the federal First Amendment's clause stating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof " [1]

**II. The Sherbert "Compelling Interest" Test**

**A. The Test**

In 1963, the United States Supreme Court ruled in Sherbert v. Verner, 374 U S 398 (1963), that claims under the First Amendment's religion clauses would be judged according to the "compelling interest" test. The "compelling interest" test constitutes the highest level of scrutiny[2] that the Supreme Court has applied in analyzing claims against state actions alleged to be unconstitutional. Under this level of scrutiny, the burden is on the state to prove that any interference with an individual's religious practice meets two criteria First, the State must show that interference is "justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate '"[3] Second, in the process of making such a showing, the state must "demonstrate that no alternative forms of regulation would [meet the state interest] without infringing First Amendment Rights."[4]

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[1] *See 10 Fla. Jur. 2d, 595-606.*

[2] *This level of scrutiny is called "strict scrutiny" which "requires [the] state to establish that it has a compelling interest justifying the law and that distinctions created by law are necessary to further some governmental purpose " BLACKS LAW DICTIONARY, 1422 (6th ed 1990)*

[3] *Sherbert v Verner (quoting NAACP v Button), 374 U.S 398, at 403 (1963)*

[4] *Id at 407, see also Thomas v Review Board of the Indiana Employment Security Division, 450 U.S 707, at 718(1980) ("The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.") (citing Sherbert)*

For an interest to be found "compelling," the Sherbert Court stated, "no showing merely of a rational relationship to some colorable state interest would suffice, in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interest, give occasion for permissible limitation ' " [5]

### B. Nonapplicability of the Sherbert Test

In applying the Sherbert "compelling interest" test the United States Supreme Court gave a great degree of deference to a person's subjective assertion of religious deprivation in First Amendment "free exercise" of religion cases.[6] However, later Supreme Court rulings instituted certain exceptions to the application of the "compelling interest" test The "compelling interest" test was found inapplicable to "free exercise" challenges against government actions in the following three circumstances.

#### 1. Military "Free Exercise" Cases

In Goldman v Weinberger, 475 U.S. 503 (1986), the United States Supreme Court ruled that the Sherbert "compelling interest" test was not applicable to "free exercise" claims in military situations The Goldman Court found this exception justifiable because the military is a "specialized society separate from civilian society," whose mission necessitates fostering "instinctive obedience, unity, commitment, and esprit de corps" through, among other things, regulations enforcing a heightened degree of uniformity [7]

#### 2. Prison "Free Exercise" Cases

In Turner v Safley, 482 U.S 78 (1987), the United States Supreme Court held that prison regulations were not subject to the "compelling interest" test, because, although prisoners still retain their constitutional rights, the "institutional order" necessary for a corrective environment justifies a lessened level of scrutiny.[8] In prison "free exercise" cases, a court must only inquire "whether a prison regulation that burdens fundamental rights is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns "[9]

In O'Lone v Estate of Shabazz, 482 U.S. 342 (1987), the United States Supreme Court reaffirmed the Turner holding In O'Lone, the Court asserts several criteria for weighing the reasonableness of prisoners' religious rights claims against a particular prison policy

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[5] *Sherbert v Verner, 374 U S 398, at 406 (1963) (quoting Thomas v Collins ); see also Wisconsin v Yoder, 406 U S 205, at 215 (1972)(Only those interests of the "highest order" are "compelling".)*

[6] *See Thomas v Review Board of the Indiana Employment Security Division, 450 U S 707, at 715 (1981) ("We see, therefore, that [the petitioner] drew a line, and it is not for us to say that the line he drew was an unreasonable one. .The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion ")*

[7] *Goldman v Weinberger, 475 U S 503, at 506-508 (1986).*

[8] *Turner v Safley, 482 U S 78 (1987)*

[9] *Id at 87.*

(1) Whether the policy in question serves a legitimate penological interest,[10]

(2) Whether the prisoners bringing the claim have an alternative means of religious worship,[11]

(3) Whether the costs of accommodating prisoners' religious requests are excessive,[12] and

(4) Whether there exist any "obvious, easy alternatives" to the prisoners' request [13]

### 3. Generally Applicable Laws

A "generally applicable" law is a facially neutral law which is applied, in a generalized fashion and without discrimination, to a general population in a blanket manner [14]

In Bowen v. Roy, 476 U.S. 693 (1986), the United States Supreme Court rejected a "free exercise" challenge to a state law which required that all residents utilize social security numbers in order to get governmental assistance. The Court differentiated between a "facially neutral" state law which "indirectly and incidentally" affects a particular religious practice, and a state law which "criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons "[15] The Court found the two to be "wholly different," and that "absent proof to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest."[16]

In Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S 439 (1988), the United States Supreme Court, applying the reasoning in Roy, rejected a "free exercise" challenge to a road construction project planned for a tract of federally owned land. Against a claim that the construction would disrupt an area containing ritualistic value to certain Native Americans, the Court differentiated between state actions that coerce, penalize, or prohibit the exercise of religion and state actions which "may make it more difficult to practice certain religions but which have no tendency to coerce individuals

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[10] *O'Lone v Estate of Shabazz, 482 U S. 342, at 350 (1987)*

[11] *Id at 351-352.*

[12] *Id. at 352-353*

[13] *Id at 353*

[14] *See Bowen v Roy, 476 U S 693, 703-705 (1986), City of Boerne v. Flores, 117 S Ct 2157, at 2160-2161 (1997)*

[15] *Bowen v. Roy, 476 U S 693, at 706 (1986)*

[16] *Id at 707-708.*

into acting contrary to their religious beliefs."[17] Under the ruling in Lyng, only state actions that coerce, penalize, or prohibit the exercise of religion are subject to the "compelling interest" test. Accordingly, generalized state actions which are merely "inconvenient" but are not specifically prohibitive or coercive of religious practice are not subject to the "compelling interest" test.[18]

The Goldman, Turner, O'Lone, Roy, and Lyng cases reaffirmed the Sherbert "compelling interest" test, but created exceptions to its application In those cases where the "compelling interest" test does not apply, proving a case against the state for infringement of free exercise of religion is made more difficult

## III. Smith, the Religious Freedom Restoration Act of 1993, and City of Boerne

In Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), the United States Supreme Court limited the application of Sherbert's "compelling interest" test to only two circumstances:

(1) When the government regulation at issue burdened a constitutional right other than religious free exercise rights;[19] and

(2) When state unemployment-compensation rules conditioned the availability of benefits on an applicant's willingness to work under conditions forbidden by his/her religion [20]

In Smith, the United States Supreme Court further found the "compelling interest" test inapplicable to a "generally applicable" law.[21] This ruling thus effectively removed use of the "compelling interest" test in the majority of free exercise of religion cases [22]

In reaction to the Smith opinion, the United States Congress passed the Religious Freedom Restoration Act of 1993 (RFRA), which provided, in pertinent part.

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[17] *Lyng v Northwest Indian Cemetery Protective Association, 485 U S 439, at 450 (1988)*

[18] *Id. at 449-451*

[19] *Employment Division, Department of Human Resources of Oregon v Smith, 494 U S. 872, at 881 (1990)*

[20] *Id. at 883*

[21] *Id at 884-886("Although, as noted earlier, we have sometimes used the Sherbert test to analyze free exercise challenges to such laws . we have never applied the test to invalidate one We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges The government's ability to enforce generally applicable prohibitions of generally harmful conduct, like its ability to carry on other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development'")*

[22] *See Montgomery v County of Clinton, Michigan, 743 F. Supp. 1253, at 1259 (W D Mich 1990) ("There is no contention that the laws under which the autopsy was authorized are other than generally applicable and religion neutral. Similarly, there is no contention that the authorization itself was other than religion-neutral. The religion of decedent and of his next of kin playe no role in the decision and the actions of the defendants It follows then, by implication of Employment Division [the Smith case], that defendant's actions need only have been reasonably related to a legitimate governmental objective")*

**SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.**

(a) IN GENERAL.- Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
(b) EXCEPTION.- Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person-
(1) is in furtherance of a compelling governmental interest, and
(2) is the least restrictive means of furthering that compelling governmental interest.
(c) JUDICIAL RELIEF.-A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution

RFRA had two basic effects:

(1) It created a new cause of action against government for any person who alleged that his or her free exercise of religion was substantially burdened by government action;[23] and

(2) It re-established the use of the "compelling interest" test without the modifying exceptions of the post-Sherbert line of cases

RFRA resulted in an increased opportunity to bring lawsuits against the state for alleged infringement upon the free exercise of religion, and, the "compelling interest" test made it more difficult for the state to win these cases. This produced an increase in the number of First Amendment religious freedom cases entertained by state and federal courts.[24]

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[23] *The meaning of "substantial burden" has been given varied interpretations See Mack v O'Leary, 80 F 3d 1175, at 1178-1180 (7th Cir 1996) ("The Fourth, Ninth, and Eleventh Circuits define "substantial burden" as one that either compels the religious adherent to engage in conduct that his religion forbids . . .or forbids him to engage in conduct that his religion requires . The Eighth and Tenth Circuits use a broader definition-- action that forces religious adherents to 'refrain from religiously motivated conduct ' . or that 'significantly inhibit[s] or constrain[s] conduct or expression that manifests some central tenet of a [person's] individual beliefs ' The Sixth Circuit seems to straddle the divide, asking whether the burdened practice is 'essential' or 'fundamental,' .We hold . that a substantial burden is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs ")*

[24] *See Rust v Clarke, 883 F Supp 1293 (D Neb 1995) (Prisoners following Asatru religion were not denied their rights under RFRA when their requests for access to location and time for ceremonies, and to ceremonial articles, were denied by correctional officials because such denials were the least restrictive means of furthering compelling state interests. Requests included stone altars, evergreen trees, cauldrons, wooden Viking swords, a sauna, special meats and foods, and the allowance for a ceremonial fire at worship services.), Campos v Coughlin, 854 F Supp. 194 (S.D N.Y. 1994)( Preliminary injunction is granted allowing inmates to wear*

In 1997, the United States Supreme Court, in City of Boerne v. P.F. Flores, 117 S Ct. 1257 (1997), declared RFRA unconstitutional on two grounds First, the Court held that RFRA's subject matter exceeded the enumerated powers of Congress under s. 5 of the federal Fourteenth Amendment [25] Second, the Court held that the RFRA's sweeping nature went beyond Congress' power to enact remedial legislation binding the states, and thus violated the balance between federal and state power (in short, it violates states' rights). [26]

The effect of City of Boerne was to restore the Smith ruling to effective law Thus the "compelling interest" test is only applicable when the government regulation at issue burdens a constitutional right other than religious free exercise rights and when state unemployment compensation rules condition the availability of benefits on an applicant's willingness to work under conditions forbidden by his/her religion Furthermore, the "compelling interest" test is inapplicable to a "generally applicable" law.

In response to this, CS/HB 3201 has been filed and it creates the "Religious Freedom Restoration Act of 1998."

B EFFECT OF PROPOSED CHANGES:

**Application of the "Compelling Interest" Test**

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*beads in conformity with the Santeria religion.); Prins v. Coughlin, 76 F 3d 504 (2d Cir 1996) (Jewish inmate's allegations that transfer from one prison facility to another violated RFRA by creating difficulties in meeting dietary and ceremonial requirements of his religion are found insufficient), Phipps v Parker, 879 F. Supp 734 (W D Ky 1995) (Prison's requirement of short haircuts do not violate orthodox Hasidic Jewish inmate's RFRA rights), Bessard v California Community Colleges, 867 F Supp 1454 (E D Cal. 1994) (Requirement of loyalty oaths for state employment violates rights of Jehovah's Witnesses under RFRA.), Mack v O'Leary, 80 F.3d 1175 (7th Cir 1996) (Evidentiary hearing is required for determination of whether a particular religious requirement is a central tenet of prisoner's religion, the inhibition of which would constitute violation of RFRA), Abate v Walton, 77 F 3d 488 (9th Cir.1996) (Prisoner's suit alleging that menu offered by correctional facility does not satisfy dietary requirements of his religion fails for lack of adequate showing to that effect), Jolly v. Coughlin, 76 F 3d 468 (2d Cir 1996) (Prison authorities' use of confinement to compel Rastafarian prisoner to submit to tuberculosis examination, which he asserts contradicts his religious beliefs, violates RFRA), Werner v. McCotter, 49 F 3d 1476 (10th Cir 1995) (Prisoner alleging correctional authorities' prohibition of sweat lodge for Native American religious rituals, and possession of medicine bag, has established a prima facie case under the RFRA); Hamilton v. Schriro, 74 F.3d 1545 (8th Cir 1996) (Prison regulations requiring short hair length and denying sweat lodge ceremony for Native American inmates does not violate RFRA because it is narrowly tailored to meet compelling interests); Lawson v Duggar, 844 F Supp 1538 (1995) (RFRA is violated by routine prohibition of literature of Hebrew Israelite faith by correctional facility), Cheema v Thompson, 67 F.3d 883 (9th Cir 1995) (Preliminary injunction is granted allowing Sikh schoolchildren to carry ceremonial knives to school), Thiry v. Carlson, 78 F.3d 1491 (10th Cir. 1996) (RFRA was not violated by the building of highway through burial area because the Native American and Christian beliefs implicated allowed for moving of gravesites when necessary).*

[25] *City of Boerne v. P F Flores, 117 S Ct 2157, at 2172 ("RFRA was designed to control cases and controversies, such as the one before us, but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control ")*

[26] *Id at 2170 (1997) ("Remedial legislation under sec 5 'should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against ' . RFRA is not so confined ") (quoting Civil Rights Cases, 109 U S, at 13), see also id at 2172 ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance ")*

The Religious Freedom Restoration Act of 1998 (the Act) provides that government shall not substantially burden the free exercise of religion unless the government demonstrates that the burden

(1) Is in furtherance of a "compelling governmental interest," and
(2) Is the least restrictive means of furthering that interest.

"Government" or "state" is defined to include "any branch, department, agency, instrumentality, or official or other person acting under color of law of the state, a county, special district, municipality, or any other subdivision of the state." The Act specifically includes within its provisions "rules of general applicability," and does not provide for a alternative standard in regard to cases brought by incarcerated persons

The effect of this Act in Florida could parallel the experience with RFRA at the national level RFRA produced a broadened capacity for legal action against the state for alleged infringement upon free exercise of religion. Proponents of RFRA had affirmed this effect as indicative of a greater protection for religious practice [27] Conversely, the greater deference to the subjective claims of individuals that RFRA provided, over even facially neutral state laws, created concerns that the basic regulatory and security functions of government could be adversely affected.[28] The Act's provisions are substantially similar to those of RFRA.

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[27] *For example, see Brief of American Bar Association as Amicus Curiae in Support of Respondents at 1-2, City of Boerne v Flores, 117 S. Ct 1257 (1997) ("The ABA [American Bar Association] policy rests on the conviction that only by limiting governmental interference with the exercise of religion to those instances where government can demonstrate an urgent need to do so can we protect the principles of religious liberty and tolerance on which this country was founded and for which it is unequaled elsewhere in the world. The ABA concluded that the compelling interest test is also the most practical means for ensuring that smaller and unpopular faiths receive the same level of protection as mainstream faiths ")*

[28] *See, e g Brief for Amici States of Ohio, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, The Commonwealth of Pennsylvania, and the Territories of American Samoa, Guam and The Virgin Islands in Support of Petitioner at 6-7, City of Boerne v Flores, 117 S Ct 1257 (1997) ( "By dictating a universal strict scrutiny standard for clashes between individual religious liberty claims and collective security needs, RFRA disrupts core State police powers In the area of education, for example, RFRA has generated a raft of unusual lawsuits It has subjected such matters as the selection of songs performed by high school choirs, the enforcement of minimal educational standards and the disciplining of errant faculty to strict federal review. Likewise, the RFRA mandate has made it more difficult for state and local governments to maintai public safety The Act has generated extensive litigation over such inherently local issues as state highway improvements intended to reduce accidents, nuisance abatement actions dealing with excessive holiday lighting and the applicability of otherwise unremarkable highway and hunting safety regulations "); but see also Brief of the States of Maryland, Connecticut, Massachusetts and New York As Amici Curiae in Support of Respondent at 5, City of Boerne v Flores, 117 S Ct 1257 (1997) ("[T]here [is no] reason to believe that RFRA has undermined or will undermine the States' ability to manage their educational or public safety functions For example, virtually all of the education-related cases that have been brought under RFRA have involved only ancillary issues of public education (such as sex education programs, graduations, etc ) and, even then, have been largely unsuccessful. The same is true regarding issues of public safety ")*

The Act, like RFRA, includes within its provisions cases brought by incarcerated persons [29] The Department of Corrections has expressed its concern that the "compelling interest" standard of review will give inmates greater latitude in asserting unreasonable demands which conflict with a correctional institution's need for order and security [30] Supporters of the Act assert, however, that the "compelling interest" level of scrutiny is sufficient to allow the courts to accommodate objective penological considerations

**Provision for Claim or Defense**

This Act also provides that a person whose religious exercise has been burdened in violation of the Act may assert that violation "as a claim or defense in a judicial proceeding[31] and

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[29] *RFRA, like the Act presently, had established the "compelling interest" test for all claims against the state for infringement upon the free exercise of religion, including claims from incarcerated individuals or groups. This had created debate as to whether the greater capacity for successful litigation by inmates had hindered the security and order of corrections facilities, and whether it produced an inordinate degree of inmate litigation See, e g Brief for Amici States of Ohio, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, The Commonwealth of Pennsylvania, and the Territories of American Samoa, Guam and The Virgin Islands in Support of Petitioner at 3-6, City of Boerne v Flores, 117 S Ct. 1257 (1997) ("[RFRA] has spawned a remarkable wave of inmate litigation in the years since it was passed Based on a Lexis/Nexis search conducted on November 12, 1996, no fewer than 189 inmate cases have been decided involving RFRA-based challenges . .The litigation wave generated by RFRA disrupts State prisons and State prison administrations in many ways As an initial matter, RFRA cases are harder to dispose of than most due to the difficulty (if not impossibility) of determining the accommodations that are truly necessary for the proper exercise of a given religion For like reasons, RFRA lawsuits are expensive New attorneys and experts must be hired to defend them, depositions and other discovery must be taken to respond to them, and successful lawsuits require costly reconfigurations of corrections programs, sometimes even prison buildings. . . Besides the difficulty of responding to this litigation an the cost of handling it, RFRA lawsuits compel corrections officials to divert extensive staff time to handling the litigation They must investigate the 'religious' nature of each claim and the 'religious' necessity to each inmate of bringing the claim Making matters worse is the "least restrictive means" test, which regularly compels corrections staff to develop ways to accommodate even the most unusual and isolated demands "), but see Brief of the States of Maryland, Connecticut, Massachusetts and New York As Amici Curiae in Support of Respondent at 3-9, City of Boerne v Flores, 117 S Ct 1257 (1997) ("Properly interpreted, RFRA does not and will not impede the States' ability to operate their prisons effectively With respect to prison management, RFRA requires courts to provide substantial deference to the States and to those responsible for administering the state penal systems . . .The limitations inherent in th requirement of proving a 'substantial burden' preserves State authority in may instances where RFRA may be invoked Although the lower courts, prior to O'Lone, disagreed among themselves as to whether the Sherbert/Yoder compelling interest test applies to religious freedom claims in the prison context, even those courts that had applied that test accorded a great deal of deference to the judgements of prison administrators. . This deference applied at two distinct levels First, following this Court's statements in earlie decisions, the lower courts recognized that, in the prison context, order, safety, security, and discipline are paramount government interests. .Second, those courts recognize that prison officials are entitled to great deference in determining whether a particular prison regulation is tailored with sufficient precision to the state interest at issue ")*

[30] *The Department of Corrections is concerned not only with the ability to win lawsuits under the Act, but with the possibility that the Act's "compelling interest" standard, as applied to prison situations, may give incarcerated individuals an increased capacity to go to trial on frivolous matters In this, the Department of Corrections' assertions parallel similar criticisms by amici in the Bourne case See Brief for Amici States of Ohio, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, The Commonwealth of Pennsylvania, and the Territories of American Samoa, Guam and The Virgin Islands in Support of Petitioner at 3, City of Boerne v. Flores, 117 S Ct 1257 (1997) ( "Many of the cases . involve recycled claims that were defeated years ago under the reasonableness test applied to inmate free exercise claims Thus, though many of the claims now confronting State prison officials could not have met the pleading requirements of Rule 11 under prior law, [under RFRA's 'compelling interest' standard] they are now being litigated anew in every corner of the country ")*

[31] *Use of this Act as a claim or defense in a "judicial proceeding" appears to limit the forum within which such a claim or defense may be brought "Administrative proceedings" are, for example, not mentioned (e g Ch. 120, F S , proceedings conducted by "agencies" as defined therein). This apparent limitation conflicts with this Act's attorney's fee provision The fee provision appears to entitle a non-governmental prevailing party to reasonable attorney's fees and costs in "any action or proceeding" to enforce the Act -- not just in judicial proceedings*

obtain appropriate relief". This creates a new cause of action against government Furthermore, what the scope of "appropriate relief" might entail is uncertain It could mean issuing an injunction or writ to awarding compensatory damages

**Provisions Regarding Applicability of the Act**

This Act also sets forth the following statements of applicability.

1. "This act applies to all state law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this act."

Thus this Act's provisions are retroactive and prospective in effect, and apply to laws found in the Florida Statutes as well as apparently to, for example, local ordinances and codes Accordingly, a person could sue a governmental entity under this Act for governmental actions previously committed[32] that were in conformance with then existing law, and if that person prevailed, he or she would be entitled to reasonable attorneys' fees and costs There is no period of time allowed for a governmental entity to establish provisions and procedures (e.g., variance provisions) that would take into consideration the Act's new provisions regarding free exercise of religion.

2. "State law adopted after the date of the enactment of this act is subject to this act unless such law explicitly excludes such application by reference to this act."

Any state law[33] created after this Act takes effect can circumvent this Act's provisions by simply stating that the Act does not apply. If such a statement is provided in a new law, then a defense or claim pursuant to this Act is unavailable Existing law cannot so circumvent this Act's applicability, unless possibly it is readopted with the appropriate statement regarding the Act's inapplicability.

Additionally, one legislature may not bind the hands of future legislatures with regard to prohibiting changes to statutory law. Neu v. Miami Herald Publishing, Co., 462 So 2d 821, at 824 (Fla 1985). Accordingly, future legislatures could otherwise negate the effect of this Act, without expressly referencing it

3 "Nothing in this act shall be construed to authorize the government to burden any religious belief."

4. "Nothing in this act shall be construed to circumvent the provisions of chapter 893, Florida Statutes."

Chapter 893, F S , deals with drug abuse prevention and control Several of the sections in Ch 893, F.S., make it unlawful to, for example, sell, manufacture, deliver,

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[32] *There is no time limit associated with the retroactive application of this Act. Thus, conceivably an action by the state done many years ago could be brought before the courts as an alleged violation of this Act*

[33] *"State" is defined in this Act to include counties municipalities, and special districts Accordingly, when referencing "state law" that includes local law as well*

possess , or traffic in certain controlled substances. It is unclear how this Act could "circumvent" the provisions of that chapter. Possibly what is meant is that the provisions of this Act are inapplicable with regard to the enforcement of Ch 893, F.S If so, courts, in ruling on criminal cases brought pursuant to Ch. 893, F.S , would then have to dismiss any claim or defense brought pursuant to this Act However, the meaning of this provision is still speculative.

5. "Nothing is this act shall be construed to affect, interpret, or in any way address that portion of s 3, Art. I of the State Constitution prohibiting laws respecting the establishment of religion."

This could mean that the provisions of this Act are intended to address only governmental actions that affect the free exercise of religion, not the establishment of religion However, if the court finds the legislation to affect the establishment of religion, a statement within a general law stating the contrary is ineffectual.

6 "Nothing is this act shall create any rights by an employee against an employer if the employer is not a governmental agency."

This means that the provisions of this Act are not available against the private sector and thus cannot be used as a claim or defense in private sector litigation

Finally, this Act also provides that "the prevailing party in any action or proceeding to enforce a provision of this act is **entitled to** reasonable attorney's fees and costs to be paid by the government." This language is confusing. Initially, it appears that the prevailing party is awarded reasonable attorney's fees and costs But then the sentence concludes with: "to be paid by the government." Accordingly, the government, when a prevailing party, would not be entitled to reasonable attorney's fees and costs.[34] Finally, the fee provision does not appear mandatory (e g , the court must/shall award reasonable attorney's fees and costs to the nongovernmental prevailing party) but only "entitles" a prevailing party to reasonable attorney's fees and costs

C. APPLICATION OF PRINCIPLES:

1 Less Government

a. Does the bill create, increase or reduce, either directly or indirectly.

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[34] *Under RFRA, there existed a bifurcated standard for the awarding of legal fees For judicial proceedings, 42 U S C 1988, applied, and that law provides that 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." For administrative proceedings, s 504(b)(1)(C) of title 5, United States Code, applied, and that law provides that "an agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that the special circumstances make an award unjust "*

(1) any authority to make rules or adjudicate disputes?

This Act creates a cause of action under which a person may sue the government for alleged violation of his or her free exercise of religion. Its provisions may also be used as a defense.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

To the extent legal action is brought pursuant to this Act, governmental entities will have to engage personnel, including legal counsel, to defend its actions (in administrative as well as in judicial forums); and, the courts will have to hear such matters

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced

An agency or program is not eliminated or reduced

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes

a. Does the bill increase anyone's taxes?

No

b. Does the bill require or authorize an increase in any fees?

No.

c Does the bill reduce total taxes, both rates and revenues?

No.

d Does the bill reduce total fees, both rates and revenues?

No.

e Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No

b Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4 Individual Freedom:

a Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

This bill appears to increase a person's options with regard to free exercise of religion.

b Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

a If the bill purports to provide services to families or children

This bill does not purport to provide services to families or children

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b Does the bill directly affect the legal rights and obligations between family members?

No.

c If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

This bill does not create or change a program providing services to families or children.

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Creates new sections of law.

E. SECTION-BY-SECTION RESEARCH:

Section 1: Provides a title: "Religious Freedom Restoration Act of 1998 "

Section 2: Provides definitions.

Section 3: Provides that government shall not substantially burden a person's exercise of religion unless the State's action is to further a "compelling governmental interest" and is accomplished by the "least restrictive means" possible; and, provides that a person whose religious exercise has been burdened in violation of the Act may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief.

Section 4: Provides for entitlement to reasonable attorney's fees and costs by the prevailing nongovernmental party.

Section 5: Provides that this Act applies to all state law (statutory or otherwise), and the implementation of that law, whether adopted before or after the implementation of this act; provides that state law adopted after enactment of this Act is subject to this Act unless expressly otherwise stated by such laws; provides that nothing in this Act shall authorize the State to burden any religious belief; provides that nothing in this Act shall circumvent Ch. 893, F. S. ("Drug Abuse Prevention and Control"), provides that nothing in this Act shall affect the portion of s 3, Art I of the State Constitution which prohibits laws respecting the establishment of religion, and, provides that nothing in this Act creates any rights by an employee against a non-governmental employer

Section 6: Provides an effective date of upon becoming law.

III FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT.

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

   See "Fiscal Comments"

2. Recurring Effects.

   See "Fiscal Comments"

3 Long Run Effects Other Than Normal Growth:

   None.

4 Total Revenues and Expenditures.

   See "Fiscal Comments"

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1 Non-recurring Effects.

See "Fiscal Comments"

2 Recurring Effects:

See "Fiscal Comments"

3 Long Run Effects Other Than Normal Growth:

None.

C DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

1. Direct Private Sector Costs

None.

2 Direct Private Sector Benefits:

None.

3 Effects on Competition, Private Enterprise and Employment Markets

None.

D. FISCAL COMMENTS

The fiscal impact of this bill is indeterminate. To the extent increased litigation against government results from this Act, then state and local goverments will have to defend against same Litigation entails expense, including attorneys' fees Furthermore, any relief granted against the state may have a fiscal impact This indeterminate amount of resulting litigation will also have a fiscal impact on the courts.

IV CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION.

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to expend funds

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority of counties or municipalities to raise revenues.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES.

On April 7, 1998, the Committee on Governmental Operations adopted one "remove everything after the enactment clause" amendment That amendment provided that government shall not substantially burden a person's free exercise of religion except in cases where the government has demonstrated that the burden is in furtherance of a "compelling governmental interest," and that it is the least restrictive means of furthering that interest This test is to be applied to all cases asserting a claim against the state for infringement upon the free exercise of religion, including those from incarcerated persons The amended bill was made a committee substitute.

The original bill provided that in cases brought by incarcerated individuals, the government has to demonstrate that the burden is in furtherance of a "substantial penological interest," and that it is the least restrictive means of furthering that interest The original bill also defined "Exercise of Religion," as "the exercise of religion under s. 3, Art. I of the State Constitution " The committee substitute changed that definition.

VII. SIGNATURES:

COMMITTEE ON GOVERNMENTAL OPERATIONS:
Prepared by: Legislative Research Director

Garci Perez Jimmy O. Helms

*specifically appropriated for responding to the agricultural emergency are insufficient to eliminate the agricultural emergency, funds shall be transferred from the Working Capital Fund to the Agricultural Emergency Eradication Trust Fund pursuant to s 570 191 in an amount determined by the Administration Commission The Administration Commission shall direct the Executive Office of Governor to establish the appropriate spending authority within the Department of Agriculture and Consumer Services and the Comptroller shall transfer the funds to the Agricultural Emergency Eradication Trust Fund Likewise, if fund balances exist in the Agricultural Emergency Eradication Trust Fund, the Administration Commission shall direct the Executive Office of the Governor to establish spending authority as requested by the Department of Agriculture and Consumer Services to address an agricultural emergency when declared by the Commissioner of Agriculture pursuant to s 570 07*

Section 2 This act shall take effect July 1 of the year in which enacted, if legislation creating the Agricultural Emergency Eradication Trust Fund is adopted in the same legislative session or an extension thereof

And the title is amended as follows

On page 1, lines 3 through 17,
remove from the title of the bill

and insert in lieu thereof amending s 215 32, F S ; providing for transfers of funds by the Comptroller to the Agricultural Emergency Eradication Trust Fund, providing for approval by the Administration Commission, providing for spending authority to be established, providing a contingent effective date

Rep Fuller moved the adoption of the amendment, which failed of adoption

Representative(s) Bronson offered the following

**Amendment 2 (with title amendment)**—On page 4, lines 26-30,
remove from the bill all of said lines

and insert in lieu thereof

*(3)(a) Any refunds of the tax imposed under s 206 41(1)(f) claimed under s 206 41(4)(c)1 in excess of such refunds claimed during the fiscal year preceding the effective date of this act shall be deducted from the amount transferred pursuant to s 206 608(1), during the year the claims are made, to the Agricultural Emergency Eradication Trust Fund*

*(b) Any refunds of the tax imposed under s 206 41(1)(g) claimed under s 206 41(4)(c)1 in excess of such refunds claimed during the fiscal year preceding the effective date of this act shall be deducted from the amount transferred pursuant to s 206 606(1)(d), during the year the claims are made, to the Agricultural Emergency Eradication Trust Fund*

And the title is amended as follows

On page 1, line 13, after the semicolon

Insert providing for deductions from such moneys under certain circumstances,

Rep Bronson moved the adoption of the amendment, which was adopted

Representative(s) K Pruitt offered the following:

**Amendment 3**—On page 5, line 10
remove from the bill *$4*

and insert in lieu thereof *$1*

Rep K Pruitt moved the adoption of the amendment, which was adopted

Under Rule 127, the bill was referred to the Engrossing Clerk

**CS/CS/HB 1847**—A bill to be entitled An act relating to agriculture, creating s 570 191 F S , creating the Agricultural Emergency Eradication Trust Fund, prescribing its uses, defining what constitutes an "agricultural emergency", providing an effective date

—was read the second time by title

Representative(s) Bronson offered the following

**Amendment 1 (with title amendment)**—On page 1, of the bill, between lines 23 and 24,

insert

Section 2 *For Fiscal Year 1998-99, up to $10 million collected in the Agricultural Emergency Eradication Trust Fund is hereby transferred to the Plant Industry Trust Fund for the purposes of carrying out any existing or future declared agricultural emergencies*

And the title is amended as follows

On page 1, line 6 after the semicolon,

insert: transferring funds for Fiscal Year 1998-99,

Rep Bronson moved the adoption of the amendment, which was adopted

Under Rule 127, the bill was referred to the Engrossing Clerk

**CS/CS/HB 4141**—A bill to be entitled An act relating to water resources, creating s 373 45923, F S , providing legislative findings and intent, authorizing the South Florida Water Management District to participate as local sponsor for the Restudy of the Central and Southern Florida Project, providing duties of the Joint Legislative Committee on Everglades Oversight, providing for public hearings, providing reporting requirements, providing for project cooperation agreements, providing for legislative authorization providing an effective date

—was read the second time by title and, under Rule 127, referred to the Engrossing Clerk

**CS/HB 4107**—A bill to be entitled An act relating to coastal redevelopment, amending s 163 335, F S , providing legislative intent for the scope of activities included in community redevelopment, amending s 163 340, F S , redefining the terms "blighted area," "community redevelopment," and "community redevelopment area", amending s 163 360, F S , providing additional criteria for approval of a community redevelopment, creating s 163 336, F S , providing legislative intent, providing for the geographical locations of coastal resort area redevelopment pilot projects, providing for administration of the pilot projects, providing exemptions to certain coastal construction requirements, providing for the scheduled expiration of these provisions, providing an effective date

—was read the second time by title and, under Rule 127, referred to the Engrossing Clerk

**CS/HB 3173**—A bill to be entitled An act relating to retirement funds, amending and revising the provisions of ss 175 071 and 185 06, F S , revising investment provisions to permit municipalities greater investment latitude to make foreign investments, providing for general powers and duties of the board of trustees, providing an effective date

—was read the second time by title and, under Rule 127, referred to the Engrossing Clerk

**CS/HB 3201**—A bill to be entitled An act relating to religious freedom, creating the "Religious Freedom Restoration Act of 1998", providing that government shall not substantially burden the exercise of religion, providing exceptions, providing definitions, providing for attorney's fees and costs, providing applicability, providing construction, providing an effective date

—was read the second time by title

Representative(s) Lawson and Grady offered the following

**Amendment 1**—On page 3 between lines 15 and 16,

insert

*(4) This act shall not apply to persons held in criminal custody under judicial order*

Rep Lawson moved the adoption of the amendment

Further consideration of **CS/HB 3201** with pending amendment was temporarily postponed under Rule 147

## General Calendar

### Bills and Joint Resolutions on Third Reading

On motion by Rep Thrasher, all bills on Third Reading on the Daily Folder were temporarily postponed

### Bills and Joint Resolutions on Second Reading

**CS/CS/HB 3899**—A bill to be entitled An act relating to intangible personal property taxes, amending s 199 023, F S, defining "ministerial function," "processing activity," and "investment adviser" for purposes of ch 199, F S, amending s 199 052, F S, increasing the minimum amount of annual intangible personal property tax which a person may be required to pay, providing taxable status of intangible personal property held by a trust for which a bank or savings association acts as trustee or as an agent other than a trustee, providing responsibilities of Florida residents with a beneficial interest in a trust for which a bank or savings association acts as trustee, providing taxable status of assets purchased by, and property managed by, an investment adviser under specified conditions providing taxable situs of credit card receivables and charge card receivables, defining "credit card receivables" and "charge card receivables", conforming language repealing s 199 052(11), F S, relating to returns filed by banking organizations, to conform, amending s 199 175, F S, relating to taxable situs, conforming language, amending s 199 185, F S, revising the exemption from intangible personal property taxes for certain property held in trust, exempting accounts receivable arising out of a trade or business from intangible personal property taxes and providing a schedule for implementing the exemption, exempting stock options granted to employees by an employer and stock purchased by employees under certain conditions from intangible personal property taxes, providing a full, rather than partial, exemption from the annual tax for banks and savings associations and revising application of the exemption, exempting insurers from the annual tax, repealing s 199 185(1)(k), F S, relating to an exemption for real estate mortgage investment conduits, to conform, repealing s 199 104, F S, which provides a credit against the annual tax for banks and savings associations, repealing s 220.68, F S, which provides a credit against the franchise tax imposed on banks and savings associations based on intangible tax paid, amending s 199 282, F S, revising the penalty for late filing of an annual intangible tax return, providing a limitation on combined delinquency and late filing penalties, revising the penalty for omitting or undervaluing property on an annual return, amending s 199 292, F.S, revising the distribution of intangible tax revenues, amending s 220 02, F S, relating to order of credits against the corporate income tax or franchise tax, and s 624 509, F S, relating to the insurance premium tax, conforming language, providing application, providing effective dates

—was read the second time by title.

The Committee on General Government Appropriations offered the following

**Amendment 1 (with title amendment)**—On page 8, lines 23 & 24 remove all of said lines from the bill

and insert in lieu thereof *state solely because they are managed or controlled by a bank or savings association as defined in s 220 62 or an affiliate or subsidiary thereof that is domiciled in this state shall only be treated as having*

Rep Brooks moved the adoption of the amendment, which was adopted

Further consideration of **CS/CS/HB 3899** was temporarily postponed under Rule 147

**HB 3921**—A bill to be entitled An act relating to drivers' licenses; amending s 322 21, F S, revising language with respect to license fees for the renewal of certain Class D or Class E licenses, providing an effective date

—was read the second time by title and, under Rule 127, referred to the Engrossing Clerk

**CS/CS/HB 4407**—A bill to be entitled An act relating to tax on sales, use, and other transactions, providing a short title, providing that no tax levied under ch 212, F S, shall be collected on sales of clothing with a value of $50 or less during specified periods in August 1998 and January 1999, providing a definition, providing for rules, providing an effective date

—was read the second time by title

Representative(s) Gottlieb offered the following

**Amendment 1 (with title amendment)**—On page 1, lines 17 through 23
remove from the bill all of said lines

and insert in lieu thereof *school supplies and clothing having a taxable value of $50 or less during the following periods*

*(a) From 12 01 a m , August 15, 1998, through midnight, August 21, 1998*

*(b) From 12 01 a m , January 15, 1999, through midnight, January 17, 1999*

*(2)(a) As used in this section, the term "school supplies" means lined paper, poster board, notebooks, binders, scissors, pencils, pens, rulers crayons, markers, lunchboxes, backpacks, dictionaries, thesauruses tape, tape dispensers, staples, and staplers.*

*(b) As used in this section, the term "clothing" means any*

And the title is amended as follows

On page 1 lines 5 through 8 of the bill
remove from the title of the bill all of said lines

and insert in lieu thereof F.S, shall be collected on sales of school supplies and clothing with a value of $50 or less during specified periods in August 1998 and January 1999, providing definitions, providing for rules,

Rep Gottlieb moved the adoption of the amendment.

Further consideration of **CS/CS/HB 4407**, with pending amendment was temporarily postponed under Rule 147

**CS/CS/HB 3899**—A bill to be entitled An act relating to intangible personal property taxes, amending s 199 023, F S, defining "ministerial function," "processing activity," and "investment adviser" for purposes of ch 199, F S., amending s 199 052, F S, increasing the minimum amount of annual intangible personal property tax which a person may be required to pay, providing taxable status of intangible personal property held by a trust for which a bank or savings association acts as trustee or as an agent other than a trustee, providing responsibilities of Florida residents with a beneficial interest in a trust for which a bank or savings association acts as trustee, providing taxable status of assets purchased by, and property managed by, an investment adviser under specified conditions, providing taxable situs of credit card receivables and charge card receivables, defining "credit card receivables" and "charge card receivables", conforming language repealing s 199 052(11), F S, relating to returns filed by banking organizations, to conform, amending s 199 175, F S, relating to taxable situs, conforming language, amending s 199 185, F S, revising the exemption from intangible personal property taxes for certain property held in trust, exempting accounts receivable arising out of a trade or business from intangible personal property taxes and providing a

*required documentation listed in subsection (5) Upon verification that the applicant has met these requirements, the department shall issue a written decision granting eligibility for partial tax credits (a tax credit certificate) in the amount of 35 percent of the total costs claimed, subject to the $250,000 limitation, for the tax year in which the tax credit application is submitted based on the report of the certified public accountant and the certifications from the appropriate registered technical professionals.*

*(8) On or before March 1, the Department of Environmental Protection shall inform each eligible applicant of the amount of its partial tax credit and provide each eligible applicant with a tax credit certificate that must be submitted with its tax return to the Department of Revenue to claim the tax credit Credits will not result in the payment of refunds if total credits exceed the amount of tax owed*

*(9) If an applicant does not receive a tax credit allocation due to an exhaustion of the $5-million annual tax credit authorization, such application will then be included in the same first-come, first-served order in the next year's annual tax credit allocation, if any*

*(10) The Department of Environmental Protection may adopt rules to prescribe the necessary forms required to claim tax credits under this section and to provide the administrative guidelines and procedures required to administer this section Prior to the adoption of rules regulating the tax credit application, the department shall, by September 1, 1998, establish reasonable interim application requirements and forms*

*(11) The Department of Environmental Protection may revoke or modify any written decision granting eligibility for partial tax credits under this section if it is discovered that the tax credit applicant submitted any false statement, representation, or certification in any application, record, report, plan, or other document filed in an attempt to receive partial tax credits under this section The Department of Environmental Protection shall immediately notify the Department of Revenue of any revoked or modified orders affecting previously granted partial tax credits Additionally, the taxpayer must notify the Department of Revenue of any change in its tax credit claimed*

*(12) An owner, operator, or real property owner who receives state-funded site rehabilitation under s 376 3078(3) for rehabilitation of a drycleaning-solvent-contaminated site is ineligible to receive a tax credit under s 199 1055 or s 220 1845 for costs incurred by the taxpayer in conjunction with the rehabilitation of that site during the same time period that state-administered site rehabilitation was underway*

Section 5 Paragraph (o) is added to subsection (7) of section 213 053, Florida Statutes, to read

213 053 Confidentiality and information sharing —

(7) Notwithstanding any other provision of this section, the department may provide

*(o) Information relative to ss 199 1055, 220 1845, and 376 30781 to the Department of Environmental Protection in the conduct of its official business*

Disclosure of information under this subsection shall be pursuant to a written agreement between the executive director and the agency Such agencies, governmental or nongovernmental, shall be bound by the same requirements of confidentiality as the Department of Revenue Breach of confidentiality is a misdemeanor of the first degree, punishable as provided by s 775 082 or s 775 083

Section 6 This act shall take effect July 1, 1998

And the title is amended as follows

On page 1, between lines 2 and 3

and insert creating s 199 1055 F S , providing for a contaminated site rehabilitation tax credit against the intangible personal property tax, authorizing the Department of Revenue to adopt rules, amending s 220 02, F S , providing for an additional cross-reference, creating s 220 1845, F S , providing for a contaminated site rehabilitation tax credit against the corporate income tax, authorizing the Department of Revenue to adopt rules, creating s 376 30781, F S , providing for a partial tax credit for the rehabilitation of drycleaning-solvent-contaminated sites and brownfield sites, providing for the Department of Environmental Protection to allocate such partial credits, providing procedures for application for tax credits, providing for a nonrefundable review fee, providing verification requirements, authorizing the Department of Environmental Protection to adopt rules, providing for revocation or modification of eligibility for tax credit under certain conditions, amending s 213 053, F S , providing for information-sharing,

Rep Clemons moved the adoption of the amendment

Further consideration of **CS/HB 4117**, with pending amendment, was temporarily postponed under Rule 147

**CS/HB 3485**—A bill to be entitled An act relating to the powers and duties of the Governor, amending s 14 23, F S , regulating the nomination of appointees to federal regional fisheries management councils, providing an effective date

—was read the second time by title

Representative(s) Safley offered the following

**Amendment 1**—On page 1, lines 13-22, remove from the bill all of said lines,

and insert in lieu thereof

*(4)(a) NOMINATIONS TO FEDERAL REGIONAL FISHERIES MANAGEMENT COUNCILS —The Governor is prohibited from nominating for appointment to any one of the federal fisheries management councils established under 16 U S C s 1801, et seq, as amended, the name of any person who is, or who has been at any time during the 24 months preceding such nomination, a lobbyist for or paid employee of any entity of any kind whatsoever whose interests are or could be affected by actions or decisions of such fisheries management councils*

*(b) For purposes of this section, the term "lobbyist" means any natural person who, for compensation, seeks, or sought during the preceding 24 months, to influence the governmental decisionmaking of a reporting individual or procurement employee, as those terms are defined under s 112 3148, or his or her agency, or who seeks, or sought during the preceding 24 months, to encourage the passage, defeat, or modification of any proposal or recommendation by such reporting individual or procurement employee or his or her agency*

Rep Safley moved the adoption of the amendment, which was adopted

Under Rule 127, the bill was referred to the Engrossing Clerk

## Motions Relating to Committee References

On motion by Rep Garcia, agreed to by two-thirds vote, HB 4315 was withdrawn from the Committee on Criminal Justice Appropriations and remains referred to the Committee on Education Appropriations

On motion by Rep Garcia, agreed to by two-thirds vote, HB 4315 was withdrawn from the Committee on Education Appropriations and placed on the appropriate Calendar or Council list

## Continuation of Daily Folder

### Continuation of Governmental Responsibility Council Calendar

#### Bills and Joint Resolutions on Second Reading

**CS/HB 3201**—A bill to be entitled An act relating to religious freedom creating the "Religious Freedom Restoration Act of 1998", providing that government shall not substantially burden the exercise

of religion, providing exceptions, providing definitions, providing for attorney's fees and costs, providing applicability, providing construction, providing an effective date

—was taken up, having been read the second time earlier today, now pending on motion by Rep Lawson to adopt Amendment 1

The question recurred on the adoption of **Amendment 1**, which failed of adoption The vote was

Yeas—49

| | | | |
|---|---|---|---|
| Albright | Chestnut | Jones | Putnam |
| Alexander | Crist | Kelly | Roberts-Burke |
| Argenziano | Crow | King | Rodriguez-Chomat |
| Arnall | Dennis | Lacasa | Safley |
| Bainter | Dockery | Lawson | Smith |
| Ball | Edwards | Littlefield | Spratt |
| Boyd | Flanagan | Lynn | Tamargo |
| Bradley | Fuller | Melvin | Thrasher |
| Bronson | Futch | Miller | Trovillion |
| Brooks | Goode | Morroni | Westbrook |
| Burroughs | Healey | Morse | |
| Bush | Hill | Murman | |
| Casey | Horan | Peaden | |

Nays—66

| | | | |
|---|---|---|---|
| The Chair | Effman | Logan | Sembler |
| Andrews | Eggelletion | Mackenzie | Silver |
| Arnold | Fasano | Mackey | Sindler |
| Barreiro | Feeney | Maygarden | Stabins |
| Betancourt | Fischer | Meek | Stafford |
| Bitner | Frankel | Merchant | Starks |
| Bloom | Garcia | Minton | Sublette |
| Brennan | Gay | Ogles | Tobin |
| Bullard | Gottlieb | Posey | Villalobos |
| Byrd | Greene | Prewitt, D | Wallace |
| Carlton | Hafner | Pruitt, K. | Warner |
| Clemons | Harrington | Rayson | Wasserman Schultz |
| Constantine | Heyman | Reddick | Wiles |
| Cosgrove | Jacobs | Ritchie | Wise |
| Crady | Kosmas | Ritter | Ziebarth |
| Dawson-White | Lippman | Sanderson | |
| Diaz de la Portilla | Livingston | Saunders | |

Excused from time to time for Conference Committee—Bitner, Bradley, Byrd, Carlton, Clemons, Lippman, Meek, Morse, Safley, Stabins, Thrasher, Warner

Votes after roll call
Nays—Turnbull
Yeas to Nays—Kelly
Nays to Yeas—Merchant

Representative(s) Bloom offered the following

**Amendment 2**—On page 3, between lines 24 and 25, of the bill

insert

*(7) Nothing in this act shall be construed to affect, interpret, or in any way address that portion of s 3, Art I of the State Constitution and Amendment 1 to the Constitution of the United States respecting the establishment of religion This act shall not be construed to permit any practice prohibited by those provisions*

Rep Bloom moved the adoption of the amendment, which was adopted

Representative(s) Starks offered the following

**Amendment 3**—On page 3, line 4,
remove from the bill *party*

and insert in lieu thereof *plaintiff*

Rep Starks moved the adoption of the amendment, which was adopted

Under Rule 127, the bill was referred to the Engrossing Clerk

**CS/HB 4117**—A bill to be entitled An act relating to drycleaning solvent cleanup amending s 376 30, F S , providing legislative intent regarding drycleaning solvents, amending s 376 301, F S , providing definitions, amending s 376 303, F S , providing for late fees for registration renewals, amending s 376 3078, F S , providing legislative intent regarding voluntary cleanup, providing that certain deductibles must be deposited into the Water Quality Assurance Trust Fund, clarifying circumstances under which drycleaning restoration fund may not be used, providing additional criteria for determining eligibility for rehabilitation, specifying when certain deductibles must be paid amending the date after which no restoration funds may be used for drycleaning site rehabilitation, clarifying who may apply jointly for participation in the program, providing certain liability immunity for certain adjacent landowners, providing for contamination cleanup criteria that incorporate risk-based corrective action principles to be adopted by rule, requiring certain third-party liability insurance coverage for each operating facility, specifying the circumstances under which work may proceed on the next site rehabilitation task without prior approval, requiring the Department of Environmental Protection to give priority consideration to the processing and approval of permits for voluntary cleanup projects, providing the conditions under which further rehabilitation may be required, providing for continuing application of certain immunity for real property owners, requiring the Department of Environmental Protection to attempt to negotiate certain agreements with the U S Environmental Protection Agency, amending s 376 308, F S , protecting certain immunity for real property owners amending s 376 313, F S , correcting a statutory cross reference amending s 376 70, F S , clarifying certain registration provisions requiring dry drop-off facilities to pay the gross receipts tax, providing for the payment of taxes and the determination of eligibility in the program, amending ss 287 0595 and 316 302, F S , correcting statutory cross references, amending s 213 053, F S., authorizing the Department of Revenue to release certain information to certain persons, providing an effective date

—was taken up, having been read the second time, and amended earlier today, now pending on motion by Rep Clemons to adopt Amendment 4

The question recurred on the adoption of **Amendment 4**, which was withdrawn

Under Rule 127, the bill was referred to the Engrossing Clerk

**HB 4771**—A bill to be entitled An act relating to child support enforcement, amending s 61 13, F S , requiring child support orders to apportion certain medical expenses, providing requirements for notice and service of process, amending s 61.1301, F S , revising provisions relating to income deduction orders and notices, amending s 61 181 F S , requiring evaluation of certain child support enforcement demonstration projects, requiring a report, amending s 61 30, F S requiring certain information to accompany child support determinations, providing a limitation on retroactive awards, amending s 69 041, F S.; authorizing Department of Revenue participation in mortgage foreclosures based upon interests in a child support lien amending ss 319 24 and 409 2575, F S , authorizing the director of the state child support enforcement program to delegate certain responsibilities with respect to motor vehicle liens, amending s 319 32 F S , providing a fee for motor vehicle liens, amending ss 372 561 and 372 57, F S , requiring applicants for certain game and freshwater fish licenses to provide social security numbers, amending s 382 008 F S requiring death and fetal death registrations to include social security numbers, if available, restricting use of such numbers, amending s 382 013, F S , providing for certain use of birth registration information providing certain notice relating to paternity affidavits, amending s 409 2557, F S , providing specific rulemaking authority, creating s 409 2558, F S , providing for the department's distribution and disbursement of child support payments creating s 409 2559 F S

| | | | |
|---|---|---|---|
| Gottlieb | Livingston | Pruitt, K | Starks |
| Greene | Lynn | Putnam | Sublette |
| Hafner | Mackenzie | Rayson | Tamargo |
| Harrington | Mackey | Reddick | Thrasher |
| Healey | Maygarden | Ritchie | Tobin |
| Heyman | Meek | Ritter | Trovillion |
| Hill | Melvin | Roberts-Burke | Turnbull |
| Horan | Merchant | Rodriguez-Chomat | Valdes |
| Jacobs | Miller | Sanderson | Villalobos |
| Jones | Minton | Saunders | Wallace |
| Kelly | Morroni | Sembler | Wasserman Schultz |
| King | Morse | Silver | Westbrook |
| Kosmas | Murman | Sindler | Wiles |
| Lacasa | Ogles | Smith | Wise |
| Lawson | Peaden | Spratt | Ziebarth |
| Lippman | Posey | Stabins | |
| Littlefield | Prewitt, D | Stafford | |

Nays—None

Excused from time to time for Conference Committee—Bitner, Bradley, Byrd, Clemons, Lippman, Safley, Thrasher, Warner

Votes after roll call
Yeas—Clemons

So the bill passed, as amended, and was immediately certified to the Senate

**CS/HB 4117**—A bill to be entitled An act relating to drycleaning solvent cleanup, amending s 376 30, F S , providing legislative intent regarding drycleaning solvents, amending s 376 301, F S , providing definitions, amending s 376 303, F S , providing for late fees for registration renewals, amending s 376 3078, F S , providing legislative intent regarding voluntary cleanup, providing that certain deductibles must be deposited into the Water Quality Assurance Trust Fund, clarifying circumstances under which drycleaning restoration fund may not be used, providing additional criteria for determining eligibility for rehabilitation, specifying when certain deductibles must be paid, amending the date after which no restoration funds may be used for drycleaning site rehabilitation, clarifying who may apply jointly for participation in the program, providing certain liability immunity for certain adjacent landowners providing for contamination cleanup criteria that incorporate risk-based corrective action principles to be adopted by rule, repealing the requirement that certain costs be credited to the owner or operator against certain future taxes, requiring certain third-party liability insurance coverage for each operating facility, specifying the circumstances under which work may proceed on the next site rehabilitation task without prior approval, requiring the Department of Environmental Protection to give priority consideration to the processing and approval of permits for voluntary cleanup projects, providing the conditions under which further rehabilitation may be required, providing for continuing application of certain immunity for real property owners, requiring the Department of Environmental Protection to attempt to negotiate certain agreements with the U S. Environmental Protection Agency, amending s 376 308, F S , protecting certain immunity for real property owners, amending s 376 313, F S , correcting a statutory cross reference, amending s 376.70, F S , clarifying certain registration provisions, requiring dry drop-off facilities to pay the gross receipts tax, providing for the payment of taxes and the determination of eligibility in the program, amending s 376 75, F S , exempting a certain drycleaning solvent from the sales and use tax, amending ss 287 0595 and 316 302, F S , correcting statutory cross references, amending s 213 053, F.S , authorizing the Department of Revenue to release certain information to certain persons, providing an effective date

—was read the third time by title

The Committee on Rules, Resolutions, & Ethics offered the following

**Technical Amendment 5**—On page 42, line 6,

after the period, insert
Costs incurred by an owner or operator for such response actions, up to a maximum of $10,000 in the aggregate for all spills at a single facility, shall be credited to the owner or operator against the future gross receipts tax set forth in s 376 70 and, in the case of a wholesale supply facility, against the future tax on production or importation of perchloroethylene, as set forth in s 376 75
On page 50, line 23,
remove from the bill *Ch*

and insert in lieu thereof *chapter*

Reps Thrasher and Crady moved the adoption of the amendment, which was adopted

The question recurred on the passage of CS/HB 4117 The vote was

Yeas—120

| | | | |
|---|---|---|---|
| The Chair | Crist | Kelly | Ritter |
| Albright | Crow | King | Roberts-Burke |
| Alexander | Culp | Kosmas | Rodriguez-Chomat |
| Andrews | Dawson-White | Lacasa | Rojas |
| Argenziano | Dennis | Lawson | Safley |
| Arnall | Diaz de la Portilla | Lippman | Sanderson |
| Arnold | Dockery | Littlefield | Saunders |
| Bainter | Edwards | Livingston | Sembler |
| Ball | Effman | Logan | Silver |
| Barreiro | Eggelletion | Lynn | Sindler |
| Betancourt | Fasano | Mackenzie | Smith |
| Bitner | Feeney | Mackey | Spratt |
| Bloom | Fischer | Maygarden | Stabins |
| Boyd | Flanagan | Meek | Stafford |
| Bradley | Frankel | Melvin | Starks |
| Brennan | Fuller | Merchant | Sublette |
| Bronson | Futch | Miller | Tamargo |
| Brooks | Garcia | Minton | Thrasher |
| Brown | Gay | Morroni | Tobin |
| Bullard | Goode | Morse | Trovillion |
| Burroughs | Gottlieb | Murman | Turnbull |
| Bush | Greene | Ogles | Valdes |
| Byrd | Hafner | Peaden | Villalobos |
| Carlton | Harrington | Posey | Wallace |
| Casey | Healey | Prewitt, D | Warner |
| Chestnut | Heyman | Pruitt, K | Wasserman Schultz |
| Clemons | Hill | Putnam | Westbrook |
| Constantine | Horan | Rayson | Wiles |
| Cosgrove | Jacobs | Reddick | Wise |
| Crady | Jones | Ritchie | Ziebarth |

Nays—None

Excused from time to time for Conference Committee—Bitner, Bradley, Byrd, Clemons, Lippman, Safley, Thrasher, Warner

So the bill passed, as amended, and was immediately certified to the Senate after engrossment

On motion by Rep Safley, **CS/HB 3485** was temporarily postponed under Rule 147 and the third reading nullified

**CS/HB 3201**—A bill to be entitled An act relating to religious freedom, creating the "Religious Freedom Restoration Act of 1998", providing that government shall not substantially burden the exercise of religion; providing exceptions, providing definitions, providing for attorney's fees and costs, providing applicability, providing construction, providing an effective date

—was read the third time by title

**Motion to Reconsider**

Rep Crady moved that the House reconsider the vote by which **Amendment 1** to **CS/HB 3201** failed of adoption (shown in the *Journal* on pages 1115-1116, April 24), which was not agreed to The vote was

Yeas—69

| | | | |
|---|---|---|---|
| Albright | Clemons | Littlefield | Rojas |
| Alexander | Cosgrove | Livingston | Safley |
| Andrews | Crady | Logan | Sanderson |
| Argenziano | Crist | Lynn | Saunders |
| Arnall | Crow | Mackey | Sembler |
| Bainter | Culp | Maygarden | Smith |
| Ball | Dennis | Meek | Spratt |
| Betancourt | Dockery | Melvin | Sublette |
| Bitner | Edwards | Merchant | Tamargo |
| Boyd | Flanagan | Minton | Thrasher |
| Bradley | Fuller | Morroni | Trovillion |
| Bronson | Healey | Morse | Villalobos |
| Bullard | Hill | Murman | Warner |
| Burroughs | Jones | Ogles | Westbrook |
| Bush | Kelly | Peaden | Ziebarth |
| Carlton | King | Putnam | |
| Casey | Lacasa | Roberts-Burke | |
| Chestnut | Lawson | Rodriguez-Chomat | |

Nays—50

| | | | |
|---|---|---|---|
| The Chair | Fasano | Horan | Silver |
| Arnold | Feeney | Jacobs | Sindler |
| Barreiro | Fischer | Kosmas | Stabins |
| Bloom | Frankel | Lippman | Stafford |
| Brennan | Futch | Mackenzie | Starks |
| Brooks | Garcia | Miller | Tobin |
| Brown | Gay | Posey | Turnbull |
| Byrd | Goode | Prewitt, D | Valdes |
| Constantine | Gottlieb | Pruitt, K | Wallace |
| Dawson-White | Greene | Rayson | Wasserman Schultz |
| Diaz de la Portilla | Hafner | Reddick | Wise |
| Effman | Harrington | Ritchie | |
| Eggelletion | Heyman | Ritter | |

Excused from time to time for Conference Committee—Bitner, Bradley, Byrd, Clemons, Lippman, Safley, Thrasher, Warner

Votes after roll call.
Yeas to Nays—Andrews, Sublette

The question recurred on the passage of CS/HB 3201 The vote was

Yeas—114

| | | | |
|---|---|---|---|
| The Chair | Clemons | Greene | Morse |
| Albright | Constantine | Hafner | Murman |
| Alexander | Cosgrove | Harrington | Ogles |
| Andrews | Crady | Healey | Peaden |
| Arnall | Crist | Heyman | Posey |
| Arnold | Crow | Hill | Prewitt, D |
| Bainter | Culp | Horan | Pruitt, K |
| Ball | Dawson-White | Jacobs | Putnam |
| Barreiro | Dennis | Jones | Rayson |
| Betancourt | Diaz de la Portilla | Kelly | Reddick |
| Bitner | Dockery | King | Ritchie |
| Bloom | Edwards | Kosmas | Ritter |
| Boyd | Effman | Lippman | Roberts-Burke |
| Bradley | Eggelletion | Livingston | Rodriguez-Chomat |
| Brennan | Fasano | Logan | Rojas |
| Bronson | Feeney | Lynn | Safley |
| Brooks | Fischer | Mackenzie | Sanderson |
| Brown | Flanagan | Mackey | Saunders |
| Bullard | Frankel | Maygarden | Sembler |
| Burroughs | Fuller | Meek | Silver |
| Bush | Futch | Melvin | Sindler |
| Byrd | Garcia | Merchant | Smith |
| Carlton | Gay | Miller | Spratt |
| Casey | Goode | Minton | Stabins |
| Chestnut | Gottlieb | Morroni | Stafford |
| Starks | Tobin | Wallace | Wise |
| Sublette | Trovillion | Warner | Ziebarth |
| Tamargo | Turnbull | Wasserman Schultz | |
| Thrasher | Valdes | Wiles | |

Nays—5

| | | | |
|---|---|---|---|
| Argenziano | Lawson | Littlefield | Westbrook |
| Lacasa | | | |

Excused from time to time for Conference Committee—Bitner, Bradley, Byrd, Clemons, Lippman, Safley, Thrasher, Warner

So the bill passed, as amended, and was immediately certified to the Senate

**HB 4771**—A bill to be entitled An act relating to child support enforcement, amending s 61 13, F S , requiring child support orders to apportion certain medical expenses, providing requirements for notice and service of process, amending s 61 1301, F S , revising provisions relating to income deduction orders and notices, amending s 61 181, F S , requiring evaluation of certain child support enforcement demonstration projects, requiring a report, amending s 61 30, F S , requiring certain information to accompany child support determinations, providing a limitation on retroactive awards, amending s 69 041, F S , authorizing Department of Revenue participation in mortgage foreclosures based upon interests in a child support lien, amending ss 319 24 and 409 2575, F S , authorizing the director of the state child support enforcement program to delegate certain responsibilities with respect to motor vehicle liens, amending s 319 32, F S , providing a fee for motor vehicle liens, amending ss 372 561 and 372 57, F S , requiring applicants for certain game and freshwater fish licenses to provide social security numbers, amending s 382 008, F S , requiring death and fetal death registrations to include social security numbers, if available, restricting use of such numbers, amending s 382 013, F S , providing for certain use of birth registration information, providing certain notice relating to paternity affidavits, amending s 409 2557, F S , providing specific rulemaking authority, creating s 409 2558, F S , providing for the department's distribution and disbursement of child support payments, creating s 409 2559, F S , providing for establishment of a state disbursement unit, amending s 409 2561, F S , relating to child support obligations when public assistance is paid, amending s 409 2564, F S , relating to subpoenas in child support actions, providing for challenges, providing for enforcement, providing for fines, amending s 409 25641, F S , providing for processing of automated administrative enforcement requests creating s 409 25658, F S , providing for use of certain unclaimed property for past-due child support, providing duties of the department and the Department of Banking and Finance, providing for notice and hearings, amending ss 409 2567, 409 2578, and 443 051, F S , correcting and conforming references, amending ss 409 2572, 414 095, and 414 32, F S , providing for determinations of good cause for failure to cooperate with the child support enforcement agency, amending ss 409 2576 and 455 213, F S , clarifying conditions for disclosure of social security numbers, amending s 409 2579, F S , revising provisions which limit or prohibit disclosure of the identity and whereabouts of certain persons, providing a penalty, amending s 443 1715, F S , relating to disclosure of wage and unemployment compensation information, amending s 741 04, F S , relating to information required for issuance of a marriage license, amending s 742 032, F S , relating to requirements for notice and service of process, amending s 743 07, F S , relating to support for dependents 18 years of age or older, amending s 61 046, F S , revising definitions, amending s 61 181, F S , providing for processing of certain central depository payments through the Department of Revenue's State Disbursement Unit, continuing a fee through a specified date, providing for the use of funds creating s 61 1824, F S , providing for a State Disbursement Unit, providing responsibilities, creating s 61 1825, F S , providing for operation of a State Case Registry, providing requirements creating s 61 1826, F S , providing legislative findings, providing for department cooperative agreements and contracts for operation of the State Disbursement Unit and the non-Title IV-D component of the State Case Registry providing contract requirements, providing for performance reviews, requiring a

An act relating to religious freedom; creating the "Religious Freedom Restoration Act of 1998"; providing that government shall not substantially burden the exercise of religion; providing exceptions; providing definitions; providing for attorney's fees and costs; providing applicability; providing construction; providing an effective date.

WHEREAS, it is the finding of the Legislature of the State of Florida that the framers of the Florida Constitution recognizing free exercise of religion as an unalienable right secured its protection in s. 3, Art. I of the State Constitution, and

WHEREAS, laws which are "neutral" toward religion may burden the free exercise of religion as surely as laws intended to interfere with the free exercise of religion, and

WHEREAS, governments should not substantially burden the free exercise of religion without compelling justification, and

WHEREAS, the compelling interest test as set forth in certain federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests, and

WHEREAS, it is the intent of the Legislature of the State of Florida to establish the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972), to guarantee its application in all cases where free exercise of religion is substantially burdened, and to provide a claim or defense to

persons whose religious exercise is substantially burdened by government, NOW, THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. Short title.--This act may be cited as the "Religious Freedom Restoration Act of 1998."

Section 2. Definitions.--As used in this act:

(1) "Government" or "state" includes any branch, department, agency, instrumentality, or official or other person acting under color of law of the state, a county, special district, municipality, or any other subdivision of the state.

(2) "Demonstrates" means to meet the burden of going forward with the evidence and of persuasion.

(3) "Exercise of religion" means an act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief.

Section 3. Free exercise of religion protected.--

(1) The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:

(a) Is in furtherance of a compelling governmental interest; and

(b) Is the least restrictive means of furthering that compelling governmental interest.

(2) A person whose religious exercise has been burdened in violation of this section may assert that

violation as a claim or defense in a judicial proceeding and obtain appropriate relief.

Section 4. Attorney's fees and costs.--The prevailing plaintiff in any action or proceeding to enforce a provision of this act is entitled to reasonable attorney's fees and costs to be paid by the government.

Section 5. Applicability; construction.--

(1) This act applies to all state law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this act.

(2) State law adopted after the date of the enactment of this act is subject to this act unless such law explicitly excludes such application by reference to this act.

(3) Nothing in this act shall be construed to authorize the government to burden any religious belief.

(4) Nothing in this act shall be construed to circumvent the provisions of chapter 893, Florida Statutes.

(5) Nothing in this act shall be construed to affect, interpret, or in any way address that portion of s. 3, Art. I of the State Constitution prohibiting laws respecting the establishment of religion.

(6) Nothing in this act shall create any rights by an employee against an employer if the employer is not a governmental agency.

(7) Nothing in this act shall be construed to affect, interpret, or in any way address that portion of s. 3, Art. I of the State Constitution and Amendment 1 to the Constitution of the United States respecting the establishment of religion. This act shall not be construed to permit any practice prohibited by those provisions.

Section 6. This act shall take effect upon becoming a law.

**STORAGE NAME:** h3201s1z.go ****FINAL ACTION****
**DATE:** May 15, 1998 ****SEE FINAL ACTION STATUS SECTION****

# HOUSE OF REPRESENTATIVES
# COMMITTEE ON
# GOVERNMENTAL OPERATIONS
# FINAL BILL RESEARCH & ECONOMIC IMPACT STATEMENT

**BILL #** CS/HB 3201 **(Chapter #: 98-412, Laws of Florida)**

**RELATING TO:** Religious Freedom Restoration Act

**SPONSOR(S):** Committee on Governmental Operations, Representative Starks and others

**COMPANION BILL(S)** CS/SB 296 (s)

**ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:**

(1) GOVERNMENTAL OPERATIONS YEAS 4 NAYS 0
(2)
(3)
(4)
(5)

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## I. FINAL ACTION STATUS:

CS/HB 3201 passed the House of Representatives on April 28, 1998, and the Senate on May 1, 1998. CS/HB 3201 was ordered enrolled on May 1, 1998, and became law on June 17, 1998, as Chapter 98-412, Laws of Florida.

## II. SUMMARY:

This bill addresses the standard by which the courts judge an individual's claim alleging state interference with free exercise of religion, and establishes a new cause of action for its infringement. CS/HB 3201 will require that any alleged interference with religious free exercise be judged according to whether the state's action is in furtherance of a compelling state interest, and, if so, whether that interest is met by the least intrusive means possible.

The effect of this Act in Florida could parallel the experience with the federal Religious Freedom Restoration Act of 1993 (RFRA). RFRA produced a broadened capacity for legal action against the state for alleged infringement upon free exercise of religion. Proponents of RFRA had affirmed this effect as indicative of a greater protection for religious practice. Conversely, the greater deference to the subjective claims of individuals that RFRA provided, over even facially neutral state laws, created concerns that the basic regulatory and security functions of government could be adversely affected.

The Department of Corrections has expressed its concern that the heightened standard of review will give inmates greater latitude in asserting unreasonable demands which conflict with a correctional institution's need for order and security. Supporters of the Act assert, however, that the "compelling interest" standard of scrutiny will accommodate objective penological considerations.

The fiscal impact of this bill is indeterminate. The degree of possible fiscal impact will vary according to the extent of increased litigation.

III. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

**Religious Freedom Under the U.S. and Florida Constitutions**

**I. Florida Courts Tend to Follow Federal Rulings**

Section 3, Article I of the Florida Constitution states:

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

The application of s. 3, Article I by Florida courts has largely paralleled the Federal law regarding the application of the federal First Amendment's clause stating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." [1]

**II. The Sherbert "Compelling Interest" Test**

**A. The Test**

In 1963, the United States Supreme Court ruled in Sherbert v. Verner, 374 U.S. 398 (1963), that claims under the First Amendment's religion clauses would be judged according to the "compelling interest" test. The "compelling interest" test constitutes the highest level of scrutiny[2] that the Supreme Court has applied in analyzing claims against state actions alleged to be unconstitutional. Under this level of scrutiny, the burden is on the state to prove that any interference with an individual's religious practice meets two criteria. First, the State must show that interference is "justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'"[3] Second, in the process of making such a showing, the state must "demonstrate that no

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[1] *See 10 Fla. Jur 2d, 595-606*

[2] *This level of scrutiny is called "strict scrutiny" which "requires [the] state to establish that it has a compelling interest justifying the law and that distinctions created by law are necessary to further some governmental purpose " BLACKS LAW DICTIONARY, 1422 (6th ed. 1990).*

[3] *Sherbert v. Verner (quoting NAACP v. Button), 374 U.S 398, at 403 (1963).*

alternative forms of regulation would [meet the state interest] without infringing First Amendment Rights."[4]

For an interest to be found "compelling," the Sherbert Court stated, "no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interest, give occasion for permissible limitation.' " [5]

### B. Nonapplicability of the Sherbert Test

In applying the Sherbert "compelling interest" test the United States Supreme Court gave a great degree of deference to a person's subjective assertion of religious deprivation in First Amendment "free exercise" of religion cases.[6] However, later Supreme Court rulings instituted certain exceptions to the application of the "compelling interest" test. The "compelling interest" test was found inapplicable to "free exercise" challenges against government actions in the following three circumstances.

#### 1. Military "Free Exercise" Cases

In Goldman v. Weinberger, 475 U.S. 503 (1986), the United States Supreme Court ruled that the Sherbert "compelling interest" test was not applicable to "free exercise" claims in military situations. The Goldman Court found this exception justifiable because the military is a "specialized society separate from civilian society," whose mission necessitates fostering "instinctive obedience, unity, commitment, and esprit de corps" through, among other things, regulations enforcing a heightened degree of uniformity.[7]

#### 2. Prison "Free Exercise" Cases

In Turner v. Safley, 482 U.S. 78 (1987), the United States Supreme Court held that prison regulations were not subject to the "compelling interest" test, because, although prisoners still retain their constitutional rights, the "institutional order" necessary for a corrective environment justifies a lessened level of scrutiny.[8] In prison "free exercise" cases, a court must only inquire "whether a prison regulation that burdens fundamental

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[4] *Id at 407; see also Thomas v Review Board of the Indiana Employment Security Division, 450 U S. 707, at 718(1980)("The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest ")(citing Sherbert).*

[5] *Sherbert v Verner, 374 U.S 398, at 406 (1963) (quoting Thomas v. Collins ), see also Wisconsin v Yoder, 406 U S 205, at 215 (1972)(Only those interests of the "highest order" are "compelling" )*

[6] *See Thomas v Review Board of the Indiana Employment Security Division, 450 U.S 707, at 715 (1981) ("We see, therefore, that [the petitioner] drew a line, and it is not for us to say that the line he drew was an unreasonable one .The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion.").*

[7] *Goldman v Weinberger, 475 U.S 503, at 506-508 (1986).*

[8] *Turner v Safley, 482 U.S 78 (1987)*

rights is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns."[9]

In O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), the United States Supreme Court reaffirmed the Turner holding. In O'Lone, the Court asserts several criteria for weighing the reasonableness of prisoners' religious rights claims against a particular prison policy:

(1) Whether the policy in question serves a legitimate penological interest;[10]

(2) Whether the prisoners bringing the claim have an alternative means of religious worship;[11]

(3) Whether the costs of accommodating prisoners' religious requests are excessive;[12] and

(4) Whether there exist any "obvious, easy alternatives" to the prisoners' request.[13]

**3. Generally Applicable Laws**

A "generally applicable" law is a facially neutral law which is applied, in a generalized fashion and without discrimination, to a general population in a blanket manner.[14]

In Bowen v. Roy, 476 U.S. 693 (1986), the United States Supreme Court rejected a "free exercise" challenge to a state law which required that all residents utilize social security numbers in order to get governmental assistance. The Court differentiated between a "facially neutral" state law which "indirectly and incidentally" affects a particular religious practice, and a state law which "criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons."[15] The Court found the two to be "wholly different," and that "absent proof to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest."[16]

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[9] *Id. at 87.*

[10] *O'Lone v. Estate of Shabazz, 482 U.S. 342, at 350 (1987)*

[11] *Id. at 351-352.*

[12] *Id. at 352-353.*

[13] *Id. at 353*

[14] *See Bowen v. Roy, 476 U.S. 693, 703-705 (1986); City of Boerne v. Flores, 117 S. Ct. 2157, at 2160-2161 (1997)*

[15] *Bowen v. Roy, 476 U.S. 693, at 706 (1986).*

[16] *Id. at 707-708.*

In Lyng v Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988), the United States Supreme Court, applying the reasoning in Roy, rejected a "free exercise" challenge to a road construction project planned for a tract of federally owned land. Against a claim that the construction would disrupt an area containing ritualistic value to certain Native Americans, the Court differentiated between state actions that coerce, penalize, or prohibit the exercise of religion and state actions which "may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs."[17] Under the ruling in Lyng, only state actions that coerce, penalize, or prohibit the exercise of religion are subject to the "compelling interest" test. Accordingly, generalized state actions which are merely "inconvenient" but are not specifically prohibitive or coercive of religious practice are not subject to the "compelling interest" test.[18]

The Goldman, Turner, O'Lone, Roy, and Lyng cases reaffirmed the Sherbert "compelling interest" test, but created exceptions to its application. In those cases where the "compelling interest" test does not apply, proving a case against the state for infringement of free exercise of religion is made more difficult.

**III. Smith, the Religious Freedom Restoration Act of 1993, and City of Boerne**

In Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), the United States Supreme Court limited the application of Sherbert's "compelling interest" test to only two circumstances:

(1) When the government regulation at issue burdened a constitutional right other than religious free exercise rights;[19] and

(2) When state unemployment-compensation rules conditioned the availability of benefits on an applicant's willingness to work under conditions forbidden by his/her religion.[20]

In Smith, the United States Supreme Court further found the "compelling interest" test inapplicable to a "generally applicable" law.[21] This ruling thus effectively removed use of the "compelling interest" test in the majority of free exercise of religion cases.[22]

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[17] *Lyng v Northwest Indian Ceremony Protective Association, 485 U.S 439, at 450 (1988)*

[18] *Id. at 449-451.*

[19] *Employment Division, Department of Human Resources of Oregon v Smith, 494 U.S. 872, at 881 (1990).*

[20] *Id at 883*

[21] *Id at 884-886("Although, as noted earlier, we have sometimes used the Sherbert test to analyze free exercise challenges to such laws we have never applied the test to invalidate one. We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges The government's ability to enforce generally applicable prohibitions of generally harmful conduct, like its ability to carry on other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'")*

[22] *See Montgomery v County of Clinton, Michigan, 743 F. Supp 1253, at 1259 (W.D. Mich. 1990) ("There is no contention that the laws under which the autopsy was authorized are other than generally applicable and religion neutral. Similarly, there is no contention that the authorization itself was other than religion-neutral. The religion of decedent and of his next of kin*

In reaction to the Smith opinion, the United States Congress passed the Religious Freedom Restoration Act of 1993 (RFRA), which provided, in pertinent part:

> **SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.**
>
> (a) IN GENERAL.- Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
> (b) EXCEPTION.- Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person-
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.
> (c) JUDICIAL RELIEF.-A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

RFRA had two basic effects:

(1) It created a new cause of action against government for any person who alleged that his or her free exercise of religion was substantially burdened by government action;[23] and

(2) It re-established the use of the "compelling interest" test without the modifying exceptions of the post-Sherbert line of cases.

RFRA resulted in an increased opportunity to bring lawsuits against the state for alleged infringement upon the free exercise of religion; and, the "compelling interest" test made it more difficult for the state to win these cases. This produced an increase in the number of First Amendment religious freedom cases entertained by state and federal courts.[24]

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*played no role in the decision and the actions of the defendants. It follows then, by implication of Employment Division [the Smith case], that defendant's actions need only have been reasonably related to a legitimate governmental objective").*

[23] *The meaning of "substantial burden" has been given varied interpretations. See Mack v. O'Leary, 80 F 3d 1175, at 1178-1180 (7th Cir 1996)("The Fourth, Ninth, and Eleventh Circuits define "substantial burden" as one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires The Eighth and Tenth Circuits use a broader definition-- action that forces religious adherents to 'refrain from religiously motivated conduct.' . . or that 'significantly inhibit[s] or constrain[s] conduct or expression that manifests some central tenet of a [person's] individual beliefs' . . The Sixth Circuit seems to straddle the divide, asking whether the burdened practice is 'essential' or 'fundamental,' . . . We hold . . . that a substantial burden is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs.")*

[24] *See Rust v Clarke, 883 F Supp 1293 (D Neb. 1995) (Prisoners following Asatru religion were not denied their rights under RFRA when their requests for access to location and time for ceremonies, and to ceremonial articles, were denied by correctional officials because such denials were the least restrictive means of furthering compelling state interests. Requests included stone altars, evergreen trees, cauldrons, wooden Viking swords, a sauna, special meats and foods, and the allowance for a ceremonial*

In 1997, the United States Supreme Court, in City of Boerne v. P.F. Flores, 117 S. Ct. 1257 (1997), declared RFRA unconstitutional on two grounds. First, the Court held that RFRA's subject matter exceeded the enumerated powers of Congress under s. 5 of the federal Fourteenth Amendment.[25] Second, the Court held that the RFRA's sweeping nature went beyond Congress' power to enact remedial legislation binding the states, and thus violated the balance between federal and state power (in short, it violates states' rights). [26]

The effect of City of Boerne was to restore the Smith ruling to effective law. Thus the "compelling interest" test is only applicable when the government regulation at issue burdens a constitutional right other than religious free exercise rights and when state unemployment compensation rules condition the availability of benefits on an applicant's willingness to work under conditions forbidden by his/her religion. Furthermore, the "compelling interest" test is inapplicable to a "generally applicable" law.

In response to this, CS/HB 3201 has been filed and it creates the "Religious Freedom Restoration Act of 1998."

B EFFECT OF PROPOSED CHANGES:

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*fire at worship services), Campos v Coughlin, 854 F Supp 194 (S D N Y 1994)( Preliminary injunction is granted allowing inmates to wear beads in conformity with the Santeria religion.); Prins v. Coughlin, 76 F.3d 504 (2d Cir 1996)(Jewish inmate's allegations that transfer from one prison facility to another violated RFRA by creating difficulties in meeting dietary and ceremonial requirements of his religion are found insufficient.); Phipps v. Parker, 879 F Supp 734 (W.D.Ky 1995)(Prison's requirement of short haircuts do not violate orthodox Hasidic Jewish inmate's RFRA rights), Bessard v. California Community Colleges, 867 F Supp 1454 (E D.Cal. 1994)(Requirement of loyalty oaths for state employment violates rights of Jehovah's Witnesses under RFRA), Mack v O'Leary, 80 F 3d 1175 (7th Cir 1996) (Evidentiary hearing is required for determination of whether a particular religious requirement is a central tenet of prisoner's religion, the inhibition of which would constitute violation of RFRA.); Abate v Walton, 77 F 3d 488 (9th Cir.1996) (Prisoner's suit alleging that menu offered by correctional facility does not satisfy dietary requirements of his religion fails for lack of adequate showing to that effect.); Jolly v. Coughlin, 76 F 3d 468 (2d Cir. 1996)(Prison authorities' use of confinement to compel Rastafarian prisoner to submit to tuberculosis examination, which he asserts contradicts his religious beliefs, violates RFRA); Werner v. McCotter, 49 F 3d 1476 (10th Cir 1995) (Prisoner alleging correctional authorities' prohibition of sweat lodge for Native American religious rituals, and possession of medicine bag, has established a prima facie case under the RFRA); Hamilton v. Schriro, 74 F 3d 1545 (8th Cir 1996)(Prison regulations requiring short hair length and denying sweat lodge ceremony for Native American inmates does not violate RFRA because it is narrowly tailored to meet compelling interests.); Lawson v Duggar, 844 F. Supp 1538 (1995)(RFRA is violated by routine prohibition of literature of Hebrew Israelite faith by correctional facility.); Cheema v. Thompson, 67 F.3d 883 (9th Cir.1995) (Preliminary injunction is granted allowing Sikh schoolchildren to carry ceremonial knives to school); Thiry v. Carlson, 78 F 3d 1491 (10th Cir. 1996)(RFRA was not violated by the building of highway through burial area because the Native American and Christian beliefs implicated allowed for moving of gravesites when necessary)*

[25] *City of Boerne v. P F Flores, 117 S. Ct. 2157, at 2172 ("RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.").*

[26] *Id at 2170 (1997)("Remedial legislation under sec 5 'should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against' RFRA is not so confined.")(quoting Civil Rights Cases, 109 U.S, at 13), see also id. at 2172 ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").*

**Application of the "Compelling Interest" Test**

The Religious Freedom Restoration Act of 1998 (the Act) provides that government shall not substantially burden the free exercise of religion unless the government demonstrates that the burden

(1) Is in furtherance of a "compelling governmental interest," and
(2) Is the least restrictive means of furthering that interest.

"Government" or "state" is defined to include "any branch, department, agency, instrumentality, or official or other person acting under color of law of the state, a county, special district, municipality, or any other subdivision of the state." The Act specifically includes within its provisions "rules of general applicability," and does not provide for a alternative standard in regard to cases brought by incarcerated persons.

The effect of this Act in Florida could parallel the experience with RFRA at the national level. RFRA produced a broadened capacity for legal action against the state for alleged infringement upon free exercise of religion. Proponents of RFRA had affirmed this effect as indicative of a greater protection for religious practice.[27] Conversely, the greater deference to the subjective claims of individuals that RFRA provided, over even facially neutral state laws, created concerns that the basic regulatory and security functions of government could be adversely affected [28] The Act's provisions are substantially similar to those of RFRA.

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[27] *For example, see Brief of American Bar Association as Amicus Curiae in Support of Respondents at 1-2, City of Boerne v Flores, 117 S. Ct. 1257 (1997)("The ABA [American Bar Association] policy rests on the conviction that only by limiting governmental interference with the exercise of religion to those instances where government can demonstrate an urgent need to do so can we protect the principles of religious liberty and tolerance on which this country was founded and for which it is unequaled elsewhere in the world. The ABA concluded that the compelling interest test is also the most practical means for ensuring that smaller and unpopular faiths receive the same level of protection as mainstream faiths.")*

[28] *See, e.g. Brief for Amici States of Ohio, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, The Commonwealth of Pennsylvania, and the Territories of American Samoa, Guam and The Virgin Islands in Support of Petitioner at 6-7, City of Boerne v Flores, 117 S Ct. 1257 (1997)( "By dictating a universal strict scrutiny standard for clashes between individual religious liberty claims and collective security needs, RFRA . disrupts . . .core State police powers In the area of education, for example, RFRA has generated a raft of unusual lawsuits. It has subjected such matters as the selection of songs performed by high school choirs, the enforcement of minimal educational standards and the disciplining of errant faculty to strict federal review. . . .Likewise, the RFRA mandate has made it more difficult for state and local governments to maintain public safety. The Act has generated extensive litigation over such inherently local issues as state highway improvements intended to reduce accidents, nuisance abatement actions dealing with excessive holiday lighting and the applicability of otherwise unremarkable highway and hunting safety regulations."), but see also Brief of the States of Maryland, Connecticut, Massachusetts and New York As Amici Curiae in Support of Respondent at 5, City of Boerne v. Flores, 117 S. Ct 1257 (1997)("[T]here [is no] reason to believe that RFRA has undermined or will undermine the States' ability to manage their educational or public safety functions For example, virtually all of the education-related cases that have been brought under RFRA have involved only ancillary issues of public education (such as sex education programs, graduations, etc ) and, even then, have been largely unsuccessful The same is true regarding issues of public safety.").*

The Act, like RFRA, includes within its provisions cases brought by incarcerated persons.[29] The Department of Corrections has expressed its concern that the "compelling interest" standard of review will give inmates greater latitude in asserting unreasonable demands which conflict with a correctional institution's need for order and security.[30] Supporters of the Act assert, however, that the "compelling interest" level of scrutiny is sufficient to allow the courts to accommodate objective penological considerations.

**Provision for Claim or Defense**

This Act also provides that a person whose religious exercise has been burdened in violation of the Act may assert that violation "as a claim or defense in a judicial proceeding[31] and

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[29] *RFRA, like the Act presently, had established the "compelling interest" test for all claims against the state for infringement upon the free exercise of religion, including claims from incarcerated individuals or groups This had created debate as to whether the greater capacity for successful litigation by inmates had hindered the security and order of corrections facilities, and whether it produced an inordinate degree of inmate litigation See, e g Brief for Amici States of Ohio, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, The Commonwealth of Pennsylvania, and the Territories of American Samoa, Guam and The Virgin Islands in Support of Petitioner at 3-6, City of Boerne v Flores, 117 S Ct 1257 (1997) ("[RFRA] has spawned a remarkable wave of inmate litigation in the years since it was passed Based on a Lexis/Nexis search conducted on November 12, 1996, no fewer than 189 inmate cases have been decided involving RFRA-based challenges The litigation wave generated by RFRA disrupts State prisons and State prison administrations in many ways As an initial matter, RFRA cases are harder to dispose of than most due to the difficulty (if not impossibility) of determining the accommodations that are truly necessary for the proper exercise of a given religion . .For like reasons, RFRA lawsuits are expensive. New attorneys and experts must be hired to defend them, depositions and other discovery must be taken to respond to them, and successful lawsuits require costly reconfigurations of corrections programs, sometimes even prison buildings Besides the difficulty of responding to this litigation and the cost of handling it, RFRA lawsuits compel corrections officials to divert extensive staff time to handling the litigation They must investigate the 'religious' nature of each claim and the 'religious' necessity to each inmate of bringing the claim Making matters worse is the "least restrictive means" test, which regularly compels corrections staff to develop ways to accommodate even the most unusual and isolated demands "), but see Brief of the States of Maryland, Connecticut, Massachusetts and New York As Amici Curiae in Support of Respondent at 3-9, City of Boerne v Flores, 117 S. Ct 1257 (1997) ("Properly interpreted, RFRA does not and will not impede the States' ability to operate their prisons effectively . .With respect to prison management, RFRA requires courts to provide substantial deference to the States and to those responsible for administering the state penal systems The limitations inherent in the requirement of proving a 'substantial burden' preserves State authority in may instances where RFRA may be invoked. Although the lower courts, prior to O'Lone, disagreed among themselves as to whether the Sherbert/Yoder compelling interest test applies to religious freedom claims in the prison context, even those courts that had applied that test accorded a great deal of deference to the judgements of prison administrators This deference applied at two distinct levels. First, following this Court's statements in earlier decisions, the lower courts recognized that, in the prison context, order, safety, security, and discipline are paramount government interests .Second, those courts recognize that prison officials are entitled to great deference in determining whether a particular prison regulation is tailored with sufficient precision to the state interest at issue.")*

[30] *The Department of Corrections is concerned not only with the ability to win lawsuits under the Act, but with the possibility that the Act's "compelling interest" standard, as applied to prison situations, may give incarcerated individuals an increased capacity to go to trial on frivolous matters In this, the Department of Corrections' assertions parallel similar criticisms by amici in the Bourne case. See Brief for Amici States of Ohio, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, The Commonwealth of Pennsylvania, and the Territories of American Samoa, Guam and The Virgin Islands in Support of Petitioner at 3, City of Boerne v Flores, 117 S Ct 1257 (1997) ("Many of the cases involve recycled claims that were defeated years ago under the reasonableness test applied to inmate free exercise claims Thus, though many of the claims now confronting State prison officials could not have met the pleading requirements of Rule 11 under prior law, [under RFRA's 'compelling interest' standard] they are now being litigated anew in every corner of the country ")*

[31] *Use of this Act as a claim or defense in a "judicial proceeding" appears to limit the forum within which such a claim or defense may be brought. "Administrative proceedings" are, for example, not mentioned (e.g Ch. 120, F.S , proceedings conducted by "agencies" as defined therein) This apparent limitation conflicts with this Act's attorney's fee provision. The fee provision appears to entitle a non-governmental prevailing party to reasonable attorney's fees and costs in "any action or proceeding" to enforce the Act -- not just in judicial proceedings.*

obtain appropriate relief". This creates a new cause of action against government. Furthermore, what the scope of "appropriate relief" might entail is uncertain. It could mean issuing an injunction or writ to awarding compensatory damages.

**Provisions Regarding Applicability of the Act**

This Act also sets forth the following statements of applicability:

1. "This act applies to all state law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this act."

Thus this Act's provisions are retroactive and prospective in effect, and apply to laws found in the Florida Statutes as well as apparently to, for example, local ordinances and codes. Accordingly, a person could sue a governmental entity under this Act for governmental actions previously committed[32] that were in conformance with then existing law, and if that person prevailed, he or she would be entitled to reasonable attorneys' fees and costs. There is no period of time allowed for a governmental entity to establish provisions and procedures (e.g , variance provisions) that would take into consideration the Act's new provisions regarding free exercise of religion.

2. "State law adopted after the date of the enactment of this act is subject to this act unless such law explicitly excludes such application by reference to this act."

Any state law[33] created after this Act takes effect can circumvent this Act's provisions by simply stating that the Act does not apply. If such a statement is provided in a new law, then a defense or claim pursuant to this Act is unavailable. Existing law cannot so circumvent this Act's applicability, unless possibly it is readopted with the appropriate statement regarding the Act's inapplicability.

Additionally, one legislature may not bind the hands of future legislatures with regard to prohibiting changes to statutory law. Neu v. Miami Herald Publishing, Co., 462 So.2d 821, at 824 (Fla. 1985). Accordingly, future legislatures could otherwise negate the effect of this Act, without expressly referencing it.

3. "Nothing in this act shall be construed to authorize the government to burden any religious belief."

4. "Nothing in this act shall be construed to circumvent the provisions of chapter 893, Florida Statutes."

Chapter 893, F.S., deals with drug abuse prevention and control. Several of the sections in Ch. 893, F.S., make it unlawful to, for example, sell, manufacture, deliver, possess , or

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[32] *There is no time limit associated with the retroactive application of this Act. Thus, conceivably an action by the state done many years ago could be brought before the courts as an alleged violation of this Act.*

[33] *"State" is defined in this Act to include counties, municipalities, and special districts. Accordingly, when referencing "state law" that includes local law as well*

traffic in certain controlled substances. It is unclear how this Act could "circumvent" the provisions of that chapter. Possibly what is meant is that the provisions of this Act are inapplicable with regard to the enforcement of Ch. 893, F.S. If so, courts, in ruling on criminal cases brought pursuant to Ch. 893, F.S., would then have to dismiss any claim or defense brought pursuant to this Act. However, the meaning of this provision is still speculative.

5. "Nothing in this act shall be construed to affect, interpret, or in any way address that portion of s. 3, Art. I of the State Constitution prohibiting laws respecting the establishment of religion."

This subsection specifically addresses the Acts applicability to part of the state constitution. Its assertion could mean that the provisions of this Act are intended to address only governmental actions that affect the free exercise of religion, not the establishment of religion. However, if the court finds the legislation to affect the establishment of religion, a statement within a general law stating the contrary is ineffectual.

6. "Nothing in this act shall be construed to affect, interpret, or in any way address that portion of s. 3, Art. I of the State Constitution and Amendment 1 to the Constitution of the United States respecting the establishment of religion. This act shall not be construed to permit any practice prohibited by those provisions."

This reiterates the assertion that the Act is not intended to address establishment of religion, and contains language which cross-references both the State and Federal constitutions. In regard to the reference to the state constitution, this subsection contains language which appears redundant in light of other sections of the Act.

7. "Nothing is this act shall create any rights by an employee against an employer if the employer is not a governmental agency."

This means that the provisions of this Act are not available against the private sector and thus cannot be used as a claim or defense in private sector litigation.

Finally, this Act also provides that "the prevailing plaintiff in any action or proceeding to enforce a provision of this act is **entitled to** reasonable attorney's fees and costs to be paid by the government." Accordingly, the government, when a prevailing party, would not be entitled to reasonable attorney's fees and costs.[34] The fee provision does not appear mandatory (e.g., the court must/shall award reasonable attorney's fees and costs to the nongovernmental prevailing party) but only "entitles" a prevailing party to reasonable attorney's fees and costs.

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[34] *Under RFRA, there existed a bifurcated standard for the awarding of legal fees For judicial proceedings, 42 U.S.C 1988, applied, and that law provides that 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 " For administrative proceedings, s. 504(b)(1)(C) of title 5, United States Code, applied, and that law provides that "an agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that the special circumstances make an award unjust "*

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

This Act creates a cause of action under which a person may sue the government for alleged violation of his or her free exercise of religion. Its provisions may also be used as a defense.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

To the extent legal action is brought pursuant to this Act, governmental entities will have to engage personnel, including legal counsel, to defend its actions (in administrative as well as in judicial forums); and, the courts will have to hear such matters.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

An agency or program is not eliminated or reduced.

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

This bill appears to increase a person's options with regard to free exercise of religion.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

This bill does not purport to provide services to families or children.

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

This bill does not create or change a program providing services to families or children.

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Creates new sections of law.

E. SECTION-BY-SECTION RESEARCH:

Section 1: Provides a title: "Religious Freedom Restoration Act of 1998."

Section 2: Provides definitions.

Section 3: Provides that government shall not substantially burden a person's exercise of religion unless the State's action is to further a "compelling governmental interest" and is accomplished by the "least restrictive means" possible; and, provides that a person whose religious exercise has been burdened in violation of the Act may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief.

Section 4: Provides for entitlement to reasonable attorney's fees and costs from the government by the prevailing plaintiff.

Section 5: Provides that this Act applies to all state law (statutory or otherwise), and the implementation of that law, whether adopted before or after the implementation of this act, provides that state law adopted after enactment of this Act is subject to this Act unless expressly otherwise stated by such laws; provides that nothing in this Act shall authorize the State to burden any religious belief; provides that nothing in this Act shall circumvent Ch. 893, F. S. ("Drug Abuse Prevention and Control"); provides that nothing in this Act shall affect the portion of s. 3, Art I of the State Constitution which prohibits laws respecting the establishment of religion; provides that nothing in this Act creates any rights by an employee against a non-governmental employer; and, provides that nothing in this Act shall affect the portions of s 3, Art. I of the State Constitution and Amendment 1 of the Constitution of the United States respecting the establishment or religion.

Section 6: Provides an effective date of upon becoming law.

IV. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See "Fiscal Comments"

2. Recurring Effects:

   See "Fiscal Comments"

3. Long Run Effects Other Than Normal Growth:

   None.

4. Total Revenues and Expenditures:

   See "Fiscal Comments"

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

   See "Fiscal Comments"

2. Recurring Effects:

   See "Fiscal Comments"

3. Long Run Effects Other Than Normal Growth:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

   None.

2. Direct Private Sector Benefits:

   None.

3. Effects on Competition, Private Enterprise and Employment Markets:

   None.

D. FISCAL COMMENTS:

The fiscal impact of this bill is indeterminate. To the extent increased litigation against government results from this Act, then state and local governments will have to defend against same. Litigation entails expense, including attorneys' fees. Furthermore, any relief granted against the state may have a fiscal impact. This indeterminate amount of resulting litigation will also have a fiscal impact on the courts.

V. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to expend funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority of counties or municipalities to raise revenues.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

VI. COMMENTS:

None.

VII. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On April 7, 1998, the Committee on Governmental Operations adopted one "remove everything after the enactment clause" amendment. That amendment provided that government shall not substantially burden a person's free exercise of religion except in cases where the government has demonstrated that the burden is in furtherance of a "compelling governmental interest," and that it is the least restrictive means of furthering that interest. This test is to be applied to all cases asserting a claim against the state for infringement upon the free exercise of religion, including those from incarcerated persons. The amended bill was made a committee substitute.

The original bill provided that in cases brought by incarcerated individuals, the government has to demonstrate that the burden is in furtherance of a "substantial penological interest," and that it is the least restrictive means of furthering that interest. The original bill also defined "Exercise of Religion," as "the exercise of religion under s. 3, Art. I of the State Constitution." The committee substitute changed that definition.

On April 24, 1998, two amendments were adopted on the House floor. First, an amendment was adopted which added language which asserts that nothing in the Act shall be construed to affect, interpret, or in any way address the portions of the State Constitution and the Constitution of the United States which deal with establishment of religion. A second amendment was adopted which asserted that the prevailing "plaintiff" in any action brought under the Act would be entitled to compensation by the government. Prior to the amendment, the text of the Act contained the word "party" in place of "plaintiff."

VIII. SIGNATURES:

COMMITTEE ON GOVERNMENTAL OPERATIONS:

| Prepared by: | Legislative Research Director: |
|---|---|
| Garci Perez | Jimmy O. Helms |

**FINAL RESEARCH PREPARED BY COMMITTEE ON GOVERNMENTAL OPERATIONS:**

| Prepared by: | Legislative Research Director: |
|---|---|
| Garci Perez | Jimmy O. Helms |

# Florida Legislature On-Line Sunshine



## S 296 : Religious Freedom Restoration Act

**S 296 GENERAL BILL/CS by Judiciary; Grant; (CO-SPONSORS) Bronson; Klein**
**(Similar CS/1ST ENG/H 3201, Compare H 3203, H 4189, CS/S 0298)**
Religious Freedom Restoration Act; creates "Religious Freedom Restoration Act of 1998"; provides that government shall not substantially burden exercise of religion; provides exceptions; provides definitions; provides for attorney's fees & costs; provides applicability; provides construction. EFFECTIVE DATE: Upon becoming law.
11/05/97 SENATE Prefiled
11/19/97 SENATE Referred to Judiciary; Governmental Reform and Oversight
03/03/98 SENATE Introduced, referred to Judiciary; Governmental Reform and Oversight -SJ 00025
04/09/98 SENATE On Committee agenda-- Judiciary, 04/14/98, 3:00 pm, Room-309C
04/14/98 SENATE Comm. Action: CS by Judiciary -SJ 00499; CS read first time on 04/16/98 -SJ 00499
04/16/98 SENATE Now in Governmental Reform and Oversight -SJ 00499
04/27/98 SENATE Withdrawn from Governmental Reform and Oversight -SJ 00940; Placed on Calendar
04/28/98 SENATE Placed on Special Order Calendar -SJ 01092
04/29/98 SENATE Placed on Special Order Calendar -SJ 01092
04/30/98 SENATE Placed on Special Order Calendar -SJ 01222, -SJ 01522
05/01/98 SENATE Placed on Special Order Calendar -SJ 01522, -SJ 01808; House Bill substituted -SJ 01642; Laid on Table, Iden./Sim./Compare Bill(s) passed, refer to CS/HB 3201 (Ch. 98-412)

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BILL TEXT: (Top)

sb0296(View As: HTML, As Printed)
sb0296c1(View As: HTML, As Printed)

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AMENDMENTS: (Top)

Amendment 084348: An Amendment to sb0296(View As: HTML,As Printed)
Amendment 272216: An Amendment to sb0296(View As: HTML,As Printed)
Amendment 375554: An Amendment to sb0296(View As: HTML,As Printed)

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STAFF ANALYSIS/BILL RESEARCH: (Top)

S0296 by ju(View As: As Printed)

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VOTE HISTORY: (Top)

**By** Senator Grant

13-469-98 See HB

A bill to be entitled

An act relating to religious freedom; creating the "Religious Freedom Restoration Act of 1998"; providing that government shall not substantially burden the exercise of religion; providing exceptions; providing definitions; providing for attorney's fees and costs; providing applicability; providing construction; providing an effective date.

WHEREAS, it is the finding of the Legislature of the State of Florida that the framers of the Florida Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in s. 3, Art. I of the State Constitution, and

WHEREAS, laws which are "neutral" toward religion may burden the free exercise of religion as surely as laws intended to interfere with the free exercise of religion, and

WHEREAS, governments should not substantially burden the free exercise of religion without compelling justification, and

WHEREAS, the compelling interest test as set forth in certain federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests, and

WHEREAS, it is the intent of the Legislature of the State of Florida to establish the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972), to guarantee its application in all cases where free exercise of religion is substantially burdened, and to provide a claim or defense to

persons whose religious exercise is substantially burdened by government, NOW, THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. Short title.--This act may be cited as the "Religious Freedom Restoration Act of 1998."

Section 2. Definitions.--As used in this act:

(1) "Government" or "state" includes any branch, department, agency, instrumentality, or official or other person acting under color of law of the state, a county, special district, municipality, or any other subdivision of the state.

(2) "Demonstrates" means to meet the burden of going forward with the evidence and of persuasion.

(3) "Exercise of religion" means the exercise of religion under s. 3, Art. I of the State Constitution.

(4) "Incarcerated" means confined within any correctional facility in the state.

Section 3. Free exercise of religion protected.--

(1) The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:

(a) Is in furtherance of a compelling governmental interest; and

(b) Is the least restrictive means of furthering that compelling governmental interest.

(2) The government shall not substantially burden an incarcerated person's exercise of religion, even if the burden

results from a rule of general applicability, except that government may substantially burden an incarcerated person's exercise of religion only if the burden:

(a) Is in furtherance of a substantial penological interest; and

(b) Is the least restrictive means of furthering that substantial penological interest.

(3) A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief.

Section 4. Attorney's fees and costs.--The prevailing party in any action or proceeding to enforce a provision of this act is entitled to reasonable attorney's fees and costs to be paid by the government.

Section 5. Applicability; construction.--

(1) This act applies to all state law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this act.

(2) State law adopted after the date of the enactment of this act is subject to this act unless such law explicitly excludes such application by reference to this act.

(3) Nothing in this act shall be construed to authorize the government to burden any religious belief.

(4) Nothing in this act shall be construed to circumvent the provisions of chapter 893, Florida Statutes.

(5) Nothing in this act shall be construed to affect, interpret, or in any way address that portion of s. 3, Art. I of the State Constitution prohibiting laws respecting the establishment of religion.

(6) Nothing in this act shall create any rights by an employee against an employer if the employer is not a governmental agency.

Section 6. This act shall take effect upon becoming a law.

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LEGISLATIVE SUMMARY

Creates the "Religious Freedom Restoration Act of 1998." Defines terms for purposes of the act. Provides that government may not substantially burden a person's exercise of religion, or the exercise of religion of a person incarcerated within a correctional facility within the state, even if the burden results from a rule of general applicability. Provides an exception in which government may substantially burden a person's exercise of religion only if it demonstrates that the application of the burden to the person is in furtherance of a compelling governmental interest, or a substantial penological interest, and is the least restrictive means of furthering the compelling governmental interest or substantial penological interest. Provides for attorney's fees and costs. Provides applicability. Provides construction.

**By** the Committee on Judiciary and Senators Grant, Bronson and Klein

308-2142-98

A bill to be entitled

An act relating to religious freedom; creating the "Religious Freedom Restoration Act of 1998"; providing that government shall not substantially burden the exercise of religion; providing exceptions; providing definitions; providing for attorney's fees and costs; providing applicability; providing construction; providing an effective date.

WHEREAS, it is the finding of the Legislature of the State of Florida that the framers of the Florida Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in s. 3, Art. I of the State Constitution, and

WHEREAS, laws which are "neutral" toward religion may burden the free exercise of religion as surely as laws intended to interfere with the free exercise of religion, and

WHEREAS, governments should not substantially burden the free exercise of religion without compelling justification, and

WHEREAS, the compelling interest test as set forth in certain federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests, and

WHEREAS, it is the intent of the Legislature of the State of Florida to establish the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972), to guarantee its application in all cases where free exercise of religion is substantially burdened, and to provide a claim or defense to

persons whose religious exercise is substantially burdened by government, NOW, THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. Short title.--This act may be cited as the "Religious Freedom Restoration Act of 1998."

Section 2. Definitions.--As used in this act:

(1) "Government" or "state" includes any branch, department, agency, instrumentality, or official or other person acting under color of law of the state, a county, special district, municipality, or any other subdivision of the state.

(2) "Demonstrates" means to meet the burden of going forward with the evidence and of persuasion.

(3) "Exercise of religion" means an act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief.

Section 3. Free exercise of religion protected.--

(1) The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:

(a) Is in furtherance of a compelling governmental interest; and

(b) Is the least restrictive means of furthering that compelling governmental interest.

(2) A person whose religious exercise has been burdened in violation of this section may assert that

violation as a claim or defense in a judicial proceeding and obtain appropriate relief.

Section 4. Attorney's fees and costs.--The prevailing plaintiff in any action or proceeding to enforce a provision of this act is entitled to reasonable attorney's fees and costs to be paid by the government.

Section 5. Applicability; construction.--

(1) This act applies to all state law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this act.

(2) State law adopted after the date of the enactment of this act is subject to this act unless such law explicitly excludes such application by reference to this act.

(3) Nothing in this act shall be construed to authorize the government to burden any religious belief.

(4) Nothing in this act shall be construed to circumvent the provisions of chapter 893, Florida Statutes.

(5) Nothing in this act shall be construed to affect, interpret, or in any way address that portion of s. 3, Art. I of the State Constitution prohibiting laws respecting the establishment of religion.

(6) Nothing in this act shall create any rights by an employee against an employer if the employer is not a governmental agency.

Section 6. This act shall take effect upon becoming a law.

STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN
COMMITTEE SUBSTITUTE FOR
Senate Bill 296

The Committee Substitute for Senate Bill 296 removes any references to incarcerated persons, thus establishing a uniform compelling interest test that applies to all persons.

The bill also allows attorney's fees for the prevailing plaintiff, instead of the prevailing party.

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below

Date April 14, 1998 Revised: _____ _____ _____ _____

Subject Religious Freedom Restoration Act

| | Analyst | Staff Director | Reference | Action |
|---|---|---|---|---|
| 1 | Geraci | Moody | JU | Favorable/CS |
| 2 | | | GO | |
| 3 | | | | |
| 4. | | | | |
| 5. | | | | |

## I. Summary:

Committee Substitute for Senate Bill 296 creates the "Religious Freedom Restoration Act of 1998 "

The bill provides that government may not substantially burden a person's exercise of religion, even if the burden results from a rule of facially neutral application The CS addresses the standard by which the courts may judge an individual's claim alleging governmental interference with the free exercise of religion Such alleged interference will be judged according to whether the state's action is in furtherance of a compelling state interest, and, if so, whether that interest is met by the least intrusive means possible

The bill provides for an award of attorney's fees and costs paid by the government to the prevailing plaintiff in any action or proceeding to enforce a provision of this act

The bill shall take effect upon becoming a law

The bill creates yet unnumbered sections of the Florida Statutes

## II. Present Situation:

Section 3, Art I of the Florida Constitution states

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof Religious freedom shall not justify practices inconsistent with public morals, peace or safety No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury

directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution

The application of s 3, Art I, Fla Const , by Florida courts has largely paralleled the Federal law regarding the application of the federal First Amendment's clause stating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"

## A. The *Sherbert* Analysis

In 1963, the United States Supreme Court created a balancing test to determine whether a facially neutral state law of general applicability could place unacceptable pressure on an individual to abandon the precepts of his or her religion *Sherbert v. Verner*, 374 U S 398 (1963) In this case, the appellant, a member of the Seventh-Day Adventist Church, lost her job because she refused to work on Saturday, the Sabbath Day of her religion *Id.* at 399 She was unable to obtain other employment because of her observation of the Sabbath, but was denied unemployment benefits because her refusal to work on Saturday was not a good cause justification *Id* at 400

To apply the balancing test, the Court must first determine whether the regulation imposes any burden on the free exercise of the claimant's religion *Id.* at 402 If it does, the Court must then determine whether some compelling state interest justifies the substantial infringement of the claimant's First Amendment rights *Id.* at 403 The compelling interest test constitutes the highest level of scrutiny, strict scrutiny, that the Supreme Court has applied in analyzing claims against state actions alleged to be unconstitutional Under this level of scrutiny, the burden is on the state to prove that any interference with an individual's religious practice meets two criteria First, the state must show that interference is "justified by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate" *Id.* Second, in the process of making such a showing, the state must "demonstrate that no alternative forms of regulation would [meet the state interest] without infringing First Amendment rights" *Id* at 407

## B. Exceptions to the *Sherbert* Analysis

In applying the compelling interest test, the Supreme Court has given a great degree of deference to a person's subjective assertion of religious deprivation in First Amendment free exercise of religion cases However, later Supreme Court rulings instituted certain exceptions to the application of the compelling interest test. The test was found inapplicable to free exercise challenges against government actions in the following three circumstances·

### 1. Military "Free Exercise" Cases

In *Goldman v. Weinberger*, 475 U.S 503 (1986), the United States Supreme Court ruled that the compelling interest test was not applicable to free exercise claims in military situations. The *Goldman* Court found this exception justifiable because the military is a "specialized society separate from civilian society," whose mission necessitates fostering "instinctive obedience, unity,

commitment, and esprit de corps" through, among other things, regulations enforcing a heightened degree of uniformity. *Id.* at 506

**2. Prison "Free Exercise" Cases**

In *Turner v. Safley*, 482 U.S. 78 (1987), the United States Supreme Court held that prison regulations were not subject to the compelling interest test, because, although prisoners still retain their constitutional rights, the "institutional order" necessary for a corrective environment justifies a lessened level of scrutiny *Id.* In prison free exercise cases, a court must only inquire "whether a prison regulation that burdens fundamental rights is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns." *Id.* at 87

In *O'Lone v. Estate of Shabazz*, 482 U S 342 (1987), the United States Supreme Court reaffirmed the *Turner* holding In *O'Lone*, the Court asserted several criteria for weighing the reasonableness of prisoners' religious rights claims against a particular prison policy.
(1) Whether the policy in question serves a legitimate penological interest,
(2) Whether the prisoners bringing the claim have an alternative means of religious worship,
(3) Whether the costs of accommodating prisoners' religious requests are excessive, and
(4) Whether there exist any "obvious, easy alternatives" to the prisoners' request.
*Id.*

**3. Generally Applicable Laws**

A generally applicable law is a facially neutral law which is applied, in a generalized fashion and without discrimination, to a general population in a blanket manner *See Bowen v. Roy*, 476 U.S. 693, 703-705 (1986), *City of Boerne v. Flores*, 117 S Ct 2157, at 2160-2161 (1997).

In *Bowen v. Roy*, 476 U.S 693 (1986), the United States Supreme Court rejected a free exercise challenge to a state law which required that all residents utilize social security numbers in order to get governmental assistance The Court differentiated between a "facially neutral" state law which "indirectly and incidentally" affects a particular religious practice, and a state law which "criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons " *Id.* at 706 The Court found the two to be "wholly different," and that "absent proof to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest " *Id.* at 707

In *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S 439 (1988), the Court, applying the reasoning in *Roy*, rejected a free exercise challenge to a road construction project planned for a tract of federally owned land Against a claim that the construction would disrupt an area containing ritualistic value to certain Native Americans, the Court differentiated between state actions that coerce, penalize, or prohibit the exercise of religion and state actions which "may make it more difficult to practice certain religions but which have no tendency to coerce

individuals into acting contrary to their religious beliefs." *Lyng* at 450 Under the ruling in *Lyng*, only state actions that coerce, penalize, or prohibit the exercise of religion are subject to the compelling interest test. Accordingly, generalized state actions which are merely "inconvenient" but are not specifically prohibitive or coercive of religious practice are not subject to the compelling interest test. *Id.* at 449.

The *Goldman*, *Turner*, *O'Lone*, *Roy*, and *Lyng* cases reaffirmed the *Sherbert* analysis, but created exceptions to its application In those cases where the compelling interest test does not apply, proving a case against the state for infringement of free exercise of religion is much more difficult

**C. The Religious Freedom Restoration Act of 1993**

The *Sherbert* analysis continued to be controlling until 1990, when the Court decided *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U S. 872 (1990) In this case, the claimants were denied unemployment benefits because of their use of peyote for sacramental purposes in their Native American Church. *Id.* at 874 The Court chose not to use the compelling interest test, finding that the right of free exercise does not excuse an individual from complying with a law forbidding an act, that may be required by his religious beliefs, if the law is not specifically aimed at religious practice, and is otherwise constitutional as applied to others who engage in the act for nonreligious reasons *Id.* at 878 The Court distinguished *Sherbert* on the grounds that the test was created in a context related to unemployment compensation eligibility rules that allowed individualized governmental assessment of the reasons for the relevant conduct *Id.* at 884. Also, the Court explained that the only decisions where it has been held "that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press." *Id.* at 881

In response to the *Smith* decision, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA). 42 U.S.C s 2000bb RFRA revived the compelling interest test, but included a least restrictive means analysis not present in the original case RFRA resulted in an increased opportunity to bring lawsuits against the state for alleged infringement upon the free exercise of religion and the standard of strict scrutiny made it more difficult for a state to win such a case. This produced an increase in the number of First Amendment religious freedom cases entertained by state and federal courts

In June of 1997, in *City of Boerne v. Flores*, 117 S Ct 2157 (1997), the Court held RFRA unconstitutional because it was not a proper exercise of Congress' enforcement power The Court stated that the "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior It appears, instead, to attempt a substantive change in constitutional protections " *Id.* The Court found that the RFRA was an intrusion into the States' general authority to regulate for the health and welfare of their citizens, and by imposing a least restrictive means requirement, Congress created legislation broader than is appropriate *Id.* This case upholds the ruling in *Smith*, and at this time, *Smith* is the controlling case law.

## III. Effect of Proposed Changes:

The Religious Freedom Restoration Act of 1998 (the Act) provides that government shall not substantially burden the free exercise of religion, even if the burden results from a rule of general applicability, unless the government demonstrates that the burden

- Is in furtherance of a compelling governmental interest, and
- Is the least restrictive means of furthering that interest

RFRA had established the compelling interest test for all claims against the state for infringement upon the free exercise of religion, including claims from incarcerated individuals or groups This had created debate as to whether the greater capacity for successful litigation by inmates had hindered the security and order of corrections facilities, and whether it produced an inordinate degree of inmate litigation *See, e.g. Brief for Amici States of Ohio, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, The Commonwealth of Pennsylvania, and the Territories of American Samoa, Guam and The Virgin Islands in Support of Petitioner* at 3-6, *City of Boerne v. Flores*, 117 S Ct 1257 (1997) ("[RFRA] has spawned a remarkable wave of inmate litigation in the years since it was passed Based on a Lexis/Nexis search conducted on November 12, 1996, no fewer than 189 inmate cases have been decided involving RFRA-based challenges . The litigation wave generated by RFRA disrupts State prisons and State prison administrations in many ways As an initial matter, RFRA cases are harder to dispose of than most due to the difficulty (if not impossibility) of determining the accommodations that are truly necessary for the proper exercise of a given religion. . For like reasons, RFRA lawsuits are expensive. New attorneys and experts must be hired to defend them; dispositions and other discovery must be taken to respond to them, and successful lawsuits require costly reconfigurations of corrections programs, sometimes even prison buildings Besides the difficulty of responding to this litigation and the cost of handling it, RFRA lawsuits compel corrections officials to divert extensive staff time to handling the litigation They must investigate the 'religious' nature of each claim and the 'religious' necessity to each inmate of bringing the claim Making matters worse is the "least restrictive means" test, which regularly compels corrections staff to develop ways to accommodate even the most unusual and isolated demands "), *but see Brief of the States of Maryland, Connecticut, Massachusetts and New York As Amici Curiae in Support of Respondent* at 3-9, *City of Boerne v. Flores*, 117 S. Ct 1257 (1997) ("Properly interpreted, RFRA does not and will not impede the States' ability to operate their prisons effectively With respect to prison management, RFRA requires courts to provide substantial deference to the States and to those responsible for administering the state penal systems The limitations inherent in the requirement of proving a "substantial burden" preserves State authority in may instances where RFRA may be invoked. Although the lower courts, prior to *O'Lone*, disagreed among themselves as to whether the *Sherbert/Yoder* compelling interest test applies to religious freedom claims in the prison context, even those courts that had applied that test accorded a great deal of deference to the judgements of prison administrators. . This deference applied at two distinct levels First, following this Court's statements in earlier decisions, the lower courts recognized that, in the prison context, order, safety, security, and discipline are paramount government interests . Second, those courts

recognize that prison officials are entitled to great deference in determining whether a particular prison regulation is tailored with sufficient precision to the state interest at issue ")

The Department of Corrections has expressed concerns that the heightened standard of review will give inmates greater latitude in asserting unreasonable demands which conflict with a correctional institution's need for order and security The Department of Corrections is concerned not only with the ability to win lawsuits under the Act, but with the possibility that the Act's compelling interest standard may give incarcerated individuals an increased capacity to go to trial on frivolous matters In this, the Department of Corrections' assertions parallel similar criticisms by amici in the *Bourne* case. *See Brief for Amici States of Ohio, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, The Commonwealth of Pennsylvania, and the Territories of American Samoa, Guam and The Virgin Islands in Support of Petitioner* at 3, *City of Boerne v. Flores*, 117 S Ct 1257 (1997) (Many of the cases . . involve recycled claims that were defeated years ago under the reasonableness test applied to inmate free exercise claims. Thus, though many of the claims now confronting State prison officials could not have met the pleading requirements of Rule 11 under prior law, [under RFRA's "compelling interest"standard] they are now being litigated anew in every corner of the country )

This Act also sets forth the following statements of applicability

- This act applies to all state law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this act,
- State law adopted after the date of the enactment of this act is subject to this act unless such law explicitly excludes such application by reference to this act;
- Nothing in this act shall be construed to authorize the government to burden any religious belief,
- Nothing in this act shall be construed to circumvent the provisions of chapter 893, Florida Statutes,
- Nothing in this act shall be construed to affect, interpret, or in any way address that portion of s 3, Art I of the State Constitution prohibiting laws respecting the establishment of religion,
- Nothing in this act shall create any rights by an employee against an employer if the employer is not a governmental agency.

This Act's provisions are retroactive and prospective in effect, and apply to laws found in the Florida Statutes, as well as to local ordinances and codes Arguably, a person could sue a governmental entity under this Act for governmental actions previously committed that were in conformance with then existing law, and if that person prevailed, he or she would be entitled to reasonable attorneys' fees and costs There is no time limit associated with the retroactive application of this Act. Therefore, an action by the state done many years ago could, arguably, be brought before the courts as an alleged violation of this Act There is no period of time allowed for a governmental entity to establish provisions and procedures that would take into consideration the Act's new provisions regarding free exercise of religion This application may be considered unconstitutional because of the retrospective nature of the Act In *McCord v. Smith*,

43 So 2d 704 (Fla 1949), the Florida Supreme Court held that "[a] retrospective provision of a legislative act is not necessarily invalid It is so only in those cases wherein vested rights are adversely affected or destroyed or when a new obligation or duty is created or imposed, or an additional disability is established, on connection with transactions or considerations previously had or expiated " *Id.* at 708. The Florida Supreme Court also found that a statutory requirement for a nonprevailing party to pay attorney fees constituted "a new obligation or duty," and was therefore substantive in nature and could only be applied prospectively *Young v. Altenhaus*, 472 So 2d 1152 (Fla 1985). Additionally, in overturning RFRA as unconstitutional, the United States Supreme Court found that RFRA "cannot be considered remedial, preventive legislation, if those terms are to have any meaning." *City of Boerne v. Flores*, 117 S Ct 2157 (1997) Since this Act is based on RFRA, it could be construed that it is substantive in nature If the Act applies retrospectively, it could be found unconstitutional

Any state law created after this Act takes effect can circumvent this Act's provisions by simply stating that the Act does not apply If such a statement is provided in a new law, then a defense or claim pursuant to this Act is unavailable Existing law cannot so circumvent this Act's applicability, unless possibly it is readopted with the appropriate statement regarding the Act's inapplicability. "State" is defined in this Act to include counties, municipalities, and special districts Accordingly, when referencing "state law," the reference includes local law as well

Additionally, one legislature may not bind the hands of future legislatures with regard to prohibiting changes to statutory law *Neu v. Miami Herald Publishing, Co.*, 462 So 2d 821, at 824 (Fla 1985) Accordingly, future legislatures could otherwise negate the effect of this Act, without expressly referencing it

The provisions of this Act only apply to governmental actions that affect the free exercise of religion, not the establishment of religion This means that the provisions of this Act are not available against the private sector and cannot be used as a claim or defense in private sector litigation

This Act would re-establish the compelling interest test in cases where state actions were alleged to have violated a person's free exercise of religion. In such an instance, the State would be required to meet the requisite standard by the least intrusive means possible. The effect of this Act in Florida could parallel the experience with RFRA at the national level RFRA produced a broadened capacity for legal action against the state for alleged infringement upon free exercise of religion. Proponents of RFRA had affirmed this effect as indicative of a greater protection for religious practice. Conversely, the greater deference to the subjective claims of individuals that RFRA provided, over even facially neutral state laws, created concerns that the basic regulatory and security functions of government could be adversely affected

This Act also provides that "the prevailing plaintiff in any action or proceeding to enforce a provision of this act is entitled to reasonable attorney's fees and costs to be paid by the government."

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None

B Public Records/Open Meetings Issues

None.

C. Trust Funds Restrictions

None.

D. Other Constitutional Issues:

This application may be considered unconstitutional, if the Act is retrospective in nature In *McCord v. Smith*, 43 So 2d 704 (Fla 1949), the Florida Supreme Court held that "[a] retrospective provision of a legislative act is not necessarily invalid It is so only in those cases wherein vested rights are adversely affected or destroyed or when a new obligation or duty is created or imposed, or an additional disability is established, on connection with transactions or considerations previously had or expiated " *Id.* at 708 The Florida Supreme Court also found that a statutory requirement for a nonprevailing party to pay attorney fees constituted "a new obligation or duty," and was therefore substantive in nature and could only be applied prospectively. *Young v. Altenhaus*, 472 So 2d 1152 (Fla. 1985) Additionally, in overturning RFRA as unconstitutional, the United States Supreme Court found that RFRA "cannot be considered remedial, preventive legislation, if those terms are to have any meaning " *City of Boerne v. Flores*, 117 S Ct. 2157 (1997). Since this Act is based on RFRA, it could be construed that it is substantive in nature. If the Act is retrospective in nature, it could be found unconstitutional.

## V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The fiscal impact of this bill is indeterminate The degree of possible fiscal impact will vary according to the extent of increased litigation To the extent increased litigation against a governmental entity results from this Act, then state and local governments will have to defend against such litigation. Litigation involves expenses, including attorney's fees Furthermore, any relief granted against the state may have a fiscal impact. This indeterminate amount of resulting litigation will also have a fiscal impact on the courts

## VI. Technical Deficiencies:

None

## VII. Related Issues:

None.

## VIII. Amendments:

None.

# Florida Legislature On-Line Sunshine



## H 3203: Religious Freedom

**H 3203 JOINT RESOLUTION by Starks; (CO-SPONSORS) Ball; Byrd; Feeney (Similar H 4189, CS/S 0298, Compare CS/1ST ENG/H 3201, CS/S 0296)**
Religious Freedom; constitutional amendment to provide that state shall not substantially burden free exercise of religion of any person, or any person incarcerated within state correctional facility, even if burden results from rule of general applicability; provides exception only upon demonstration that application of burden is in furtherance of compelling interest or substantial penological interest, etc. Amends s. 3, Art. I.
11/14/97 HOUSE Prefiled
12/17/97 HOUSE Referred to Civil Justice & Claims (JC)
03/03/98 HOUSE Introduced, referred to Civil Justice & Claims (JC) -HJ 00018
03/04/98 HOUSE Withdrawn from Civil Justice & Claims (JC); Withdrawn from further cons.,Iden/Sim/Compare Bill(s) passed, refer to CS/HB 3201 (Ch. 98-412) -HJ 00120

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BILL TEXT: (Top)

hb3203(View As: HTML, As Printed)

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AMENDMENTS: (Top)

NO AMENDMENTS AVAILABLE

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STAFF ANALYSIS/BILL RESEARCH: (Top)

NO STAFF ANALYSIS/BILL RESEARCH AVAILABLE

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VOTE HISTORY: (Top)

NO VOTE DATA AVAILABLE

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STATUTE CITATIONS: (Top)

NO STATUTE CITATIONS FOUND FOR REQUESTED BILL.

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CONSTITUTION CITATIONS:

001.03

By Representatives Starks and Trovillion

House Joint Resolution

A joint resolution proposing an amendment to Section 3 of Article I of the State Constitution relating to religious freedom.

Be It Resolved by the Legislature of the State of Florida:

That the amendment to Section 3 of Article I of the State Constitution set forth below is agreed to and shall be submitted to the electors of Florida for approval or rejection at the general election to be held in November 1998:

SECTION 3. Religious freedom.--There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. The state or any political subdivision or agency thereof shall not substantially burden the free exercise of religion of any person, even if the burden results from a rule of general applicability. The state or any political subdivision or agency thereof may substantially burden a person's free exercise of religion only if the state or political subdivision or agency thereof demonstrates that application of the burden to the person is in furtherance of a compelling interest of the state or a political subdivision or agency thereof and is the least restrictive means of furthering that compelling interest. The state or any political subdivision or agency thereof shall not substantially burden the free exercise of religion of any person incarcerated within any correctional facility in the state, even if the burden results from a rule of general applicability. The state or any political subdivision or agency thereof may substantially burden the free exercise of religion of any person



**CODING:** Words <S>stricken</S> are deletions; words underlined are additions.

incarcerated within any correctional facility in the state, only if the burden is in furtherance of a substantial penological interest and is the least restrictive means of furthering that substantial penological interest.Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

BE IT FURTHER RESOLVED that in accordance with the requirements of s. 101.161, Florida Statutes, the title and substance of the amendment proposed herein shall appear on the ballot as follows:

PROHIBITING STATE FROM SUBSTANTIALLY BURDENING THE FREE EXERCISE OF RELIGION

Provides that the state shall not substantially burden the free exercise of religion of any person, or any person incarcerated within a state correctional facility, even if the burden results from a rule of general applicability. Provides an exception only upon demonstration that the application of the burden is in furtherance of a compelling interest or substantial penological interest, and is the least-restrictive means of furthering that compelling interest or substantial penological interest.

# Florida Legislature On-Line Sunshine



## H 4189: Religious Freedom

**H 4189 JOINT RESOLUTION by Starks (Similar H 3203, CS/S 0298, Compare CS/1ST ENG/H 3201, CS/S 0296)**

Religious Freedom; constitutional amendment to provide that state may not substantially burden free exercise of religion, even if burden results from rule of general applicability, unless state demonstrates that application of burden is in furtherance of compelling interest & is least-restrictive means of furthering that compelling interest. Amends s. 3, Art. I.

03/13/98 HOUSE Filed
03/17/98 HOUSE Introduced -HJ 00232
04/07/98 HOUSE Referred to Civil Justice & Claims (JC); Corrections (JC) -HJ 00463
05/01/98 HOUSE Died in Committee on Civil Justice & Claims (JC), Iden./Sim./Compare Bill(s) passed, refer to CS/HB 3201 (Ch. 98-412)

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AMENDMENTS: (Top)

NO AMENDMENTS AVAILABLE

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STAFF ANALYSIS/BILL RESEARCH: (Top)

NO STAFF ANALYSIS/BILL RESEARCH AVAILABLE

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VOTE HISTORY: (Top)

NO VOTE DATA AVAILABLE

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STATUTE CITATIONS: (Top)

NO STATUTE CITATIONS FOUND FOR REQUESTED BILL.

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CONSTITUTION CITATIONS:

001.03

By Representative Starks

House Joint Resolution

A joint resolution proposing an amendment to Section 3 of Article I of the State Constitution relating to religious freedom.

Be It Resolved by the Legislature of the State of Florida:

That the amendment to Section 3 of Article I of the State Constitution set forth below is agreed to and shall be submitted to the electors of Florida for approval or rejection at the general election to be held in November 1998:

SECTION 3. Religious freedom.--There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. The state or any political subdivision or agency thereof may not substantially burden the free exercise of religion, even if the burden results from a rule of general applicability, unless the state demonstrates that application of the burden is in furtherance of a compelling interest and is the least restrictive means of furthering that compelling interest.Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

BE IT FURTHER RESOLVED that in accordance with the requirements of s. 101.161, Florida Statutes, the title and substance of the amendment proposed herein shall appear on the ballot as follows:

PROHIBITING STATE FROM SUBSTANTIALLY BURDENING



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

THE FREE EXERCISE OF RELIGION

Provides that the state may not substantially burden the free exercise of religion, even if the burden results from a rule of general applicability, unless the state demonstrates that application of the burden is in furtherance of a compelling interest and is the least-restrictive means of furthering that compelling interest.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

# Florida Legislature On-Line Sunshine

Bill By Hundreds | Bill Text | Amendments | Staff Analysis/Bill Research | Vote History | Citations

## S 298 : Religious Freedom

**S 298 JOINT RESOLUTION/CS by Judiciary; Grant; (CO-SPONSORS) Bronson (Similar H 3203, H 4189, Compare CS/1ST ENG/H 3201, CS/S 0296)**
Religious Freedom; constitutional amendment to provide that state shall not substantially burden free exercise of religion, even if burden results from rule or law of general applicability, unless state demonstrates that application of burden is in furtherance of compelling interest & is least-restrictive means of furthering that compelling interest. Amends s. 3, Art. I.
11/05/97 SENATE Prefiled
11/19/97 SENATE Referred to Judiciary; Governmental Reform and Oversight; Rules and Calendar
03/03/98 SENATE Introduced, referred to Judiciary; Governmental Reform and Oversight; Rules and Calendar -SJ 00025
04/09/98 SENATE On Committee agenda-- Judiciary, 04/14/98, 3:00 pm, Room-309C
04/14/98 SENATE Comm. Action: CS by Judiciary -SJ 00499; CS read first time on 04/16/98 -SJ 00499
04/16/98 SENATE Now in Governmental Reform and Oversight -SJ 00499
04/22/98 SENATE Withdrawn from Governmental Reform and Oversight -SJ 00758; Now in Rules and Calendar
05/01/98 SENATE Died in Committee on Rules and Calendar, Iden./Sim./Compare Bill(s) passed, refer to CS/HB 3201 (Ch. 98-412)

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sb0298(View As: HTML, As Printed)
sb0298c1(View As: HTML, As Printed)

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AMENDMENTS: (Top)

NO AMENDMENTS AVAILABLE

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STAFF ANALYSIS/BILL RESEARCH: (Top)

S0298 by ju(View As: As Printed)

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VOTE HISTORY: (Top)

NO VOTE DATA AVAILABLE

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STATUTE CITATIONS: (Top)

NO STATUTE CITATIONS FOUND FOR REQUESTED BILL.

**By** Senator Grant

13-470-98 See HJR

Senate Joint Resolution

A joint resolution proposing an amendment to Section 3 of Article I of the State Constitution relating to religious freedom.

Be It Resolved by the Legislature of the State of Florida:

That the amendment to Section 3 of Article I of the State Constitution set forth below is agreed to and shall be submitted to the electors of Florida for approval or rejection at the general election to be held in November 1998:

SECTION 3. Religious freedom.--There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. The state or any political subdivision or agency thereof shall not substantially burden the free exercise of religion of any person, even if the burden results from a rule of general applicability. The state or any political subdivision or agency thereof may substantially burden a person's free exercise of religion only if the state or political subdivision or agency thereof demonstrates that application of the burden to the person is in furtherance of a compelling interest of the state or a political subdivision or agency thereof and is the least restrictive means of furthering that compelling interest. The state or any political subdivision or agency thereof shall not substantially burden the free exercise of religion of any person incarcerated within any correctional facility in the state, even if the burden results from a rule of general applicability. The state or any political subdivision or agency thereof may substantially burden the free exercise of religion of any person



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

incarcerated within any correctional facility in the state only if the burden is in furtherance of a substantial penological interest and is the least restrictive means of furthering that substantial penological interest.Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

BE IT FURTHER RESOLVED that in accordance with the requirements of s. 101.161, Florida Statutes, the title and substance of the amendment proposed herein shall appear on the ballot as follows:

PROHIBITING STATE FROM SUBSTANTIALLY BURDENING THE FREE EXERCISE OF RELIGION

Provides that the state shall not substantially burden the free exercise of religion of any person, or any person incarcerated within a state correctional facility, even if the burden results from a rule of general applicability. Provides an exception only upon demonstration that the application of the burden is in furtherance of a compelling interest or substantial penological interest, and is the least-restrictive means of furthering that compelling interest or substantial penological interest.

**By** the Committee on Judiciary and Senators Grant and Bronson

308-2141-98

Senate Joint Resolution No. ____

A joint resolution proposing an amendment to Section 3 of Article I of the State Constitution relating to religious freedom.

Be It Resolved by the Legislature of the State of Florida:

That the amendment to Section 3 of Article I of the State Constitution set forth below is agreed to and shall be submitted to the electors of Florida for approval or rejection at the general election to be held in November 1998:

SECTION 3. Religious freedom.--There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. No governmental entity shall substantially burden the free exercise of religion, even if the burden results from a rule or law of general applicability, unless the governmental entity demonstrates that application of the burden is in furtherance of a compelling interest and is the least restrictive means of furthering that compelling interest.Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

BE IT FURTHER RESOLVED that in accordance with the requirements of s. 101.161, Florida Statutes, the title and substance of the amendment proposed herein shall appear on the ballot as follows:

PROHIBITING STATE FROM SUBSTANTIALLY BURDENING

THE FREE EXERCISE OF RELIGION

Provides that the state shall not substantially burden the free exercise of religion, even if the burden results from a rule or law of general applicability, unless the state demonstrates that the application of the burden is in furtherance of a compelling interest and is the least-restrictive means of furthering that compelling interest.

STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN COMMITTEE SUBSTITUTE FOR Senate Bill 298

The Committee Substitute for Senate Joint Resolution 298 removes any references to incarcerated persons, thus establishing a uniform compelling interest test that applies to all persons.

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below )

Date: April 14, 1998 Revised _____ _____ _____ _____

Subject Religious Freedom

| | Analyst | Staff Director | Reference | Action |
|---|---|---|---|---|
| 1. | Geraci | Moody | JU | Favorable/CS |
| 2 | | | GO | |
| 3 | | | RC | |
| 4 | | | | |
| 5 | | | | |

## I. Summary:

Committee Substitute for Senate Joint Resolution 298 proposes amending the Florida Constitution to provide that a governmental entity shall not substantially burden the free exercise of religion, unless the governmental entity can demonstrate that application of such a burden is in furtherance of a compelling state interest and is the least restrictive means of furthering that interest

The joint resolution substantially amends section 3, Article I of the Florida Constitution

## II. Present Situation:

### A. Constitution Amendment Process

Article XI of the Florida Constitution sets forth the various methods of proposing amendments to the State Constitution and the method of approval or rejection of those proposals One method by which constitutional amendments may be proposed is by joint resolution agreed to by three-fifths of the membership of each house of the Legislature s 1, Art XI, Fla Const. Any such proposal must be submitted to the electors, either at the next general election held more than 90 days after the joint resolution is filed with the secretary of state, or, if pursuant to law enacted by the affirmative vote of three-fourths of the membership of each house of the Legislature and limited to a single amendment or revision, at an earlier special election held more than 90 days after such filing s. 5, Art. XI, Fla Const If the proposed amendment is approved by a vote of the electors, it becomes effective as an amendment to the State Constitution on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment *Id*

## B. The Free Exercise of Religion

Section 3, Art I of the Florida Constitution states

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof Religious freedom shall not justify practices inconsistent with public morals, peace or safety No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution

The application of s 3, Art I, Fla Const , by Florida courts has largely paralleled the Federal law regarding the application of the federal First Amendment's clause stating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"

### 1. The *Sherbert* Analysis

In 1963, the United States Supreme Court created a balancing test to determine whether a facially neutral state law of general applicability could place unacceptable pressure on an individual to abandon the precepts of his or her religion *Sherbert v. Verner*, 374 U S 398 (1963) In this case, the appellant, a member of the Seventh-Day Adventist Church, lost her job because she refused to work on Saturday, the Sabbath Day of her religion *Id.* at 399 She was unable to obtain other employment because of her observation of the Sabbath, but was denied unemployment benefits because her refusal to work on Saturday was not a good cause justification *Id.* at 400

To apply the balancing test, the Court must first determine whether the regulation imposes any burden on the free exercise of the claimant's religion *Id.* at 402 If it does, the Court must then determine whether some compelling state interest justifies the substantial infringement of the claimant's First Amendment rights *Id.* at 403 The compelling interest test constitutes the highest level of scrutiny, strict scrutiny, that the Supreme Court has applied in analyzing claims against state actions alleged to be unconstitutional Under this level of scrutiny, the burden is on the state to prove that any interference with an individual's religious practice meets two criteria First, the state must show that interference is "justified by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate." *Id.* Second, in the process of making such a showing, the state must "demonstrate that no alternative forms of regulation would [meet the state interest] without infringing First Amendment rights" *Id.* at 407

### 2. Exceptions to the *Sherbert* Analysis

In applying the compelling interest test, the Supreme Court has given a great degree of deference to a person's subjective assertion of religious deprivation in First Amendment free exercise of religion cases However, later Supreme Court rulings instituted certain exceptions to the application of the compelling interest test The test was found inapplicable to free exercise challenges against government actions in the following three circumstances

### a. Military "Free Exercise" Cases

In *Goldman v. Weinberger*, 475 U.S 503 (1986), the United States Supreme Court ruled that the compelling interest test was not applicable to free exercise claims in military situations The *Goldman* Court found this exception justifiable because the military is a "specialized society separate from civilian society," whose mission necessitates fostering "instinctive obedience, unity, commitment, and esprit de corps" through, among other things, regulations enforcing a heightened degree of uniformity *Id* at 506

### b. Prison "Free Exercise" Cases

In *Turner v. Safley*, 482 U S 78 (1987), the United States Supreme Court held that prison regulations were not subject to the compelling interest test, because, although prisoners still retain their constitutional rights, the "institutional order" necessary for a corrective environment justifies a lessened level of scrutiny *Id.* In prison free exercise cases, a court must only inquire "whether a prison regulation that burdens fundamental rights is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns." *Id.* at 87

In *O'Lone v. Estate of Shabazz*, 482 U S 342 (1987), the United States Supreme Court reaffirmed the *Turner* holding In *O'Lone*, the Court asserted several criteria for weighing the reasonableness of prisoners' religious rights claims against a particular prison policy:
(1) Whether the policy in question serves a legitimate penological interest,
(2) Whether the prisoners bringing the claim have an alternative means of religious worship,
(3) Whether the costs of accommodating prisoners' religious requests are excessive, and
(4) Whether there exist any "obvious, easy alternatives" to the prisoners' request
*Id.*

### c. Generally Applicable Laws

A generally applicable law is a facially neutral law which is applied, in a generalized fashion and without discrimination, to a general population in a blanket manner *See Bowen v Roy*, 476 U.S 693, 703-705 (1986), *City of Boerne v. Flores*, 117 S. Ct 2157, at 2160-2161 (1997).

In *Bowen v. Roy*, 476 U S. 693 (1986), the United States Supreme Court rejected a free exercise challenge to a state law which required that all residents utilize social security numbers in order to get governmental assistance The Court differentiated between a "facially neutral" state law which "indirectly and incidentally" affects a particular religious practice, and a state law which "criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons " *Id.* at 706. The Court found the two to be "wholly different," and that "absent proof to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest " *Id* at 707

In *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U S 439 (1988), the Court, applying the reasoning in *Roy*, rejected a free exercise challenge to a road construction project planned for a tract of federally owned land Against a claim that the construction would disrupt an area containing ritualistic value to certain Native Americans, the Court differentiated between state actions that coerce, penalize, or prohibit the exercise of religion and state actions which "may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs." *Lyng* at 450 Under the ruling in *Lyng*, only state actions that coerce, penalize, or prohibit the exercise of religion are subject to the compelling interest test Accordingly, generalized state actions which are merely "inconvenient" but are not specifically prohibitive or coercive of religious practice are not subject to the compelling interest test *Id.* at 449.

The *Goldman, Turner, O'Lone, Roy*, and *Lyng* cases reaffirmed the *Sherbert* analysis, but created exceptions to its application. In those cases where the compelling interest test does not apply, proving a case against the state for infringement of free exercise of religion is much more difficult.

### 3. The Religious Freedom Restoration Act of 1993

The *Sherbert* analysis continued to be controlling until 1990, when the Court decided *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U S 872 (1990) In that case, the claimants were denied unemployment benefits because of their use of peyote for sacramental purposes in their Native American Church *Id.* at 874 The Court chose not to use the compelling interest test, finding that the right of free exercise does not excuse an individual from complying with a law forbidding an act, that may be required by his religious beliefs, if the law is not specifically aimed at religious practice, and is otherwise constitutional as applied to others who engage in the act for nonreligious reasons *Id.* at 878 The Court distinguished *Sherbert* on the grounds that the test was created in a context related to unemployment compensation eligibility rules that allowed individualized governmental assessment of the reasons for the relevant conduct. *Id.* at 884 Also, the Court explained that the only decisions where it has been held "that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press " *Id* at 881

In response to the *Smith* decision, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA). 42 U.S.C. s 2000bb The Act revived the compelling interest test, but included a least restrictive means analysis not present in the original case. RFRA resulted in an increased opportunity to bring lawsuits against the state for alleged infringement upon the free exercise of religion, and the standard of strict scrutiny made it more difficult for a state to win such a case. This produced an increase in the number of First Amendment religious freedom cases entertained by state and federal courts According to the Florida Department of Corrections (DOC), there was a 587 percent increase of grievances filed by inmates after the passage of the federal RFRA. Such grievances increased from 38 grievances in 1992-92 to 261 grievances in 1996, the last year before the federal RFRA was repealed

In June of 1997, in *City of Boerne v. Flores*, 117 S Ct 2157 (1997), the Court held RFRA unconstitutional because it was not a proper exercise of Congress' enforcement power The Court stated that the "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior It appears, instead, to attempt a substantive change in constitutional protections " *Id.* The Court found that the RFRA was an intrusion into the states' general authority to regulate for the health and welfare of their citizens, and by imposing a least restrictive means requirement, Congress created legislation broader than is appropriate *Id.* This case upholds the ruling in *Smith*, and at this time, *Smith* is the controlling case law

## III. Effect of Proposed Changes:

The resolution provides that government shall not substantially burden the free exercise of religion, even if the burden results from a rule of general applicability, unless the government demonstrates that the burden.

- Is in furtherance of a compelling governmental interest, and
- Is the least restrictive means of furthering that interest

RFRA had established the compelling interest test for all claims against the state for infringement upon the free exercise of religion, including claims from incarcerated individuals or groups. This had created debate as to whether the greater capacity for successful litigation by inmates had hindered the security and order of corrections facilities, and whether it produced an inordinate degree of inmate litigation *See, e.g. Brief for Amici States of Ohio, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, The Commonwealth of Pennsylvania, and the Territories of American Samoa, Guam and The Virgin Islands in Support of Petitioner* at 3-6

> [RFRA] has spawned a remarkable wave of inmate litigation in the years since it was passed Based on a Lexis/Nexis search conducted on November 12, 1996, no fewer than 189 inmate cases have been decided involving RFRA-based challenges. . The litigation wave generated by RFRA disrupts State prisons and State prison administrations in many ways. As an initial matter, RFRA cases are harder to dispose of than most due to the difficulty (if not impossibility) of determining the accommodations that are truly necessary for the proper exercise of a given religion For like reasons, RFRA lawsuits are expensive New attorneys and experts must be hired to defend them, dispositions and other discovery must be taken to respond to them, and successful lawsuits require costly reconfigurations of corrections programs, sometimes even prison buildings . Besides the difficulty of responding to this litigation and the cost of handling it, RFRA lawsuits compel corrections officials to divert extensive staff time to handling the litigation. They must investigate the 'religious' nature of each claim and the 'religious' necessity to each inmate of bringing the claim Making matters worse is the "least restrictive means" test, which regularly compels corrections staff to develop ways to accommodate even the most unusual and isolated demands.

*City of Boerne v. Flores*, 117 S Ct 1257 (1997) *but see Brief of the States of Maryland, Connecticut, Massachusetts and New York As Amici Curiae in Support of Respondent* at 3-9, *City of Boerne v. Flores*, 117 S Ct. 1257 (1997):

> Properly interpreted, RFRA does not and will not impede the States' ability to operate their prisons effectively. . With respect to prison management, RFRA requires courts to provide substantial deference to the States and to those responsible for administering the state penal systems. . . The limitations inherent in the requirement of proving a "substantial burden" preserves State authority in many instances where RFRA may be invoked. Although the lower courts, prior to *O'Lone*, disagreed among themselves as to whether the *Sherbert/Yoder* compelling interest test applies to religious freedom claims in the prison context, even those courts that had applied that test accorded a great deal of deference to the judgements of prison administrators This deference applied at two distinct levels First, following this Court's statements in earlier decisions, the lower courts recognized that, in the prison context, order, safety, security, and discipline are paramount government interests. . . . Second, those courts recognize that prison officials are entitled to great deference in determining whether a particular prison regulation is tailored with sufficient precision to the state interest at issue.

The Department of Corrections has expressed concerns that the heightened standard of review will give inmates greater latitude in asserting unreasonable demands which conflict with a correctional institution's need for order and security The Department of Corrections is concerned not only with the ability to win lawsuits under the resolution, but with the possibility that the resolution's compelling interest standard may give incarcerated individuals an increased capacity to go to trial on frivolous matters. In this, the Department of Corrections' assertions parallel similar criticisms by amici in the *Bourne* case *See Brief for Amici States of Ohio, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, The Commonwealth of Pennsylvania, and the Territories of American Samoa, Guam and The Virgin Islands in Support of Petitioner* at 3, *City of Boerne v. Flores*, 117 S. Ct. 1257 (1997) (Many of the cases involve recycled claims that were defeated years ago under the reasonableness test applied to inmate free exercise claims Thus, though many of the claims now confronting State prison officials could not have met the pleading requirements of Rule 11 under prior law, [under RFRA's "compelling interest" standard] they are now being litigated anew in every corner of the country.)

The provisions of this resolution only apply to governmental actions that affect the free exercise of religion, not the establishment of religion This means that the provisions of this resolution are not available against the private sector and cannot be used as a claim or defense in private sector litigation

The resolution would re-establish the compelling interest test in cases where state actions were alleged to have violated a person's free exercise of religion In that instance, the state would be required to meet the requisite standard by the least intrusive means possible The effect of this resolution in Florida could parallel the experience with RFRA at the national level. RFRA

produced a broadened capacity for legal action against the state for alleged infringement upon free exercise of religion Proponents of RFRA had affirmed this effect as indicative of a greater protection for religious practice. Conversely, the greater deference to the subjective claims of individuals that RFRA provided, over even facially neutral state laws, created concerns that the basic regulatory and security functions of government could be adversely affected

The resolution provides no effective date for the constitutional amendment. As such, it would take effect on the first Tuesday after the first Monday in January following the election at which it was approved by the electorate s 5, Art XI, Fla. Const.

## IV. Constitutional Issues:

A Municipality/County Mandates Restrictions:

None.

B Public Records/Open Meetings Issues

None

C. Trust Funds Restrictions:

None.

## V. Economic Impact and Fiscal Note:

A Tax/Fee Issues:

None.

B. Private Sector Impact:

None

C. Government Sector Impact:

The fiscal impact of this resolution is indeterminate The degree of possible fiscal impact will vary according to the extent of increased litigation To the extent increased litigation against a governmental entity results from this resolution, then state and local governments will have to defend against such litigation Litigation involves expenses, including attorney's fees Furthermore, any relief granted against the state may have a fiscal impact. This indeterminate amount of resulting litigation will also have a fiscal impact on the courts.

## VI. Technical Deficiencies:

None

## VII. Related Issues:

None.

## VIII. Amendments:

None.