TESTIMONY OF STEVEN T. MCFARLAND
CHRISTIAN LEGAL SOCIETY
BEFORE THE SENATE JUDICIARY COMMITTEE

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Dirksen SOB 226

EXECUTIVE SUMMARY

The Christian Legal Society (CLS)[i] urges this committee to use every power conferred upon the Congress by the U.S. Constitution to restore the highest legal protection to religious liberty.

The need is real and growing. Churches can be and are being zoned out of cities because of their social service ministries to the destitute. Parents and students in public schools have little leverage with school officials when they object to religiously-objectionable assignments or assemblies. Even the sanctity of the confessional is being assaulted, and clergy sentenced to jail for refusing to betray the confidences of those who confess sins or seek their private spiritual counsel.

We cannot afford half-measures (as Michael Farris' proposes) that fail to use all of Congress' authority to remedy the problem. Neither can religious citizens settle for a bill that is inadequate in both its scope of coverage and its strength of protection.

The "Religious Liberty Protection Act" (H.R. 1691) is being sent to the House floor today by the House Judiciary Committee. CLS urges this Committee to enact it without adding carveouts or exceptions to its uniform protection. The RLPA employs all available federal powers to restore the strictest legal scrutiny with the broadest coverage in a constitutionally defensible manner. Our religious liberty - - the First Freedom - - deserves nothing less.

TESTIMONY

1. The Need For Statutory Relief.

1.1 Land Use Regulation Of Churches.

The Refuge Pinellas, Inc. v. City of St. Petersburg

Municipal officials in this Florida city are callously stopping an inner-city church from reaching out to the poor and needy with the love of Jesus Christ.

The Refuge is a mission church in a rundown part of St. Petersburg, Florida. Many of those who attend its worship services are homeless, poor, addicted, mentally ill, or alienated from society. The Refuge seeks to minister to the whole person. Rev. Bruce Wright, the Refuge's pastor, is almost always available to meet with and counsel hurting people. The church feeds the hungry, sponsors counseling for alcoholics and AIDS sufferers, and works with juvenile offenders. It spreads the message of God's grace through music concerts and other outreach activities. The Refuge is doing exactly what Christ calls His Church to do.

But the Refuge is doing too much in the eyes of St. Petersburg zoning officials. At about the same time the City was trying to "clean up" the church's neighborhood before the new Tampa Bay Devil Rays started the major league baseball season at nearby Tropicana Field, the City decided that the Refuge had to go.

The City announced that the Refuge was not a shining example of what the Christian church should be. In fact, the City proclaimed that the Refuge was not a church at all!

St. Petersburg zoning officials permit "churches" in the Refuge's neighborhood. But "social service agencies" are banned. The City decreed that the Refuge is not a

"church," but instead a "social service agency." Apparently the City knows best what "church" activities should look like, and they don't include reaching out to serve the poor, the needy, and the alienated.

The City ordered the Refuge to leave, to go somewhere else. But there isn't a single zoning district in the entire city where so-called "social service agencies" can locate as a matter of right. Instead, social service agencies have to get permission to set up in one of the three zones in the entire city where social service agencies are permitted. Setting up somewhere else would remove the Refuge from the neighborhood where it's most needed. And few of the church's members have cars.

Other churches in St. Petersburg offer counseling, concerts, Alcoholics Anonymous, and other forms of outreach. But the zoning officials haven't ordered them to uproot. It appears as though the economic poverty of those served by the Refuge makes all the difference in the world.

During his investigation, Development Review Services Manager Robert Jeffrey required Rev. Wright to describe "the clients or patrons you serve." In a September 15, 1997, letter explaining his decision to label the church a "social service agency," Mr. Jeffrey wrote, "the clients who are served by [the Refuge] are more analogous with [a] social service agency." Apparently the legality of Alcoholics Anonymous meetings depends upon whether the participants drink cheap Thunderbird or fine Chardonnay.

With the help of the CLS Center and a local attorney member, the Refuge is trying to get a Florida court to relabel it a "church" and permit it to stay in its present location. But the City continues to resist.

Waxing literary, the City asked in its brief, "what's in a name?". Paraphrasing Shakespeare, the City observes that a rose still smells like a rose regardless of the name by which it is called. And here's where it turns ugly:

[But] if the rose begins to smell like a stink weed, it can still call itself a rose and may look like one, but it is no longer functioning as one, and ***so it is eventually going to have a negative impact on the rose garden and be weeded out and moved to the weed patch for the sake of all those living around the garden***. Such is this case. (City's Response to Petition for Writ of Certiorari at 3, in *The Refuge Pinellas, Inc. v. City of St. Petersburg*, In the Circuit Court of the Sixth Judicial Circuit of the State of Florida, No. 97-8543-CI-88B).

So there it is. A church that is serious about serving the poor and needy is not a "church." It's a "stink weed" that needs to be "weeded out."

RLPA would avert this travesty. Section 3 would require the City of St. Petersberg to show that forcing The Refuge to move out of town was the least restrictive means of furthering a compelling government interest. Sec. 3(b)(1)(A). The Church would also be able to invoke RLPA's prohibition against zoning authorities that "unreasonably exclude from the jurisdiction" religious institutions. Sec. 3(b)(1)(D).

This case will probably decide the Refuge's future. RLPA can keep alive ministries to the most needy Americans.

1.2 Respect For Parental Rights And Religious Conscience In Public Schools.

Brown v. Hot, Sexy, And Safer Productions, Inc. (1st Cir. 1995

The U.S. Court of Appeals For The First Circuit several years ago issued a decision calling into question whether a parent's right to direct the upbringing of his child is protected by the Constitution.

On April 8, 1992, the Chelmsford (Massachusetts) High School held two mandatory, school-wide assemblies for ninth through twelfth grades. The school district contracted through the chairperson of the PTO with a performer, Suzi Landolphi, head of "Hot, Sexy, and Safer Productions", to present an AIDS awareness program for $1000.

According to the Complaint, during her presentation, Ms. Landolphi:

> 1) told the students that they were going to have a 'group sexual experience, with audience participation'; 2) used profane, lewd, and lascivious language to describe body parts and excretory functions; 3) advocated and approved oral sex, masturbation, homosexual sexual activity, and condom use during promiscuous premarital sex; 4) simulated masturbation; 5) characterized the loose pants worn by one minor as 'erection wear'; 6) referred to being in 'deep shit' after anal sex; 7) had a male minor lick an oversized condom with her, after which she had a female minor pull it over the male minor's entire head and blow it up; 8) encouraged a male minor to display his 'orgasm face' with her for the camera; 9) informed a male minor that he was not having enough orgasms; 10) closely inspected a minor and told him he had a 'nice butt'; and 11) made eighteen references to orgasms, six references to male genitals, and eight references to female genitals.

68 F. 3d at 529.

Before contracting with Ms. Landolphi, the school physician and PTO chairperson had previewed a video showing segments of Ms. Landolphi's performance. School officials, including the school superintendent, were present at the assemblies. They knew in advance what she would say and how she would say it. But no advance notification of the presentation was given to parents, despite a school policy stating that

written parental permission was a prerequisite to health classes dealing with human sexuality.

The parents of two students sued on behalf of themselves and their children, alleging that the school district had violated their privacy rights and their substantive due process rights under the First and Fourteenth Amendments, their procedural due process rights under the Fourteenth Amendment, their RFRA rights and their Free Exercise rights under the First Amendment. The district court dismissed under FRCP 12(b)(6), and the First Circuit affirmed.

In its discussion of the substantive protection under the Fourteenth Amendment of the parent's right to rear his children, after discussing Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters, 268 U.S. 510 (1925), the First Circuit stated in *dictum*:

> Nevertheless, the Meyer and Pierce cases were decided well before the current "right to privacy" jurisprudence was developed, **and the Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those fundamental rights whose infringement merits heightened scrutiny.** We need not decide here whether the right to rear one's children is fundamental because we find that, even if it were, the plaintiffs have failed to demonstrate an intrusion of constitutional magnitude on this right.

68 F. 3d at 532 (footnote omitted)(emphasis supplied.)

The First Circuit then rejected the plaintiffs' free exercise claim. First, the court questioned "whether the Free Exercise Clause even applies to public education." 68 F. 3d at 536. Second, **the court rejected the plaintiffs' claim that their parental rights were protected by the Free Exercise Clause** under the "hybrid exception," noted in Employment Division v. Smith, for "the right of parents, acknowledged in Pierce v.

Society of Sisters, 268 U.S. 510 (1925) to direct the education of their children, see Wisconsin v. Yoder, 406 U.S. 205 (1972)." Smith, 494 U.S. 872, 881 (1990). The First Circuit stated: "[A]s we explained, the plaintiffs' allegations of interference with family relations and parental prerogatives do not state a privacy or substantive due process claim. Their free exercise challenge is thus not conjoined with an independently protected constitutional protection." 68 F. 3d at 539.

Virtually all public school districts in the U.S. receive federal funds. So the RLPA would once again level the playing field for parents who, for reasons of religious conscience, wish to have their child "opt out" of objectionable instruction such as this.

1.3 Involuntary Conscription Of Clergy As Government Informers

State v. Martin (In re Hamlin)(Wash. Sup. Ct.)[1]

If you went to your pastor, rabbi or priest for spiritual counsel, and in your conversations with him discussed highly personal matters, would you expect him to keep your discussions confidential? Would you trust a pastor who disclosed your confessions even when you made them under conditions of strictest confidence? Should a rabbi be jailed simply because he refused to disclose the confessions of a man seeking spiritual guidance and counsel?

Common sense and the tenets of major religious faiths -- Protestant, Catholic, and Jewish -- all agree: confessions heard by ordained clergy should remain confidential.

But a trial court in Tacoma, Washington answered, "No," a pastor may not maintain that confidentiality if the government wants him to breach it. Incredibly, the court reasoned that the pastor is obligated to violate confidentiality and disclose

[1] 137 Wash. 2d 774, 975 P. 2d 1020 (1999).

confessions made to him. And worse, if a pastor refuses to disclose the confidential information, he should be sent to jail.

At stake is our right to seek spiritual guidance in private with the candor that only springs from the confidence that it will remain between us, our pastor, and our God.

The Rev. Rich Hamlin is an ordained minister of the Evangelical Reformed Church. He meets with anyone seeking spiritual guidance, both members of his church and non-members. Pastor Hamlin believes that hearing confessions and leading persons in confession are integral parts of his ministry, a "necessary component" of the practice of his religion. Indeed, the most important relationship an individual has is between himself and his God. For many, that relationship is enhanced by discussions of private matters with a minister, leading to repentance, reconciliation, and new resolve to do what is right.

Scott Martin sought spiritual counsel from Pastor Rich Hamlin after the death of Martin's three-month-old son. At the invitation of Martin's mother, the minister met with Mr. Martin at his mother's home, on two occasions at an army hospital, and at the home of a friend. Then Martin surrendered to police, who suspected him of homicide.

Prosecutors charged him with second degree murder in the death of his son. Pastor Hamlin continued to meet with Martin while he was incarcerated in the Pierce County jail after registering as his pastor with jail administrators.

But prosecutors did not stop with jailing Martin. They sought to compel Pastor Hamlin to testify about his conversations with the defendant. A judge agreed and ordered the minister to divulge what admissions Martin may have made in private to the Pastor.

Pastor Hamlin is convinced that Scott Martin only confided in him because he is a minister of the Gospel and because he trusted that it would go no further than the pastor.

If Pastor Hamlin were forced to reveal matters communicated to him in confidence, it would betray Martin's trust, undermine Hamlin's office as a pastor, and violate the latter's right to hear confessions and provide spiritual counsel free from state interference. When the pastor refused to testify, the trial court judge held him in contempt of court and ordered him to jail.

Pastor Hamlin took his case to the Washington Court of Appeals. Last July the appeals court reversed the trial court decision, reasoning that "Pastor Hamlin's religion, thus, constrains him to provide confessors with spiritual counsel and the opportunity for redemption. It is a duty that the pastor must fulfill based upon the tenets of his faith." Furthermore, the court held, only the communicant (Martin) could waive the confidentiality of the conversation, not the pastor or priest (Hamlin) who heard the communication.

But the State appealed this decision to the Supreme Court of the State of Washington. On March 23 of this year, a local CLS attorney and I argued to the state's high court on behalf of Pastor Hamlin. Thanks be to God, on May 6 the state supreme court ruled in favor of Pastor Hamlin, based on the state privilege law. But the prosecutor apparently intends to continue pursuing the pastor's testimony (arguing that the confidentiality of the confession may have been waived by the possible presence of the defendant's mother during portions of the counselling). If CLS and its member attorneys charged Reverend Hamlin for their legal defense, he and his church would be bankrupt by now. And he may yet go to jail for contempt.

Pastor Hamlin should not be forced to choose between fulfilling his religious duties as a pastor or serving time in jail. Federal protection is sorely needed. RLPA would extend it to many clergy, regardless of faith.

2. The Inadequacy And Questionable Constitutionality Of The Alternative

Michael Farris of the Home School Legal Defense Association has proffered an alternative bill ("Religious Exercise And Liberty Act" or RELA). While Christian Legal Society shares most of its goals, Mr. Farris' proposal does too little for too few Americans, and does it in a way that probably violates the federal Constitution.

2.1 Unnecessarily Codifying Supreme Court Precedent.

For the most part, RELA merely codifies what rights religious citizens already have under the Supreme Court's interpretation of the Free Exercise of Religion Clause of the First Amendment: an absolute right to freedom of belief and strict scrutiny of laws that burden a hybrid of Free Exercise combined with some other fundamental right.

This "hybrid rights" theory was concocted by Justice Scalia in *dictum* in the most universally condemned decision ever announced by the Supreme Court in the religion area, *Employment Division v. Smith* (1990). Why should Congress legitimize this historically-, logically- and constitutionally-questionable theory? For whatever the theory is worth, believers can already invoke it under the First Amendment. Congress will add nothing to it by writing it into the U.S. Code. CLS urges this subcommittee to ***extend*** existing protections for our First Freedom, not just codify the limited rights we already have under regrettable precedent.

RELA also codifies Justice Scalia's reasoning in *Smith*, applying strict scrutiny to laws that are not generally applicable, not facially neutral, or that discriminate against religion.[2] These do little to "move the ball forward" for Americans of faith, for clergy like Reverend Hamlin and for students who wish to avoid obscene school curriculum.

2.2 Anemic Land Use Protection.

Mr. Farris' RELA proposal does contain several new advances for religious liberty. Borrowing from RLPA (H.R. 1691), Mr. Farris includes language that would help churches against unreasonable or discriminatory land use regulation.

But RLPA (H.R. 1691) goes significantly farther. Mr. Farris' RELA would only provide treatment equal to that enjoyed by government buildings; RLPA would expressly guarantee that churches be treated at least as well as ***any*** nonreligious assembly. RLPA would expressly prohibit zoning officials from discriminating against religious assemblies; RELA would not ban it, but merely require a balancing of the government's interests against the burden on the church. And RLPA would expressly ensure reasonable inclusion of zones for religious schools and assemblies in a jurisdiction, while RELA is silent in this regard.

2.3 Unconstitutional Prison Reform.

Mr. Farris proposes to extend "hybrid rights" Free Exercise theory to prison [3]inmates. CLS strongly supports the restoration of religious liberty ***to all persons, including prisoners***. However, the Supreme Court degraded prisoners' Free Exercise protection in 1987, bifurcating them from the rest of society (whose Free Exercise rights

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[2] These post-*Smith* theories, as well as the "hybrid rights"theory, have already been invoked successfully without their codification by Congress. *See, e.g.,First Covenant Church v. City of Seattle*, 840 P. 2d 174,215-20 (Wash. 1992).

they degraded three years later in *Smith*). Then in 1997, the high court struck down the Religious Freedom Restoration Act of 1993 as it applied to state and local law. In *City of Boerne v. Flores,* the court reiterated that it alone is constitutionally empowered to interpret what the Free Exercise clause guarantees.

Therefore, by bestowing far greater protection for prisoners' religious exercise than the Court has interpreted the First Amendment to require, RELA would run afoul of the Constitution's separation of powers, and risk the same fate as befell the 1993 RFRA under *Flores*.

2.4 Less Protection Of Parent And Student Religious Excusal Rights

RLPA would enable parents and their children to "opt out" of public school curriculum that violates religious conscience or parental rights to direct their children's education. But Mr. Farris' RELA would confer no protection on a student's individual religious convictions; the hybrid theory is of no avail to a students unless their parents share their objections.

Moreover, Mr. Farris' RELA denies *any* opt-out rights unless a parent "provides a reasonable alternative assignment without requiring substantial effort or expense by the public school." In contrast, RLPA would not place the burden on the parents to assess what would be an appropriate alternative to an obscene condom demonstration or to reading a book containing graphic violence, sexual abuse or other inappropriate depictions. Neither would RLPA allow a school district to deny a religious excusal merely by claiming that the parent's alternative would require too much effort or money.

Congress can do much better by religious parents than RELA's anemic "opt out" provision. It can enact RLPA.

2.5 Protection Of Racial Discrimination In The Name of Religion.

RELA would prohibit government from interfering in the employment of teachers or pastors in *any* respect. This would exempt from antidiscrimination laws those misguided religious assemblies that would discriminate on the basis of race or national origin. For this reason alone, Christian Legal Society cannot support RELA.

In contrast, RLPA (H.R. 1691) would ***not*** confer religious exemptions on racist religions, because the Supreme Court has held that government has a compelling interest in eradicating private racial discrimination, an interest that outweighs religious freedom. *Bob Jones University v. U.S.*, 461 U.S. 574 (1983).

2.6 Dubious Constitutionality Under The 14th Amendment

As explained above (para. 2.3, *supra*), the prisoner provisions in Mr. Farris' RELA would probably violate the federal constitution's separation of legislative from judicial powers.

Equally questionable is the constitutionality of the rest of RELA, with the possible exception of its land use provisions. That is because in its *Flores* holding in 1997, the Supreme Court held that the Fourteenth Amendment (section 5) only empowered Congress to act in response to "legislation enacted or enforced due to animus or hostility to the burdened religious practices or [ ] some widespread pattern of religious discrimination in this country." Such a case can only be made with respect to regulation of land use by religious groups. On March 28 of last year, the Constitution Subcommittee of this Committee heard extensive evidence of such widespread discrimination across the U.S., from mainline Protestant to small minority faiths.

But it would be difficult to prove the existence of widespread hostility or *intentional* discrimination in zoning regulation against religion, e.g., application of antidiscrimination laws against churches when they hire their preachers or select their Sunday School volunteers, or against religious schools when they hire their classroom teachers. Neither would it be easy to prove nationwide problems with government regulation of religious education (at least not yet). Without such proof, Mr. Farris' RELA would likely exceed Congress' power under the Fourteenth Amendment and be struck, just as the high court did to the RFRA in *Flores*.

3. Congress Should Use *All* Of Its Powers To Protect Religious Liberty

Christian Legal Society shares the concerns of many that the federal government should not be permitted to expand and extend its regulatory power endlessly at the expense of our First Freedom. That is why CLS strongly ***supports*** the Religious Liberty Protection Act - - because it uses every power of Congress to ***restrict and retract*** federal, state and local government power where it burdens religious exercise.

This suspicion of big government also compels CLS to refrain from endorsing Mr. Farris' RELA. That proposal does too little for religious freedom, because it fails to use Congress' explicit power to regulate interstate commerce.

The Commerce power is not a figment of "judicial activism;" it is expressly granted to Congress. Yes, the power has been abused in the past. But it has also been wielded for good. The Partial Birth Abortion Ban Act would have been based on the Commerce Clause. Many of the nation's federal civil rights laws are too.

And RLPA (H.R. 1691) would use this express constitutional authority for an equally laudable purpose: to restrain (not extend) governmental interference with our most important freedom. It would be a painful irony if the First Freedom named in the First Amendment were the only one not to be protected by federal statute, while the Commerce power is used to promote supposed constitutional rights like abortion that are not enumerated anywhere in the Constitution.

A rope can serve as a useful analogy. The Congress has access to a strong rope. Some have misused ropes in the past (e.g., for lynchings). But the wise response to misuse is not to leave Congress' rope lying unused. Rather CLS urges Congress to pick up its "Commerce Clause rope" and use it constructively - - to cordon off government from legislating and acting in ways that substantially burden religious freedom.

4. RLPA Must Protect All Persons, Without Carve-outs Or Excluded Claims

According to the testimony of Mr. Chris Anders before the House Judiciary Subcommittee On The Constitution on May 12, 1999, the American Civil Liberties Union agrees that the Supreme Court's 1990 decision in *Employment Division v. Smith* left the Free Exercise Clause virtually toothless in all but the rarest of cases. Yet Mr. Anders admitted under questioning by Rep. Jerrold Nadler that the ACLU would rather leave religious believers statutorily defenseless than enact a RLPA that would apply to all claims and all Americans. Specifically, ACLU wants the Congress to amend the RLPA so that it could not be invoked by many believers against an antidiscrimination law. Call it by any other name if you will - - but this would be a carveout, a repudiation of the bedrock principles of "inalienable rights" and equal protection of the laws.

For the following reasons, Christian Legal Society would vigorously **oppose RLPA** if it were to include any such exclusion of a class of religious practices or claims.

4.1 Free Religious Exercise Should Not *Always* Be Subordinated To Other Civil Rights.

The first freedom protected by the Framers in our Bill of Rights is religious freedom, including protection from government prohibition on "the free *exercise*" of religion. Religious freedom is a "civil right," arguably the foundational and preeminent one upon which all others depend. If a government will not accommodate a citizen's fulfillment of his or her obligation to God, then no other human right is safe from that government.

This First Freedom includes practices inside houses of worship. But it also encompasses the living out of one's beliefs in the marketplace of ideas, of jobs, of housing. Those who support a civil rights carveout amendment to RLPA either do not understand the comprehensive nature of most religious devotion or else they dangerously overweight the government's constitutional authority to burden it.

The ACLU's proposed civil rights carveout presupposes that the First Amendment's Religion Clauses protect little mor_Êe than religiou*s belie*fs, and only if such beliefs do not infect the policies and practices of its adherents outside their houses of worship. But, as millions of religious Americans know, they do n leave their religion at the door to their office, at the factory punchclock, or at the schoolhouse gate. And among religious Americans are landlords whose consciences do not allow them to rent their private property for sinful purposes. They also include employers who want to work with people who share their most important values and priorities, including

religious ones. Religious "free *exercise*" is not confined to one's Sabbath, home or house of worship.

Consequently, free exercise of religion will conflict with the interests of third parties who want employment at the believer's private workplace or want to rent the believer's private property.

As a matter of principle, should the First Freedom always prevail over antidiscrimination law? No. Society's interest in eradicating private racial discrimination will continue to trump claims that one's religion compels racist practices.

But neither should the opposite extreme be legislated: that certain civil rights *always* outweigh the believer's interest in religious exercise. A principled RLPA would apply the same test to all religious practices substantially burdened by government, and leave to the courts a case-by-case application of that uniform test. The explicit and prominent constitutional regard for free exercise of religion admits of no exceptions, qualifiers or disclaimers. At a minimum, Congress should follow the First Amendment's lead and let all government interests be tested, and rise or fall on their own importance relative to our First Freedom.

4.2 As A Political Matter, Carveouts Will Fracture RLPA's Coalition, Spawn Other Exceptions, And Infect State Legislation As Well.

The Coalition For The Free Exercise Of Religion, an extraordinary coalition of some 80 organizations that drafted RLPA, supports a "clean" bill, a RLPA free of any kind of carveouts, exceptions or second class treatment for particular religious claims or claimants. That support is based on principle, as described in section 4.1, *supra*.

But the RLPA Coalition also resists any carveouts for a very practical reason: 80 groups could never agree on what to carveout. The coalition is held together by one magnetic commitment: we all agree that *every sincere religious practice* will be entitled to the protection of strict scrutiny.

If RLPA is amended so that it could not be raised as a defense to, e.g., discrimination law, then the Coalition's magnetism will have been lost. Coalition members would spin off under the centrifugal force of their self-interest. Each of us would have our own wish-list of what religions, religious practices, and government interests should be winners and losers. At the end of this politcal powerplay, RLPA would only protect the politically-correct and –powerful religious practices; minority faiths would be left in the carveout pile, and religious freedom as a universal right in America would be a thing of the past.

Christian Legal Society serves with the AntiDefamation League as co-chair of the Coalition's campaign to enact religious freedom legislation in the states. In the two years since *City of Boerne v. Flores*, we have been successful in passing "clean" RFRAs in Florida, Alabama, Illinois, Arizona and South Carolina.

But several weeks ago the Texas Legislature enacted a "dirty" RFRA. Rep. Scott Hochberg pushed it through the Texas House with a civil rights carveout. Not surprisingly, having breached the principle of "protection for all, without exceptions," Rep. Hochberg could hardly object to the Senate's version, which contained carveouts for incarcerated persons and a special provision on regulation of land use by religious groups. One carveout begat another. And thus shall it be if Congress opens the Pandora's Box of stripping RLPA's protection from disfavored religious practices and

believers. Not only will the federal RLPA collapse upon itself due to carveouts, but many *state legislatures* will be tempted to follow Congress' example, leaving a patchwork of laws in which religious liberty protection varies from one state to the next.

For these reasons, the 80 organizations of the RLPA Coalition, ranging from People For The American Way to the Southern Baptist Convention, oppose any exemptions and urge this Committee to pass a "clean" RLPA.

4.3 RLPA Must Protect All Persons, Including The Incarcerated.

Perhaps the most tempting class of persons to carve out of RLPA's protection would be those in prison, jail or detention awaiting adjudication. They cannot vote, cannot contribute to campaigns, and have no lobbyists.

Of the eight states that have enacted state RFRAs, only Texas has given in to that temptation. Its law says that *any* excuse a prison warden gives for burdening an inmate's religion is rebuttably presumed to be in furtherance of a compelling government interest. So prison officials can confiscate a Bible or serve only non-Kosher meals and yet the Texas inmate gets no relief from the Texas RFRA - - unless the inmate (probably undereducated and without a lawyer) can rebut the warden's pretextual justification.

Prisoner litigation includes a lot of frivolous claims. But religious claims account for a tiny fraction of them. According to Justice Fellowship, during the three and one-half years that the federal Religious Freedom Restoration Act of 1993 was in effect, 99.9% of reported prisoner cases were nonreligious in nature; only .12 of one percent (277) of reported prisoner civil cases even mentioned RFRA. So carving out prison inmates from RLPA will not appreciably diminish frivolous prisoner litigation.

In addition, some inmates have been unjustifiably deprived of their "inalienable" right to religious freedom. For example, **see the attached** handwritten letter received by Prison Fellowship recently from an inmate named Melanie Perkins in the state prison in Lowell, Florida. Having received this letter only yesterday, CLS has not yet had an opportunity to investigate the letter's allegations. But Prison Fellowship tells us that it is typical of the letters they receive from across the country about conditions in state prisons. (The Federal Bureau Of Prisons continues to be subject to the 1993 RFRA, and finds it quite workable in the nation's second largest prison system. **See attached** letter to Rev. O. Thomas from BOP General Counsel, dated Nov. 6, 1998.) Finally, not only do prisoner carveouts violate bedrock principles of human rights, fracture the RLPA coalition and inexorably lead to carveouts against other powerless classes, but they also frustrate society's penological interests. Religion changes prisoners, cutting their recidivism rate by two-thirds, according to Prison Fellowship. So it makes good policy to include inmates as beneficiaries of RLPA. If their religious practice threatens the health, safety or security of anyone in the prison, it will (and should) yield under RLPA to those interests of the warden. But some prisoner religious claims (probably a small minority) should prevail, but only if RLPA contains no carveouts . . . even for "least of these my brethren." (Gospel of Matthew 25:40).

The Religious Liberty Protection Act would broadly protect religious Americans with the strictest legal standard, one that is time-tested and workable. It would have a much firmer constitutional foundation than RELA. And RLPA would provide significant rather than anemic protection for public schoolchildren and churches facing land use obstacles. It would not be a cure-all. But RLPA employs all available federal powers to

restore the strictest legal scrutiny with the broadest coverage in a constitutionally defensible manner. Our religious liberty - - the First Freedom - - deserves nothing less.

Thank you, Mr. Chairman, for considering the views of the Christian Legal Society in this most important matter.

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[i] Disclosure: The Christian Legal Society has not received any federal grant, contract or subcontract in the current or preceding two fiscal years. CLS represents only itself at this hearing.

.*8 F. 3d 525 (1st Cir. 1995), cert. denied*, 116 S. Ct. 1044 (1996).