HON. CHARLES T. CANODY  
IN THE HOUSE OF REPRESENTATIVES  
Thursday, September 21, 2000

Mr. CANODY of Florida, Mr. Speaker, today the President of the United States will sign into law the Religious Land Use and Institutionalized Persons Act, a bill I was proud to sponsor with my colleagues the gentleman from New York, Mr. NADLER, and the gentleman from Texas, Mr. EDWARDS. The Act, which will protect the free exercise of religion from unnecessary government interference, is a product of the diligent efforts of more than 70 religious and civil rights groups from all points on the political spectrum. I appreciate that these groups for their work in helping to bring about this important new law.

The Religious Land Use and Institutionalized Persons Act has its roots in an earlier, more expansive bill, H.R. 1691, which passed the House of Representatives with an overwhelming vote after several committee hearings, two markups, and the filing of a Committee Report. S. 2869, on the other hand, passed the Senate and the House without committee action and by unanimous consent. Because it is not accompanied by any recorded history, it is appropriate that I submit at this time a Section-by-Section Analysis of the S. 2869:

The Religious Land Use and Institutionalized Persons Act

Section 1. This section provides that the title of the Act is the Religious Land Use and Institutionalized Persons Act of 2000. Section 2(a). The “General Rule” in §2(a)(1) tracks the substantive language of the Religious Freedom Restoration Act (“RFRA”), providing that land use regulation shall be applied in a manner that substantially burden religious exercise, unless imposing that burden on the person complaining serves a compelling interest by the least restrictive means. The provision is substantially the same as §§2(a) and 2(b) of H.R. 1691, except that its scope is further restricted to land use. H.R. 1691 is the broader Religious Liberty Protection Act, which passed the House and is the subject of H.R. Report 106-219.

The phrase “in furtherance of a compelling governmental interest” is taken directly from RFRA, which was enacted in 1993; this phrase was and is intended to codify the traditional compelling interest test. The Act does not use this phrase in the sense in which the Supreme Court interpreted the verb “furthers” in City of Boerne v. Flores, 521 U.S. 507, 520-21 (1997). In this case, the Court held that even a marginal contribution to the achievement of a governmental interest “furthers” that interest, id. at 521. This statutory language was drafted long before Boerne, and should not be read in light of it.

Section 2(a)(2) confines the General Rule to cases within Congress’s constitutional authority under the Commerce Clause, the Spending Clause, or Section 5 of the Fourteenth Amendment. Section 2(a)(2)(A) applies the compelling interest test to laws which the burden is imposed in a program or activity that receives federal financial assistance. This provision tracks the other civil rights legislation based on the Spending Clause, and corresponds to §2(a)(1) of H.R. 1691.

Section 2(a)(2)(B) applies the General Rule to cases in which the substantial burden affects commerce, or removal of the burden would affect interstate commerce. A jurisdictional element must be proved in each case under this subsection as an element of the cause of action. This subsection does not treat religious exercise as commerce, but it recognizes that the exercise of religion sometimes requires commercial transactions, as in the construction, purchase, or rental of buildings. This section corresponds to §2(a)(2)(D) of H.R. 1691.

Section 2(a)(2)(C) applies the General Rule to cases in which the government has authority to make individualized assessments of the property in question. Unlike the Commerce and Spending Clause sections, this section does not reach generally applicable laws. Laws that provide for individualized assessments of proposed uses are not generally applicable. This section corresponds to §2(b)(1)(D) of H.R. 1691.

Section 2(a)(2)(D) applies the General Rule to cases in which the government has authority to make individualized assessments of the property in question. Unlike the Commerce and Spending Clause sections, this section does not reach generally applicable laws. Laws that provide for individualized assessments of proposed uses are not generally applicable. This section corresponds to §2(b)(1)(D) of H.R. 1691.

Section 2(b). Section 2(b) codifies parts of the Supreme Court’s constitutional tests as applied to land use regulation. These provisions directly address some of the more egregious forms of land use regulation, and provide more precise standards than the substantial burden and compelling interest tests. These provisions overlap, but some cases may fall under only one section, or the elements of one section may be easier to prove than the elements of other sections.

Section 2(b)(1) preempts land use regulation that treats religious uses only more leniently in a manner that substantially burdens religious exercise. This section is substantially the same as §§2(a) and 2(b) of H.R. 1691.

Section 2(b)(2) provides that the government may not unreasonably exclude religious assemblies from a jurisdiction, or unreasonably limit religious assemblies, institutions, or structures within the jurisdiction. What is reasonable must be determined in light of all the facts, including the actual availability of land and the economics of religious organizations. This section corresponds to §3(b)(1)(B) and 3(b)(1)(C) of H.R. 1691.

Section 2(b)(3) provides that the government may not unreasonably exclude religious assemblies from a jurisdiction, or unreasonably limit religious assemblies, institutions, or structures within the jurisdiction. What is reasonable must be determined in light of all the facts, including the actual availability of land and the economics of religious organizations. This section corresponds to §3(b)(1)(D) of H.R. 1691.

Section 2(b)(4) is the only provision of §2 that is confined to “assemblies” and does not explicitly include institutions or structures. The subsection is limited in this way because there may conceivably be very small towns that exclude all institutions and all structures dedicated to religious assembly (so there is no discrimination) and that can show a compelling interest in excluding all religious institutions or structures. Such a place could not use its land use regulations to wholly prohibit people from assembling for religious worship in the space or structures that exist in the town.

Section 3. Section 3(a) applies the RFRA standard to protect the religious exercise of persons residing in or confined to institutionalized persons defined in the Civil Rights of Institutionalized Persons Act, such as prisons and mental hospitals. Section 3(b) confines the section to cases within Congress’s constitutional authority under the Commerce Clause and the Spending Clause. The RFRA standard, the Commerce Clause standard, and the Spending Clause standard in §3 are identical to the parallel provisions in §2, and the same explanatory comments apply. These provisions are substantially the same as §§2(a) and 2(b) of H.R. 1691, except that their scope has been restricted to institutionalized persons.

Section 4. Section 4(a) tracks RFRA, creating a private cause of action for damages, injunction, and declaratory judgment, and a defense to liability. These claims and defenses lie against a government, but the Act does not abrogate the Eleventh Amendment immunity of states. In the case of violations by a state, the Act must be enforced by suits against state officials or employees. This section is identical to §4(a) of H.R. 1691.

Section 4(b) applies the compensatory incubus test to laws that are not neutral and generally applicable, to laws that provide for individualized assessment of regulated conduct, to regulations motivated by hostility to religion, to cases involving hybrid claims that implicate both the Free Exercise Clause and some other constitutional right, and to other exceptional cases. These exceptions present issues in which the facts are uncertain and difficult to prove, or in which essential information is controlled by the government. Section 4(b) is addressed principally to these issues about whether one of these exceptions applies. It provides generally that if a complaining party produces this evidence of a free exercise violation, the government then bears the burden of persuasion on all issues except burden on religion. This section is substantially the same as §3(a) of H.R. 1691.

Section 4(c) requires a full and fair opportunity for the litigant to litigate all claims arising under section 2. This is based on existing law; no judgment is entitled to full faith and credit if there was not a full and fair opportunity to litigate. Kiemler v. Chemical Construction Corp., 456 U.S. 461, 480-81 (1982), interpreting 28 U.S.C. §1738 (1994). The rule has special application in this context, where a zoning board may refuse to entertain a federal claim because of limits on its jurisdiction, or may refuse its inquiry to the individual party and exclude evidence of how places of secular assembly were treated. If a state court then confines itself to the record before the zoning board, there has been no opportunity to litigate essential elements of the federal claim, and the resulting judgment is not entitled to full faith and credit in a federal suit under section 2 of this Act. This section is based on §3(b)(2) of H.R. 1691.

Section 4(d) tracks RFRA and provides that a successful plaintiff may recover attorneys’ fees, except that these fees are substantially the same as §4(b)(1) of H.R. 1691.
Section 4(e) makes explicit that the bill does not "amend or repeal the Prison Litigation Reform Act." The PLRA is a law that makes it more difficult for prisoners to sue the federal government, but it does not affect the Establishment Clause.

Section 4(f) expressly authorizes the United States to sue for injunctive or declaratory relief to enjoin the Act. The United States is authorized to sue the states and other entities to prevent them from enforcing the Act.

Section 4(g) provides that nothing in the Act authorizes the government to burden religious exercise, but it does not require the states to enact or enforce any federal regulatory provisions. This section is substantially the same as §5(c) of H.R. 1691.

Section 4(h) is taken verbatim from RFRA. It includes both the burden of going forward and the burden of persuasion. This section is identical to §9(5) of H.R. 1691.

Section 5 of the Act states that the Establishment Clause does not apply in potentially difficult cases. The phrase "is not constitutionally required" takes in the "may show that even in the aggregate, substantial effect on commerce" standard of RFRA. Section 5(b) provides that nothing in the Act creates any basis for reining in the government to burden religious belief, this in the aggregate, substantially affect commerce. Section 5(c) states that the bill does not require the states to enact or enforce any federal regulatory provisions. This section is substantially the same as §5(c) of H.R. 1691.

Section 5(d) defines "government" in §8(4)(A) to include the state and local entities previously covered by RFRA. "Government" does not include the United States and its agencies, because the United States remains subject to RFRA. But a further definition in §8(4)(B) does include the United States and its agencies for the purposes of §4(b) and (5). Because the burden-shifting provision in §4(a), and some of the rules of construction in §5, do not appear in RFRA. These definitions are substantially the same as those of H.R. 1691.

Section 5(e) defines "land use regulation" to include only zoning and landuse laws that limit the use or development of land or structures, and only if the claimant has a property interest in the affected land or a right to acquire such an interest. A right housing laws are not land use regulation, and this bill does not apply to fair housing laws. This section is based on §8(3) of H.R. 1691.

Section 5(f) provides that proof of an effect on commerce under §2(a)(2)B does not establish any inference or presumption that Congress meant to regulate religious exercise under any other law. Proof of an effect on commerce shows Congressional power to regulate a certain area, but it does not require the states to enact or enforce any federal regulatory program. This section closely tracks §5(f) of H.R. 1691.

Section 5(g) provides that the Act should be broadly construed to protect religious freedom in the maximum extent permitted by its terms and the Constitution. Section 5(i) provides that each provision of the Act is severable from every other provision. These sections are substantially the same as §§5(g), 5(h), and 5(i) of H.R. 1691.

Section 6 of the Act is taken from RFRA. It was carefully negotiated to ensure that the Act cannot be interpreted to provide any relief under the Establishment Clause. It is more general than §§5(c) and 5(d), which were not

The religious land use and institutionalized persons act of 2000

HON. HENRY J. HYDE
OF ILLINOIS

IN THE HOUSE OF REPRESENTATIVES

Thursday, September 21, 2000

Mr. HYDE. Mr. Speaker, tomorrow the President of the United States will sign into law the Religious Land Use and Institutionalized Persons Act. S. 2689. I would like to submit for the RECORD a document prepared by the Christian Legal Society describing zoning conflicts between churches which have come to light since subcommittee hearings on the subject.

Recent land-use cases

"In the last 10 years, zoning conflicts between churches and cities have become a leading church-state issue. Disputes have arisen over church soup kitchens or homeless shelters in suburbs, expansion of church facilities, parking squeezes on Sunday, breaches of noise ordinances or disagreements on what kind of meetings the zoning permits. Growing churches that seek new land to relocate often cannot win zoning approvals in the face of public protest over traffic." Joyce Howard Price, Portland church ordered to limit attendance, Washington Times, February 16, 2000.

Montgomery county, Md—8/10/00

A couple in Montgomery County, Maryland, challenged in federal court a zoning ordinance that allowed a Roman Catholic girls' school to build on its property without obtaining a special permit. In August 1999, a U.S. District Judge ruled that the ordinance violated the Establishment Clause, but on appeal a three-Judge panel of the 4th U.S. Circuit Court of Appeals reversed the district court by a 2-1 vote, concluding in August 2000, that "[t]he authorized, and sometimes mandatory, accommodation of religion (by the government) is a necessary aspect of the Establishment Clause jurisprudence because, without it, the government would find itself effectively and constitutionally promoting the absence of religion over its practice." The dissenting Judge differentiated between regulations that influence or alter programming and regulations that affect physical facilities.


Palos heights, il—4/19/2000

On June 30, 2000, Chicago Public Radio's Jason DeRosa reported that the Al Salam Foundation encountered opposition from the city council of Palos Heights, Illinois, when Muslims tried to buy a building from a Reformed Church and convert it into a mosque. Although the city council attempted to block the $2.1 million sale by arguing that the city needed the building for