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ISSUE ANALYSIS

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August 30, 2004

Religious Freedom is Endangered But States Are Fighting Back

One of the goals of the Home School Legal Defense Association is to work in the Federal and State legislatures and the courts to protect our right to freely exercise our religious beliefs. Because most homeschoolers teach their children at home in order to train them up in the nurture and admonition of the Lord, our right to freely exercise our religious beliefs is paramount.

Unfortunately, on June 25, 1997, the U.S. Supreme Court, by a 6-3 majority, ruled the Religious Freedom Restoration Act (RFRA) unconstitutional in *City of Boerne v. Flores*. This was a devastating blow to our religious freedom in this country.

The facts of the case are this: After the city of Boerne denied a building permit to a church because the church building was located in a historic district, Catholic Archbishop Flores of San Antonio appealed this decision, arguing that this denial of the church's right to expand to accommodate its growing congregation violated the church's right to freely exercise its religious beliefs as protected by the RFRA. The U.S. Supreme Court ruled against the church and in the process struck down the RFRA which was the highest level of protection of our religious liberty available.

Since this extremely harmful U.S. Supreme Court *Boerne* decision, state and federal courts have diminished religious freedom in many ways. For example:

- the long-standing practice of pastor-laity confidentiality has been repeatedly violated;
- a Catholic hospital was denied state accreditation for refusing to teach abortion techniques;
- there have been conflicts with zoning ordinances, such as shutting down a church ministry to the homeless because it was located on the second floor of a building with no elevator; and
- a church was prohibited by a local city ordinance from feeding more than 50 poor people per day.

The list goes on and on. This subtle erosion of our religious liberty by the courts who are applying the *Boerne* ruling is gradually removing one of the bedrock defenses of homeschooling.

But there is hope.

Resolving the Religious Freedom Crisis at the State Level

Several years ago, HSLDA and a broad coalition of organizations worked very hard to get the federal RFRA enacted. Since it was struck down, other attempts at the federal level to resolve the

religious freedom crisis have been misguided or have failed. HSLDA, therefore, along with several other pro-religious freedom organizations and many state homeschool organizations, is urging all of the 50 states to pass their own Religious Freedom Act to counter the Boerne case's devastating impact on religious freedom.

As of August 2004, by God's grace, more than a quarter of the states have acted to protect the religious freedom of the citizens in their states. Rhode Island, Connecticut, Florida, Illinois, Arizona, South Carolina, Texas, Idaho, New Mexico, Missouri, Pennsylvania and Oklahoma have passed their own state Religious Freedom Acts. Alabama made religious freedom even more secure by specifically amending their state constitution to recognize religious freedom as a fundamental right protected by the compelling interest test.

HSLDA's legal staff has worked with religious freedom coalitions in the states (and the national state religious freedom coalition), helped draft legislation, lobbied individual state legislators, attorney generals, and governor offices, sent out numerous alerts, and provided testimony at some legislative hearings in order to advance these Religious Freedom Acts. The phone calls of thousands of homeschoolers particularly contributed to the passage of the RFRA's in Illinois, Arizona, Texas, South Carolina, Idaho, New Mexico and Oklahoma. Illinois was successful after two HSLDA alerts and tremendous outpouring of calls by homeschoolers convinced legislators to override the governor's veto.

HSLDA and homeschoolers have brought significant pressure on the state legislatures of Virginia and Oregon along with much work in Louisiana, California, Missouri, and Hawaii, but the fruits of their labors have not yet been realized. In 1999, the most discouraging was the passage of Religious Freedom Restoration Acts by both houses in New Mexico and California, only to have them vetoed by the governors. However, in April 2000, HSLDA and homeschoolers were able to convince both the New Mexico legislature and the Governor Gary Johnson to re-pass and authorize a RFRA bill. Also encouraging is the fact that RFRA bills have continued to be introduced in numerous states during the 2003 and 2004 legislative sessions, although not all have passed.

Be Ready!

HSLDA members should be prepared to call their legislators to support their state Religious Freedom Act in order to save religious freedom. HSLDA will be sending our legislative alerts and updates on the battle for religious freedom in your state. We urge you to pass these alerts on to encourage your friends and relatives to also call.

If you know a supportive legislator and would like to send him our model legislation and arguments for a state Religious Freedom Act, write or call HSLDA and ask for our "State Religious Freedom Packet."

Don't let one decision by the U.S. Supreme Court denigrate this priceless inalienable right! Support your state religious freedom act this coming session.

History of the RFRA

The RFRA was originally drafted in response to a 1990 U.S. Supreme Court decision (*Smith II*) in which the Court gave the lowest level of protection to religious liberty—one of the foundational freedoms of homeschooling. Using this ruling, a state could override an individual’s right to freely exercise his religious beliefs merely by proving that its regulation was “reasonable.”

HSLDA helped form the coalition which drafted and promoted the RFRA. Three years later, Congress passed the RFRA and President Bill Clinton signed it into law, reversing the disastrous effects of *Smith II* by restoring religious freedom as a fundamental right.

The RFRA affirmed a 1963 decision (*Sherbert v. Verner*) in which the U.S. Supreme Court held that in order for a state’s regulation to prevail over an individual’s right to freely exercise his religious belief, the state had to prove that its regulation was “essential” to achieve a compelling interest. In addition, the state had to provide evidence that it was using the “least restrictive means” to accomplish this compelling interest. Under this high standard of review, the free exercise of religion was usually upheld over restrictive state regulations.

However, in the *City of Boerne* case, the U.S. Supreme Court held that the power of Congress under Section 5 of the 14th amendment is limited to “enforcing the provisions of the Fourteenth Amendment.” In the Court’s opinion, Congress does not have the authority to determine what constitutes a constitutional violation. The Court held that the RFRA went too far in attempting to change the substantive law of constitutional protections. According to the *Boerne* decision, Congress can make determinations as to the proper interpretation of the Constitution, but courts ultimately have the authority to determine if Congress has exceeded its own constitutional bounds. In other words, the U.S. Supreme Court, not Congress, is the final arbiter in interpreting the Constitution.

Unfortunately, our conservative friends—Justices Rehnquist, Scalia, and Thomas—joined with the majority in knocking our first amendment right down from its lofty fundamental right status to a simple garden variety category. The Court ruled that only when a person’s claim to freely exercise a religious belief is combined with another fundamental right still receiving the protection of the compelling interest test (in a “hybrid situation”) such as freedom of speech, freedom of the press, or the fundamental right of parents to direct the education and upbringing of their children, will it be given more than a simple reasonableness test.

Dissenting in the minority with Justices Breyer and Souter, Justice O’Connor stated that the Court should have used this case to revisit the *Smith* decision of 1990 since *Smith* had so drastically redefined the standard of review of the Free Exercise Clause, departing from decades of Supreme Court precedent.

[T]he Court’s rejection of this principle in *Smith* is supported neither by precedent nor as discussed . . . by history. The decision has harmed religious liberty. The historical evidence casts doubt on the Court’s current interpretation of the Free Exercise Clause.

O'Connor gave a stirring review of the importance of religious freedom in our country, quoting a number of state religious freedom charters. She noted that

early in our country's history, several colonies acknowledged that freedom to pursue one's chosen religious beliefs was an essential liberty. Moreover, these colonies appear to recognize that government should interfere in religious matters only when necessary to protect the civil peace or to prevent licentiousness.

She further explained that every state constitution included the right to freely exercise religious beliefs. She quoted James Madison and Thomas Jefferson in summary, explaining,

To Madison, then, duties to God were superior to duties to civil authorities—the ultimate loyalty was owed to God above all...the idea that civil obligations are subordinate to religious duty is consonant that government must accommodate, where possible, those religious practices that conflict with religious law.”

O'Connor concluded,

It has long been the Court's position that freedom of speech—a right enumerated only a few words after the rights to Free Exercise—has a special Constitutional status. Given the centrality of freedom of speech and religion to the American concept of personal liberty, it is altogether reasonable to conclude that both should be treated with the highest degree of respect...The rule the Court declared in *Smith* does not faithfully serve the purpose of the Constitution. Accordingly, I believe it essential for the Court to reconsider its holding in *Smith*.”

Unfortunately, their dissent, although correct, was ignored.

It is now left to the states to stand up for religious freedom.

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Model State Religious Freedom Restoration Act

A BILL to amend the Code of (State) by adding a section numbered _____, relating to the preservation of religious freedom.

Be it enacted by the General Assembly of (State):

Section 1. That the Code of (State) is amended by adding a section numbered _____ as follows:

§ _____. Religious freedom preserved; definitions; applicability; construction; remedies.

A. Except as provided in subsection B, no government entity shall substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability.

B. No government entity shall substantially burden a person's free exercise of religion unless it demonstrates that application of the burden to the person is (i) essential to further a compelling governmental interest and (ii) the least restrictive means of furthering that compelling governmental interest.

C. As used in this section:

“Demonstrates” means meets the burdens of going forward with the evidence and of persuasion under the standard of clear and convincing evidence.

“Exercise of religion” means the exercise of religion under Article __, § __ of the Constitution of (State), the (State) Act for Religious Freedom (§ _____ et seq.), and the First Amendment to the United States Constitution.

“Fraudulent claim” means a claim that is dishonest in fact or that is made principally for a patently improper purpose, such as a to harass the opposing party.

“Frivolous claim” means a claim that completely lacks merit under existing law and cannot be supported by a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law.

“Government entity” means any branch, department, agency, instrumentality of state government, or any official or other person acting under color of state law, or any political subdivision of the state.

“Prevails” means to obtain “prevailing party” status as defined by courts construing the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

“Substantially burden” means to inhibit or curtail religiously motivated practice.

D. Nothing in this section shall be construed to (i) authorize any government entity to burden any religious belief or (ii) affect, interpret or in any way address those portions of Article __, § __ of the Constitution of (State), the (State) Act for Religious Freedom (§ __ et seq.), and the First Amendment to the United States Constitution that prohibit laws respecting the establishment of religion. Granting government funds, benefits or exemptions, to the extent permissible under clause (ii) of this subsection shall not constitute a violation of this section. As used in this subsection, “granting” used with respect to government funding, benefits, or exemptions, shall not include the denial of government funding, benefits, or exemptions.

E. A person whose religious exercise has been burdened by government in violation of this section may assert that violation as a claim or defense in any judicial or administrative proceeding and may obtain such declaratory relief, and/or monetary damages as may properly be awarded by a court of competent jurisdiction. A person who prevails in any proceeding to enforce this section against a government entity may recover his reasonable costs and attorney’s fees. Standing to assert a claim or defense under this section shall be governed by the general rule of standing under Article __ of the Constitution of (State). The provisions of this subsection relating to attorney’s fees shall not apply to criminal prosecutions.

F. Any person found by a court with jurisdiction over the action to have abused the protections of this section by filing a frivolous or fraudulent claim may be assessed the government entity’s court costs, if any, and may be enjoined from filing further claims under this section without leave of court.