

SUBJECT: Texas Religious Freedom Restoration Act

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 12 ayes — Wolens, S. Turner, Alvarado, Bailey, Brimer, Counts, Craddick, Hunter, Longoria, Marchant, McCall, Merritt

0 nays

1 present, not voting — Danburg

2 absent — Hilbert, D. Jones

SENATE VOTE: On final passage, March 15 — 30-0

WITNESSES: *(On House companion bill, HB 601 - original version:)*  
For — Mark Briskman, Anti-Defamation League; Dimitri Kesari, Justice Fellowship and Religious Freedom Alliance; Steven McFarland, Christian Legal Society and National Coalition for Free Exercise of Religion; Kelly Shackelford, Free Market Foundation and Liberty Legal Institute; Phil Strickland, Texas Baptist Christian Coalition and RFRA Coalition; Derek Davis

Against — Marci Hamilton; Maxine Aaronson, Texas Neighborhoods Together; Christopher Bowers, National Alliance of Preservation Commissions and City of Dallas; Lowell Denton and Patrick Heath, City of Boerne; Habib Erkan, Jr., City of San Antonio; Catherine Horsey, Preservation Dallas; Laura Miller, Dallas City Council, Legislative Affairs Committee; Russ Pate, Guadalupe Social Center; Marcel Quimby, National Trust for Historic Preservation; Shirley Spellerberg, City of Corinth; Ron Emrich; Hector Garcia; Virginia McAlester; Howard Thompson; Sol Villasana

On — Douglas Laycock; Donald Lee, Texas Conference of Urban Counties; Carl Reynolds, Texas Department of Criminal Justice; Frances Rickard, Texas Historical Commission; Casey Wallace, Harris County Attorney's Office; Don Willett, Governor's Policy Office

**BACKGROUND:** In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb. According to congressional findings, RFRA was enacted because the U.S. Supreme Court, in *Employment Division v. Smith*, 494 U.S. 872 (1990), “virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.” The *Smith* case upheld the denial of employment benefits to a practitioner of the Native American Church who was fired for ingesting peyote, a hallucinogenic drug. The court found that because the law against the ingestion of peyote was a neutral, generally applicable law, enforcement of that law did not violate the constitutional guarantee of the free exercise of religion.

The purpose of RFRA, according to the act, was to restore the “compelling interest” test as set out in the U.S. Supreme Court cases *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In both cases, the court decided against the state because “only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion.” *Yoder*, 406 U.S. at 215.

The application of RFRA to the states was challenged, and in *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), the Supreme Court held that Congress had exceeded its authority in applying RFRA to actions taken by state and local governments. It thus held RFRA inapplicable to the states. RFRA is still applicable to actions by the federal government or by federal agencies.

The *Boerne* case involved the denial of a permit to expand a church in Boerne. The city denied the permit based on the church’s location in a historic preservation district. The church had hoped to expand in order to accommodate a growing congregation. The decision upheld the denial of the permit. A later settlement between the city and the church allowed the expansion of the church while preserving most of the historic building.

**DIGEST:** CSSB 138 would prohibit a government agency from substantially burdening a person’s free exercise of religion unless the agency could demonstrate that it had acted in furtherance of a compelling governmental interest and had used the least restrictive means of furthering that interest. In determining whether an interest was compelling, a court would have to give weight to the interpretation of the “compelling interest” test in federal case law. The bill would define “free

exercise of religion” as an act or refusal to act substantially motivated by sincere religious belief.

A governmental action applied to persons in the custody of a county, the Texas Youth Commission, or the Texas Department of Criminal Justice would be presumed to be done for a compelling interest in the least restrictive means unless that presumption were rebutted.

Sovereign immunity for religious freedom claims under CSSB 138 would be waived, except for sovereign immunity to suit and from liability under the 11th Amendment to the U.S. Constitution. Persons who successfully asserted that the government had burdened their free exercise of religion would be entitled to declaratory relief, injunctive relief, compensatory damages, and reasonable attorney’s fees and costs. The bill would limit compensatory damages to \$10,000 for each entire, distinct controversy, regardless of the number of people affected by the government’s action. A claimant would not be entitled to exemplary damages.

An action for damages or injunctive relief under CSSB 138 would have to be brought in state district court. Actions against individuals would not be permitted except against an individual acting in an official capacity as an officer of a government agency.

To bring an action, the person whose free exercise of religion had been burdened would have to provide written notice by certified mail 60 days before bringing a claim. The notice would have to specify:

- ! that the person’s free exercise had been burdened substantially;
- ! the act or refusal to act that was burdened; and
- ! the manner in which the exercise of government authority had burdened the free exercise of religion.

Notice would not be required in actions for declaratory or injunctive relief when the government action that threatened to burden free exercise of religion was imminent and the person did not know about the action in time to provide notice reasonably. All actions under this act would have to be asserted within one year of the date the person knew or should have known of the substantial burden on

free exercise of religion. Mailing of notice within the one-year limit would extend that limitation for up to 75 days.

Once the government received the notice, the agency could remedy the burden. If the substantial burden were cured by remedy of the governmental agency, the person could not bring an action.

CSSB 138 would state explicitly that it would not authorize the government to burden free-exercise rights, nor would it affect or interpret the sections of the Bill of Rights of the Texas Constitution that deal with religion. The protections afforded by CSSB 138 would be in addition to other provisions under state or federal laws.

CSSB 138 also would state explicitly that it would not diminish the authority of a municipality to adopt or apply laws or regulations governing zoning, land-use planning, traffic management, urban nuisance, or historic preservation that municipalities had before April 17, 1990 (the date of the *Smith* decision). The bill also would allow municipalities to adopt or apply any laws and regulations as that authority had been interpreted by any court in cases that did not involve the free exercise of religion.

The bill would not establish or eliminate a defense to civil action or criminal prosecution under a federal or state civil-rights law. It also would not affect existing law regarding employment or education of an organization whose primary purpose and function is religion. The bill would not affect the grant or denial of an appropriation or other grant of money or benefits to a religious organization, including tax exemptions.

CSSB 138 would take effect August 30, 1999, and apply only to causes of action that accrued on or after that date.

**SUPPORTERS  
SAY:**

Religious freedom is a fundamental right upon which this country was founded. CSSB 138 would restore religious freedom to the status that it had for 30 years before the *Smith* decision in 1990. That standard, the compelling interest standard, is an appropriate means of judging the state's burden on free exercise of religion and would not result in any conflicts between religious practices and state actions that were not present before the *Smith* decision.

This legislation also would follow the holding in *Smith* that requires states to legislate exceptions to generally applicable laws in order for the compelling interest standard to apply. By creating a broad exception for those laws that substantially burden the free exercise of religion and providing an opportunity for the government to be informed of and cure such burdens, CSSB 138 would ensure the reinstatement of the compelling interest test.

CSSB 138 would not allow people to use religious freedom to overturn or stop the enforcement of current laws. The only government actions that would fall under the act are those that substantially burden the free exercise of religion. The cases in which the U.S. Supreme Court has found a substantial burden on free exercise have involved specific actions that burden specific religious practices. Also, according to Justice Sandra Day O'Connor in the *Smith* case, the compelling interest test, had it been applied in the *Smith* case, still would have allowed the government to enforce the law prohibiting ingestion of peyote. *Smith*, concurring opinion of O'Connor at 902.

CSSB 138 is a carefully structured bill that tracks certain language in the federal law, which still applies at the federal level, and would add clarification to ensure that certain situations would not fall under the act. Most of these exceptions would codify previously understood exceptions to the compelling interest test, including exceptions for prison litigation, zoning, land-use planning, urban nuisances, or historic preservation. The bill also would allow exceptions for other decisions relating to free exercise of religion or municipal authority.

The notice provisions, while not included in the federal RFRA, would be an improvement to allow agencies and local governments an opportunity to remedy a burden on the free exercise of religion. The purpose of the bill is not to allow people to sue but to ensure that their rights are not burdened by government action. Giving the agency an opportunity to cure the problem would allow resolution of these disputes without going through the court system. Also, the one-year limitations period would ensure that only ripe claims would be brought under this action. Claims not acted on for more than a year could not be said reasonably to burden the exercise of religion substantially.

The \$10,000 limit on compensatory damages and prohibition against exemplary damages would ensure that the bill would not be used to create a

windfall in recovery for those whose free exercise had been burdened substantially. The purpose of the law is to encourage the removal of such burdens. The limit would be high enough to ensure that government agencies took such actions seriously, but not so high that a single judgment or particular judgments for a class of people burdened would impair the continued functioning of the government.

OPPONENTS  
SAY:

CSSB 138 is a “religious superiority act” that is not needed under current law. The stated purpose of this bill and of the federal legislation is to overturn the *Smith* case decided by the U.S. Supreme Court in 1990. While one can argue that the *Smith* case changed the legal standards related to scrutiny of religious freedom claims, the actual holding in *Smith* should be allowed to stand on its merits. The case plainly states that while religious beliefs are protected absolutely, religiously motivated conduct is subject to generally applicable state laws that are neutral on their face toward religion. Overriding this standard and reinstating a compelling interest standard could make it harder to create and enforce generally applicable laws.

The variety of religious beliefs in this country gives it strength and is part of what this country was founded to protect. But that same variety of beliefs also makes it difficult to create or enforce laws or regulations that in no way burden substantially the practice of every single one of those beliefs.

This bill would single out religious beliefs over other sincerely held beliefs and, thus, would be unfair to people who do not have religious beliefs. It would create special rights for people who are religiously motivated and could lead to additional entanglements between church and state.

OTHER  
OPPONENTS  
SAY:

The many changes made by the committee substitute make it more likely that this law could be challenged or that it might not protect the free exercise of religion entirely. The bill would not simply would return the state of the law to what existed before the *Smith* case because previous law did not include notice provisions, exceptions for prisoners, or limits on compensatory damages. These changes actually might limit the rights to which persons might be entitled without enactment of CSSB 138.

NOTES:

The committee substitute made numerous changes to the Senate-passed version, including:

- ! removing the statement that the purpose of the law is to return to the precedents set under the *Sherbert v. Verner* and *Wisconsin v. Yoder* Supreme Court cases;
- ! raising the limit on compensatory damages from \$1,000 to \$10,000 per person;
- ! establishing a notice procedure;
- ! establishing a one-year limitation period;
- ! specifying the authority of a municipality to adopt laws interpreted by any court in cases that do not involve the free exercise of religion;
- ! specifying that the law would not establish or eliminate a defense to a civil action or criminal prosecution; and
- ! limiting the bill's effect to actions accruing on or after the effective date.