

# Legislative Analysis

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## MICHIGAN RELIGIOUS FREEDOM RESTORATION ACT

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**House Bill 5958**

**Sponsor: Rep. Jase Bolger**

**Committee: Judiciary**

**Complete to 12-2-14**

### A SUMMARY OF HOUSE BILL 5958 AS INTRODUCED 11-13-14

The bill would create the Michigan Religious Freedom Restoration Act to limit governmental action that substantially burdens a person's exercise of religion, set forth legislative findings, allow a person to assert such a burden as a claim or a defense in a judicial or administrative proceeding, and to provide remedies.

#### BACKGROUND INFORMATION:

For decades, courts relied on a pair of Supreme Court cases as a "test" to balance concerns of government with the rights of citizens regarding the free exercise of religion afforded under the First Amendment. [*Sherbert v Verner* (1962) and *Wisconsin v Yoder* (1972)] Taken together, the court decisions prohibited government from imposing undue burdens on religion unless there was a compelling interest in doing so and no alternative form of regulation was available to advance the government's interest. In a later case, however, the Supreme Court held that the free exercise of religion under the First Amendment did not relieve a person from responsibility to comply with a valid and neutral law of general applicability. [*Employment Division v Smith* (1990)] This meant that laws of general applicability could burden religious practices (but only incidentally, not to a substantial amount) and that government would not need to provide special justification for such laws.

The *Smith* decision was overturned in 1993 by Congress with the enactment of the federal Religious Freedom Restoration Act. The RFRA prohibits government from imposing significant burdens on a person's religious beliefs unless the government can support that there is a compelling government interest and that the law or regulation creating the burden is the least restrictive means possible. In short, the RFRA restored the *Sherbert* and *Yoder* tests in determining whether the actions of government violate a person's free exercise of religion under the First Amendment. Subsequently, a 1997 Supreme Court decision restricted the application of the RFRA to only federal law, saying that the act was an unconstitutional use of Congress's enforcement powers that intruded on the powers of states to enact laws for the general health and welfare of their citizens. [*City of Boerne v Flores* (1997)] Recently, at least 20 states have enacted some version of a religious freedom restoration law.

## **CONTENT OF THE BILL:**

The bill creates a new act – the Michigan Religious Freedom Restoration Act (MRFRA) which is modeled after, but not identical to, the federal Religious Freedom Restoration Act. If any provision in the bill or any application of such a provision to any person or circumstance is held to be unconstitutional, the remainder of the MRFRA and the application of the provision to any other person or circumstance would not be affected.

Specifically, the MRFRA would do the following:

### **Legislative Findings**

The following legislative findings are declared in the bill:

- ❖ The free exercise of religion is an inherent, fundamental, and unalienable right secured by Article 1 of the state constitution and the First Amendment to the U.S. Constitution.
- ❖ Laws neutral toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.
- ❖ Government should not substantially burden religious exercise without compelling justification.
- ❖ That the federal Religious Freedom of Restoration Act (RFRA) was enacted in 1993 to address burdens placed on the exercise of religion in response to the U.S. Supreme Court's decision in *Employment Division v Smith*, which virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.
- ❖ That the Supreme Court held in *City of Boerne v Flores* that the RFRA infringed on the legislative powers reserved to the states under the U.S. Constitution.
- ❖ That the compelling interest test set forth in prior court rulings, including *Porth v Roman Catholic Diocese of Kalamazoo* (1995), is a workable test for striking sensible balances between religious liberty and competing governmental interests in Michigan. (In *Porth*, the Michigan Court of Appeals held that the federal RFRA barred application of Michigan's Civil Rights Act in a case in which a teacher was fired for not being a Catholic after the school adopted a new policy that only Catholics could be employed as teachers. The court ruled that the "burden of state regulation is substantial while the state's interest is less than compelling." *Porth* was decided before the RFRA was restricted to federal cases.)

### **Purposes of the MRFRA**

The purposes of the bill would be to establish the following:

- ❖ To guarantee application of the compelling interest test, as recognized by the U.S. Supreme Court in *Sherbert v Verner*, *Wisconsin v Yoder*, and *Gonzalez v O Centro Espirita Beneficente Uniao do Vegetal* (2006), to all cases where free exercise of religion is substantially burdened by government. (In *Gonzalez*, the Supreme Court ruled that the government failed to demonstrate a compelling

interest in applying the federal Controlled Substances Act to a New Mexico branch of a Brazilian church's sacramental use of a tea containing a Schedule 1 substance.)

- ❖ To provide a claim or defense to persons whose religious exercise is substantially burdened by government.

### **Definitions**

"Demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

"Exercise of Religion" means the practice or observance of religion, including an act or refusal to act, that is substantially motivated by a sincerely held religious belief, whether or not compelled by or central to a system of religious belief.

"Government" would mean any branch, department, agency, division, bureau, board, commission, council, authority, instrumentality, employee, official, or other entity of this state or a political subdivision of this state, or a person acting under color of law.

### **Exercise of Religion**

Except as otherwise provided, government could not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability. Government would be permitted to substantially burden a person's exercise of religion, only if it demonstrates that application of the burden to that person's exercise of religion in that particular instance is both of the following:

- In furtherance of a compelling governmental interest.
- The least restrictive means of furthering that compelling governmental interest.

The above applies to all laws of the state and of a political subdivision of the state (e.g., local ordinances), and the implementation of those laws, whether statutory or otherwise (such as departmental rules or orders) and whether adopted before or after the bill's effective date. This would be true unless the law explicitly excludes application by reference to the MRFRA.

### **Interpretation**

The MRFRA must be construed in favor of broad protection of religious exercise to the maximum extent permitted by the terms of the MRFRA, the state constitution, and the U.S. Constitution.

Nothing in the MRFRA could be construed to:

- Authorize any burden on any religious belief.
- Preempt or repeal any law that is equally or more protective of religious exercise than the MRFRA.
- Affect, interpret, or in any way address those portions of the U.S. Constitution that prohibit laws respecting the establishment of religion. Granting government funding, benefits, or exemptions, to the extent permissible under those

constitutional provisions, would not be a violation of the MRFRA. The term "granting", as used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

### **Remedies**

A person whose religious exercise has been burdened in violation of the prohibition on a government from substantially burdening the exercise of religion may assert that violation as a claim or defense in any judicial or administrative proceeding and obtain appropriate relief, including equitable relief (e.g., an injunction), against government. A court or tribunal could award all or a portion of the costs of litigation, including reasonable attorney fees, to a person who prevails against government under the bill.

### **FISCAL IMPACT:**

The bill would have an indeterminate fiscal impact on state and local government. If a public body were found to substantially burden an individual's religious belief, it could have to pay the costs of litigation as restitution. The Department of Civil Rights anticipates a minimal to non-existent fiscal impact to operations as a result of the bill.

The other potential costs of litigation are indeterminate; they will depend on the amount and nature of any litigation.

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.