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ENACT "MICHIGAN RELIGIOUS FREEDOM RESTORATION ACT"

House Bill 4376 with committee amendments First Analysis (7-3-97)

Sponsor: Rep. Kirk Profit
**Committee: Constitutional and Civil
Rights**

THE APPARENT PROBLEM:

In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA) in direct response to a 1990 United States Supreme Court decision in which the court held that neutral, generally applicable laws may be applied to religious practice even when not supported by a compelling governmental interest [

v.

494 U.S. 872; 110 Sct 1595 (1990)] The case involved members of the Native American Church who were denied unemployment benefits when they lost their jobs because they had used peyote for sacramental purposes, despite an Oregon statute of general applicability that made the use of the drug criminal. In evaluating the case, the court declined to apply the balancing test set forth in an earlier, 1963 court decision [v. , 374 U.S. 398 (1963)], which asks whether the law at issue substantially burdens a religious practice and, if so, whether the burden is justified by a compelling government interest. Instead, the 1990 decision explained that application of the test would have produced an anomaly in the law, namely, a constitutional right to ignore neutral laws of general applicability. The decision also noted that the only instances where a neutral, generally applicable law had failed to pass constitutional muster were in cases in which other constitutional protections were at stake. (Four justices in the decision dissented, arguing that the Oregon drug law did place a substantial burden on the Native American Church members so that it could be upheld only if it served a compelling state interest and was narrowly tailored to achieve that end. Justice O'Connor concluded that Oregon had satisfied the test, while Justices Blackmun, Brennan, and Marshall could see no compelling interest justifying the law's application to the Native American Church members.)

Congress' debate over the supreme court's decision resulted in the passage in 1993 of the Religious Freedom Restoration Act, in which Congress found that "(1) the framers of the Constitution,

recognizing free exercise of religion as an unalienable right, secured its protection in

House Bill 4376 (7-3-97)

the First Amendment of the Constitution; (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise; (3) governments should not substantially burden religious exercise without compelling justification; (4) in *Employment Division v. Smith* . . . the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." The act goes on to say that the purposes of RFRA are "(1) to restore 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) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government."

On June 25, 1997, however, the U.S. Supreme Court (in *City of Boerne v. Flores*)

held that RFRA exceeded Congress' power, reversing the federal Fifth Circuit Court's finding that RFRA was constitutional. The case involved a decision by local zoning authorities to deny a building permit to a church in Boerne, Texas, based upon the contention that the church was located in a historic district. The denial was challenged under RFRA. The District Court concluded that by enacting RFRA Congress exceeded the scope of its enforcement power under the Fourteenth Amendment (which guarantees in section 1 that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deny any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," and in section 5 gives Congress the "power to enforce, by appropriate legislation, the provisions of this article.") The Fifth Circuit reversed this decision,

finding RFRA to be constitutional, and the supreme court reversed the Fifth Circuit's decision, finding that RFRA exceeded Congress' enforcement power under section 5 of the Fourteenth Amendment, constituting "a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens" and contradicting "vital principles necessary to maintain separation of powers and the federal balance."

Legislation has been introduced to enact at the state level legislation similar to that recently struck down by the supreme court at the federal level.

THE CONTENT OF THE BILL:

The bill would create a new act, the Michigan Religious Freedom Restoration Act, that would be substantially similar to the federal Religious Freedom Restoration Act (RFRA) that the United States Supreme Court, on June 24, 1997, ruled unconstitutional.

The bill would prohibit the state or a political subdivision of the state (a county, township, city, or village) from imposing a "substantial" burden on a person's exercise of religion unless the state or political subdivision established ("by clear and convincing evidence") both of the following:

- (1) The burden was necessary to advance a "compelling" governmental interest; and
- (2) The burden was the least restrictive means of furthering that compelling governmental interest.

A person (other than an inmate in a penal or correctional institution in the state) who alleged a violation of the act could assert that violation as a claim or defense in a judicial proceeding, and could obtain equitable or other relief against the state or political subdivision for that violation. A court could award all or a portion of the costs of litigation, including reasonable attorneys' fees, to a prevailing plaintiff.

The bill would define "exercise of religion" to mean "a practice protected by Section 4 of Article I of the state constitution of 1963," which says:

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:**For:**

The bill would restore for Michigan the strict scrutiny of laws that encroach on the free exercise of religion, and would restore the more stringent judicial tests for the constitutionality of laws, namely, those requiring that laws that would affect religious freedom have a compelling state interest and be the least restrictive means to accomplish that interest. The recent U.S. Supreme Court ruling on the federal Religious Freedom Restoration Act which declared the act unconstitutional, did so, in large part, because the court found that the federal law constituted a "considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." Thus, the court gave the states a clear message that while such a law on a federal level is unconstitutional, the states themselves have the power to implement such legislation. In the absence of such legislation restoring the "compelling interest" test of the constitutionality of laws, many people believe that the U.S. Supreme Court's 1990 decision allows state and local governments to substantially burden or restrict religious practice so long as the burden or restriction was an unintended consequence of a generally applicable law instead of requiring the government to prove that the law was necessary to address a compelling state interest and was the least restrictive means possible to achieve its goal. As the supreme court noted, Congress' concerns in enacting RFRA were with laws of general applicability which place incidental burdens on religion, such as zoning and historic preservation laws, and not with any widespread pattern of religious discrimination in this country, and many proponents of the bill argue that most infringements on religious liberty result from these kind of laws that impose "incidental" burdens on religious practice. Without the bill, these infringements will continue and perhaps even escalate, as, for example, church schools become vulnerable to new regulations and church buildings become vulnerable to new restrictions on the use of their property, at a time when more and more social and economic responsibility is being shifted from the government to the religious and charitable sectors of society. Thus, for example, religious objections to autopsy have been rejected, and religious exemptions from the helmet law and from so-called "garb statutes"

have been denied. Without the bill, it also is possible to imagine laws prohibiting minors from drinking alcoholic beverages, with no exemptions for the use of sacramental wine for religious ceremonies, or laws prohibiting students in school from praying in their traditional manner during the school day, or laws requiring medical students to perform surgical procedures despite religious objections.

The bill would restore the proper balance between individuals' rights to practice their religion and the power of the state to restrict these rights in the interest of public health and welfare. At the same time, it would address concerns raised by the Department of Corrections regarding the illegal conduct of some prisoners under the guise of "religious freedom."

Religious freedom is a fundamental American right, and religious expression should be protected by the highest standards of judicial review. The bill would restore the higher standard of judicial review lost with the 1990 supreme court decision, thereby ensuring that this fundamental right had the maximum judicial protection against laws that might infringe on its free expression.

Against:

While the fundamental importance of the right to religious freedom is certainly recognized by everyone, the issue is complex and more time might be given to considering possible unanticipated implications of the bill. For example, in April 1997, Governing magazine published a short article titled "The Accidental Tyranny of Congress," in which the author points out, in part, that "the most serious effect of RFRA has not been to keep America safe for all types of worship. It has been to create new controversies in local land use law." The article goes on to discuss the effect of RFRA on land use disputes between local units of government and religious organizations: "Churches and local governments have been battling for years over how much control the government has when it comes to such things as demolition and development on church property, and signage and traffic flow onto and off of religious land. Over the course of that long struggle, localities and churches had for the most part come to workable, if sometimes uneasy, agreements around such land use sovereignty. But this balance was kicked over sideways with passage of RFRA. Years of tough negotiation and thoughtful debate were swept aside and the battle joined all over again, with churches flexing their newly granted statutory muscle. In fact, the first major court challenge to RFRA, currently before the Supreme Court [decided on June 25, 1997], has nothing to do with anybody's right to worship. It is a zoning case." Given the current intense debate in the legislature over Public Act 591 of 1996, which amended and renamed the Subdivision Control

Act, the impact of the bill on land use issues could be explored further.

Other questions have been or could be raised. For example, the recent supreme court decision overturning RFRA says that the least restrictive means requirement "was not use in the pre- jurisprudence RFRA purported to codify," and notes the substantial costs that the federal law exacted, "both in practical terms of imposing a heavy litigation burden on the states and in terms of curtailing their traditional general regulatory power."

The court further pointed out that RFRA's "substantial burden" test was "not even a discriminatory effects or disparate impact test. It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs." Justice Stevens, in a concurring opinion, says that in his opinion RFRA is a "law respecting an establishment of religion" that violates the First Amendment to the Constitution. He says, "If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to an exemption from a generally applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment. v. , 472 U.S. 38, 52-55 (1985)."

Finally, some people raised concerns that the bill not be used to create opportunities for abortion rights advocates, and propose that an "abortion neutralizing" amendment be added to the bill.

POSITIONS:

Representatives of the following groups testified in support of the bill (7-2-97):

** The Michigan Jewish Conference

** The Jewish Community Council of Metro Detroit

** The Anti-Defamation League -- Michigan Regional Office

** The Presbyterian Villages of Michigan (a series of retirement communities)

** The Michigan Family Forum

** The Michigan Corrections Organization

** The American Civil Liberties Union of Michigan

In addition, the Michigan Ecumenical Forum indicated its support of the bill. (7-2-97)

Analyst: S. Ekstrom

#This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of le

