Approved: April 10, 2002
Date

MINUTES OF THE HOUSE FEDERAL & STATE AFFAIRS COMMITTEE

The meeting was called to order by Vice-Chairperson Becky Hutchins at 2:20 p.m. on March 11, 2002 in Room 313-S of the Capitol.

All members were present except:
Representative John Edmonds - Excused
Representative Joann Freeborn - Excused
Representative Broderick Henderson - Excused
Representative Bill Mason - Excused
Representative Doug Mays - Excused
Representative Tony Powell - Excused

Committee staff present: Mary Torrence, Revisor of Statutes
Russell Mills, Legislative Research Analyst
Shelia Pearman, Committee Secretary

Conferees appearing before the committee: Representative Dan Williams
Chuck Simmons, Secretary of Corrections
Joel Oster, Attorney for Liberty Counsel, Florida
Bill Swinney, Educators for Christ
Cynthia Kelly, KS Association for School Boards

Others attending: See attached list

Vice-Chair Hutchins opened the hearing on **HB 2782 - Religious freedom restoration act.**
Representative Williams stated this Religious Freedom Restoration Act (RFRA) legislation is similar to federal legislation passed in 1993. (Attachment #1)

Mr. Oster, a native Kansan, emphasized this landmark legislation bridges the polarity and brings together such groups as the ACLU and the religious right. (Attachment #2) Making a governing body come to the bargaining table with a religious group before the governing body passes laws which will substantially burden the group's religious beliefs. He stated without RFRA, Roman Catholic hospitals could be forced to provide abortions, Bible studies in private homes could be prohibited, churches could be forced to employ individuals who openly engage in conduct that is sinful according to the Church's doctrine.

Mr. Swinney stated his prepared testimony addresses both **HB 2782** and **HB 2833** and believes the bills are in tandem. He stated the ability to understand the God-given soul strength our ancestors granted to us is often denied because of a diminished comprehension by the students of why the Puritans came to America. Without a recognition of the spiritual commitment the Puritans relied upon, they become stick figures to our students. He stated that with the sixth month anniversary of September 11, 2001, our children need constant reminders of the convictions of our nation's founders to spark a flame in their hearts. (Attachment #3)

Secretary Simmons stated while he was not opposing **HB 2782** he urged the committee to consider adopting amendments to exempt correctional operations. He stated 12 chaplains and approximately 1,500 religious volunteers already offer counseling and services for at least 21 faiths. He emphasized the unworkable standard of **HB 2782** relative to correctional operations is clearly demonstrated by the circumstances that caused the U.S. Supreme Court to reject that standard in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). (Attachment #4)

Ms. Kelly rose in opposition of **HB 2782** because passage of this legislation would produce a right, based on any religious belief to ignore neutral laws of general applicability. She cited the Supreme Court decision of *City of Boerne v. Flores*, 521 U.S. 507 (1997). She stated this legislation is unnecessary. (Attachment #5)

The meeting adjourned at 3:05 p.m. The next scheduled meeting is March 12, 2002.

HOUSE FEDERAL & STATE AFFAIRS COMMITTEE GUEST LIST

DATE March 11, 2002

NAME	REPRESENTING
William (Bill) C. Ammerman	Educators for Christ
Cindy Kelly	KASB
Amy Brunner	KASB
Alex Kotoyantz	Education
Bruce Dimmitt	Independent
Charles Simmons	Dept. of Corrections
Helen Pedigo	Governor's Office

STATE OF KANSAS

DURING SESSION:
STATE CAPITOL—427-S
TOPEKA, KANSAS 66612-1504
(785) 296-7699

HOTLINE—1-800-432-3924
TTY 785-296-8430

E-MAIL: williamsd@house.state.ks.us

TOPEKA

COMMITTEE ASSIGNMENTS:
MEMBER: e-GOVERNMENT
FEDERAL & STATE AFFAIRS
K-12 EDUCATION

HOME ADDRESS:
1230 N. PRINCE EDWARD ISLAND
OLATHE, KS 66061
(913) 393-2651

DAN WILLIAMS
REPRESENTATIVE, 14TH DISTRICT
OLATHE

March 11, 2002
Testimony
Committee on Federal and State Affairs
House Bill 2782

Chairman Mays, Vice Chairman Hutchins, and members of the House Committee on Federal and State Affairs, thank you for allowing me to testify today in favor of House Bill 2782.

HB 2782 is better known as the Religious Freedom Restoration Act (RFRA). It is an act that has been adopted by multiple states, ranging from Florida to Idaho and Connecticut to Arizona. This bill is modeled after the federal legislation passed unanimously by the United States House of Representatives and 97-3 by the United States Senate in 1993. It was signed into law by President Clinton.

In 1997, the United States Supreme Court ruled the federal RFRA to be unconstitutional. The 6-3 opinion was based upon what Justice Scalia believed to be an inappropriate federal incursion into states rights. This ruling opened the door for individual states to enact such legislation.

The purpose of the RFRA is to honor the first clause of the First Amendment to the United States Constitution. By enacting the RFRA in Kansas, we will be saying to our citizens that we believe in the importance of religious freedom.

It is not my intent to bore you with facts, so I have provided for you a packet of information about the RFRA. As some of you may know, I have a background in speaking on First Amendment issues. However, since I am one of you, I want you to hear from someone you can respect.

Joel Oster is an attorney for Liberty Counsel, a religious liberties educational and legal organization based in Orlando, Florida. A former Kansan who travels the nation trying First Amendment cases in the federal courts, he is uniquely capable of providing us an insight into the historical and legal importance of this bill.

Thank you for your time on this very important subject. If the committee is willing, I would like to defer any questions until after Mr. Oster has finished his presentation.

House Fed. &
State Affairs
Date 3/11/02
Attachment No. 1
Page 1 of 1

Why States Need RFRA

Pre-1990: Strict Scrutiny for Free Exercise Claims

* Prior to 1990, free exercise of religion claims brought under the First Amendment to the U.S. Constitution were analyzed under the "strict scrutiny" analysis. This is the highest level of protection courts provide.

* Strict scrutiny means the government cannot substantially burden a person's exercise of religion unless the government demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

1990: U.S. Supreme Court Abandons Strict Scrutiny

* In 1990, the U.S. Supreme Court abandoned the strict scrutiny test for free exercise of religion claims in the case of *Employment Division v. Smith*, 494 U.S. 872 (1990). The Court adopted a new test for free exercise of religion claims that provided a much lower level of protection for religion. Under the new test, general laws of neutral applicability that burden religion are still constitutional.

Smith's Damaging Impact on Religious Freedom

* Under the *Smith* standard, religious freedom suffered greatly. For example:

> A church in New Mexico claimed that a licensing requirement for a childcare center (i.e., rule prohibiting spanking) violated their free exercise rights. The court denied the claim under *Smith*. *Health Services Division v. Temple Baptist Church*, 814 P.2d 130 (1991).
>
> A Catholic hospital in Pennsylvania sought to preclude application of the Federal Age Discrimination in Employment Act. The court rejected the hospital's free exercise argument citing *Smith*. *Lukaszewski v. Nazareth Hospital*, 764 F.Supp. 57 (E.D. Pa. 1991).
>
> A married male paramedic sued alleging that his employer's requiring him to stay overnight with a female paramedic at a station while on duty conflicted with his religious beliefs. The court rejected his free exercise claim, citing *Smith*. *Miller v. Drennon*, F.2d , No. 91-2166 (4th Cir. 1992).

The state medical examiner in Michigan ordered an autopsy performed on the plaintiff's son after he was killed in an automobile accident. The plaintiff, who was Jewish, alleged that performance of the autopsy violated her free exercise rights. The court denied her claim, relying on *Smith. Montgomery v. County of Clinton*, 743 F.Supp 1253 (W.D. Mich. 1990).

In a wrongful death case filed on behalf of a Jehovah's Witness who was injured as a result of the defendant's negligence and who died allegedly because she refused a blood transfusion on religious grounds, the plaintiff argued that application of the rule of law stating that religion may not justify a failure to mitigate damages violated her free exercise rights. The court rejected this argument, relying in part on *Smith. Munn v. Algee*, 924 F.2d 565 (5th Cir. 1991).

A Michigan court ruled that the state's requirement that nonpublic schools use state certified teachers did not violate the defendant's free exercise rights, applying the *Smith* test. *People v. DeJonge*, 470 N.W.2d 433 (Mich. App. 1991).

An FBI agent refused for religious reasons to be involved in a domestic security and terrorism investigation. The court denied the claim based upon *Smith. Ryan v. United States*, 950 F.2d 458 (7th Cir. 1991).

A Church in New York opposed application of landmarking ordinances to buildings owned by the church. The court rejected the church's free exercise argument based upon *Smith. St. Bartholomew's Church v. City of New York and Landmarks Preservation Commission*, 914 F.2d 348 (2d Cir. 1990).

An Illinois plaintiff argued that the Boy Scouts violated Title II in denying him admission because he refused to take the "Duty to God" oath. The Scouts argued that to require them to admit those who denied a belief in God violated their free exercise rights. Relying on *Smith*, the court rejected the Scouts' argument. *Welsh v. Boy Scouts of America*, 742 F.Supp. 1413 (N.D. Ill. 1990).

Responding to Smith: RFRA

* In response to this extreme situation, a national coalition of over 65 religious denominations and civil rights groups drafted the Religious Freedom Restoration Act (RFRA). This coalition included Christians, Jewish groups, Muslims, Scientologists, Sikhs, and groups as diverse as the Traditional Values Coalition and Concerned Women for America to the ACLU and People for the American Way. Congress passed RFRA almost unanimously in 1993. RFRA again provided a strict scrutiny remedy for violations to religious exercise.

U.S. Supreme Court Strikes Down RFRA

* In June 1997, the U.S. Supreme Court held that Congress lacked the authority to pass RFRA as to state and local laws in the case of *City of Boerne v. Flores*. Thus RFRA is dead for free exercise claims which result from the application of state and local laws.

* The *Flores* decision held that Congress lacked the authority under the U.S. Constitution to pass RFRA as to the states and local laws. The *Flores* decision does not bar state legislatures from passing a state version of RFRA.

Responding to Flores: Florida RFRA

* With RFRA gone, many states were back to the *Smith* standard which provides virtually no protection for religious freedom. It is, therefore, incumbent upon the states to provide the protection lacking under the *Smith* ruling.

* Courts often adopt tests created by the U.S. Supreme Court's when analyzing similar provisions of the state Constitutions. For example, the Florida Supreme Court has adopted the so-called *Lemon* test (which the U.S. Supreme Court created for analyzing claims under the Establishment of Religion Clause of the First Amendment) to analyze claims under the Establishment of Religion Clause of the Florida Constitution. Other courts are likely to follow the same pattern concerning their state's Constitution, which would mean adopting the *Smith* test. This would be disastrous for religious freedom claims.

The Status of RFRA

On June 25, 1997... The United States Supreme Court, in a 6 to 3 decision, declared the Religious Freedom Restoration Act of 1993 unconstitutional as applied to the states. The majority opinion in the case of *City of Boerne, Texas, v. Flores* was written by Justice Anthony M. Kennedy. Since that time, 10 states have enacted their own version of the RFRA.

Alabama	Illinois
Arizona	New Mexico
Connecticut	Rhode Island
Florida	South Carolina
Idaho	Texas

Who supports RFRA?

RFRA is enthusiastically supported by more than sixty religious and civil liberties groups, spanning the political and theological spectrum, worked together to support passage of the Religious Freedom Restoration Act. Never had a broader coalition been assembled to support Congressional legislation.

Today this group has expanded to 72 different organizations that lay aside their ideological differences in order to work for religious liberty for all Americans.

Current Members of the Coalition
(as of July 10, 1997)

The Aleph Institute
American Association of Christian Schools
American Baptist Churches, USA
American Civil Liberties Union
American Conference on Religious Movements
American Ethical Union, Washington Ethical Action Office
American Humanist Association
American Jewish Committee
American Jewish Congress
American Muslim Council
Americans for Democratic Action
Americans for Religious Liberty
Americans United for Separation of Church & State
Anti-Defamation League
Association of Christian Schools International
Association on American Indian Affairs
Baptist Joint Committee on Public Affairs
B'nai B'rith
Central Conference of American Rabbis
Christian Church (Disciples of Christ)
Christian Legal Society
Christian Life Commission, Southern Baptist Convention
Christian Science Committee on Publication
Church of the Brethren
Church of Jesus Christ of Latter-day Saints
Church of Scientology International
Coalition for Christian Colleges and Universities
Coalitions for America
Concerned Women for America
Council of Jewish Federations
Council on Religious Freedom
Council on Spiritual Practices
Criminal Justice Policy Foundation
Episcopal Church

Evangelical Lutheran Church in America
Friends Committee on National Legislation
General Conference of Seventh-day AdventistsGuru Gobind Singh Foundation
Hadassah, the Women's Zionist Organization of America, Inc.
Home School Legal Defense Association
International Association of Jewish Lawyers and Jurists
International Institute for Religious Freedom
The Jewish Reconstructionist Federation
Justice Fellowship
Mennonite Central Committee U.S.
Muslim Prison Foundation
Mystic Temple of Light, Inc.
National Association of Evangelicals
National Campaign for a Peace Tax Fund
National Committee for Public Education and Religious Liberty
National Council of Churches of Christ in the USA
National Council of Jewish Women
National Council on Islamic Affairs
National Jewish Commission on Law and Public Affairs
National Sikh Center
Native American Church of North America
Native American Rights Fund
North American Council for Muslim Women
People for the American Way Action Fund
Peyote Way Church of God
Presbyterian Church (USA), Washington Office
Rabbinical Council of America
Religious Liberty Foundation
Sacred Sites Inter-faith Alliance
Soka-Gakkai International-USA
Traditional Values Coalition
Union of American Hebrew Congregations
Union of Orthodox Jewish Congregations of America
Unitarian Universalist Association of Congregations
United Church of Christ, Office for Church in Society
United Methodist Church, Board of Church & Society
United Synagogue of Conservative Judaism
Women of Reform Judaism, Federation of Temple Sisterhoods

Comment by: Ira Glasser, executive director, A.C.L.U.

"Decisions are sometimes greeted by such criticism that it forces the Court to rethink what it did. It could happen here. The Justices need to think about how they have exposed people for doing nothing more than exercise their religious rights."

Kansas Constitution
Bill of Rights

§ 7. Religious liberty. The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship. No religious test or property qualification shall be required for any office of public trust, nor for any vote at any elections, nor shall any person be incompetent to testify on account of religious belief.

I am Bill Swinney, a teacher in Kansas public schools for 32 years as well as founder and chairman of the board of an organization called Educators for Christ or EFC. Our mission is to provide fellowship, encouragement, and the opportunity for ministry and spiritual growth to all educators, including teachers, administrators, and support personnel from preschool to post-secondary levels in public, private, and home-school environments.

In that capacity, I have been able to talk with a number of people and write on a regular basis concerning the issues these two House Bills (#'s 2833 and 2782}address, courses in schools and school districts concerning the founding spirit of our country – "the hope of humankind" – as expressed principally in our nation's Declaration of Independence and the Constitution of the United States and accompanying patriotic exercises, as well as the protected freedom of religious expression.

A portion of what I write consists of scripts for e-mailed EFC Moments to our members and EFC Radio Moments aired Monday through Friday at 4:00 PM on KBUZ radio. I would like to read two of these 60 second scripts I have written as a part of my presentation today.

EFC Radio Moment #7

The measureless is often the best measure of man. Still too often, as goals and objectives are considered and established in schools today, determining the charted course curriculum is to follow, the first complaint is "how can that goal – that objective – be measured?" If a goal or objective is not measurable by subjective or objective form, it is not considered a viable part of the student's learning experience.

Oh, what lessons, what high standards of moral, upright living are then discounted. Patriotism, as a fiber that gives strength to our nation. Conviction as steel in one's strength toward a cause. Humility that causes us to gaze in respectful awe at a sunrise. Love that feeds the hungry, lifts up the downtrodden, respects another's dream, and truly encourages a child's potential. These things are not taught reliably in public schools because by worldly means, they are not objective in nature and measureable.

The truest test our students will ever experience will be neither objective nor subjective in nature, but a heart felt, gut level assessment of the student's faith, compassion for humanity, and courage in defeating the forces of evil existing in this world. By the measure of this test, we shall all one day stand. Pray that we are not found lacking.

EFC Radio Moment #3

We may learn history as a material timeline engulfing names, dates, or events, or we may also internalize the truth of history by studying it as a prompting of the human spirit, moving in the dark or light, affecting the lives of those touched by its passing. We can learn by rote memorization the date of Puritan arrival and the timeline of colonial development, but we must also understand the prompting of the human spirit that initially led the Puritan to our beautiful

shore. Without that awareness, we deny ourselves and our children the ability to understand the God-given soul strength our ancestors granted to us.

Today's school curriculum too often denies spiritual input. Without a recognition of the spiritual commitment that focused the searching eyes of colonial figures, for example, the Puritans may become in the eyes of our students only stick-figures on a one-dimensional coastline. The mix of humanity and divine inspiration inherent in so much of the freedom and history of a people who have placed their trust "in God" may be lost.

The content of a nation's curriculum is a reflection of that nation's own self-definition. We teach our children who we are, and what we show them they will become.

As some people hear these words or read them in print, the question is asked, are we in EFC, am I as an individual, attempting to convert students, to impose religious views upon students and/or my colleagues. My answer is "no." What I am attempting to do is to help my students and my colleagues – indeed all who may hear these words here or on the radio – configure their lives – arrange the parts of their lives in a manner that teaches "us about recognizing our common humanity and that each person deserves to be treated with respect and human dignity . . . "(HB 2833). I am attempting to "better prepare our students to become effective citizens and enable them to explain the justice of our cause against terrorism" and to help our students "believe that our most basic freedoms and rights are not granted to us from the government but that they are intrinsically ours" (HB 2833}. That, as expressed in HB 2782 and included in the aforementioned "basic freedoms and rights", there is a time for "striking a balance between religious liberty and competing prior governmental interests . . ."(HB 2782). Again, it is my desire, and I believe the desire of all people of good will, to help all who hear these words to so configure their lives.

We live now in times – indeed on the six month anniversary today of September 11th, 2002 – when such configurement is extremely crucial, perhaps more so than at any other time since the American Revolution, since the day Thomas Jefferson's quill first placed the Declaration of Independence upon parchment. For on September 11th, 2002, terrorists **re**configured our nation. On that day, coming fast on the heels of scandal prompted during the previous presidential administration as well as on other political levels – in a time of student disillusionment and overdependence upon the luxuries of a material world – the building blocks of our society came at least too close to toppling before our students' eyes. Though perhaps reinspired and strengthened for a season by the powerful stand of political figures and American citizenry soon following that fateful day, our students, our teachers, the American people, must now be able to find strength within their own ten-foot circles, the space they can directly influence around themselves and within their own minds. Their own spirits, their own souls. One season – one season of patriotic zeal – will not sufficiently cancel out fear, insecurity, and assure the seating of long-term patriotic conviction in our students, in our nation's heart and soul. Freedom from fear, the assurance of security, the confirmation of faith, and the reinforcement of patriotic conviction through instruction for our students and every citizen, must be established and protected by laws, formulated and approved by a just people in a just land, composed by a government of the people

and approved by the consent of the governed.

Local interests, the faith, and the strivings of the American people on a local and state level may be seen as applications of democratic principles and be more strongly affixed in the minds of our students and citizenry. Democratic principles will become living entities in their lives rather than mere words on a page or abstractions caught up in the wind of changing times. Recognition and cognition of the transfer and continuance of our national documents - our national heritage from its 18th century context to today as well as a modeling of the religious convictions of nation's founders – will fan a spark to flame in the hearts and souls of Americans now, and with the passage of these two bills into law, our forefathers' accomplishments will be reflected in the accomplishments of the people in this room, those they may influence, and our students themselves.

In closing, I present a quote from James Russell Lowell which I believe applies quite well to the nature of both these bills:

"To Americans America is something more than a promise and an expectation. It has a past and traditions of its own. A descent from men who sacrificed everything and came hither, not to better their fortunes, but to plant their idea in virgin soil, should be a good pedigree. There was never a colony save this that went forth, not to seek gold, but God."

I respectfully thank you for your time today, and I ask that God bless our nation, our state, and the work we do here today. — Bill Swinney (copyright 2002)

STATE OF KANSAS

DEPARTMENT OF CORRECTIONS
OFFICE OF THE SECRETARY
Landon State Office Building
900 S.W. Jackson — Suite 400-N
Topeka, Kansas 66612-1284
(785) 296-3317

Bill Graves
Governor

Charles E. Simmons
Secretary

Memorandum

DATE: March 11, 2002

TO: House Federal and State Affairs Committee

FROM: Charles E. Simmons
Secretary of Corrections

RE: HB 2782

HB 2782 creates the Religious Freedom Restoration Act. HB 2782 prohibits governmental statutes, rules, regulations, policies, actions, or activities that burden a person's exercise of religion unless there is a compelling state interest and the compelling interest is achieved in the least restrictive manner possible. The provisions of HB 2782 apply to statutes and actions even if the governmental rule is one of general application. The religious activities covered by HB 2782 need not be mandated by the person's religion or be central to a larger system of religious beliefs. Finally, 2782 provides for the recovery of monetary damages, attorney's fees and costs.

The critical premise of HB 2782 is the bill's claim that a "compelling interest test as set forth in certain federal court rulings [*Sherbert v. Verner*, 374 U.S. 398 (1963); and *Wisconsin v. Yoder*, 406 U.S. 205 (1963)] is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." (HB 2782, page 1, lines 19-21). The United States Supreme Court, however, has specifically rejected the "compelling interest test" in the context of administration of religious activities in a correctional facility, finding the test to be unworkable for both courts and corrections officials.

The unsuitability of the application of HB 2782 to correctional management of inmate religious activities is due to both the imprecise definition of "least restrictive" and the

boundless scope of activities that are "substantially motivated by a religious belief" even though the belief is not a compulsory component of the religion or even part of a larger system of religious beliefs. These two aspects of HB 2782 create uncertainty as to whether any restriction imposed by corrections officials is the least restrictive possible and means the ultimate evaluation of the Department's compliance is subject to variant degrees of subjective disagreement and likely will involve increasing court involvement and determination.

The Department believes that a brief outline of the religious services and activities occurring within the Department's correctional facilities illustrate the scope of the issue of prison management of inmates and their religious activities. The Department has a half time position serving as religious program coordinator, coordinating and addressing issues regarding the accommodation of the religious needs of offenders throughout the Department. The Department also employs twelve chaplains located at correctional facilities. State clergy coordinate the activities of approximately 1,500 religious volunteers who conduct religious study and counseling. Currently, weekly religious services and study groups are conducted for adherents of Asatru/Odinist, Assembly of Yahweh, Buddhism, Catholic, Christian Science, Hinduism, House of Yahweh, Islam, Jehovah Witness, Judaism, Krishna, Latter Day Saints, Moorish Science Temple of America, Native American, Protestants, Rastafarian, 7 Day Adventist, Sikh, Thelema, Unity, and Wicca faiths. Correctional officials are confronted on a routine basis with issues involving the interplay of correctional operations and religious practices.

The unworkable standard of HB 2782 relative to correctional operations is clearly demonstrated by the circumstances that caused the United States Supreme Court to reject that standard. The United States Supreme Court in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) was presented with the situation where Muslim inmates assigned to work details outside of the prison sought to be returned to the facility at noon on Fridays for participation in communal Jumu'ah prayer. Transporting the Muslim inmates back to the facility from the work site for the noon prayer entailed bringing the entire crew back since only one officer was assigned to supervise the crew. Additionally, reentry into the facility caused security concerns due to the need to search all of the inmates as well as vehicles making deliveries to the facility during a high traffic time of the day. The increased congestion at a high security access point, and the curtailment of a normal workday for the inmate work crews was deemed operationally unacceptable by prison officials. Creation of special work crews for Muslim inmates to work at the facility was not deemed feasible by prison officials due to the desire to reserve those assignments for higher custody inmates who should not be on work crews operating outside of the facility's perimeter and to avoid the creation of a select group susceptible to being a cover for an inmate gang activities or which could be viewed by other inmates as providing special privileges or treatment. The federal District Court concurred with the prison officials' assessment.

The New Jersey prison officials' accommodation of Muslim religious practices through the provisions of congregational prayer during non-work hours, a state provided Imam, religious diets, and special arrangements during the month long period of fasting for

Ramadan were insufficient in the view of the federal Circuit Court of Appeals under the "compelling interest and least restrict alternative test", contrary to the decision of the lower federal District Court.

Situations such as that presented in *O'Lone* regarding the operation of correctional facilities while providing religious exercise confront correctional officials on a daily basis, yet resulted pursuant to the standard offered in HB 2782 in conflicting decisions in the federal court, ultimately resolved by the United States Supreme Court's rejection of that standard. The United States Solicitor General, thirty-two states and the District of Columbia all joined in requesting the Supreme Court to reject the "compelling interest and least restrictive manner" test.

The standard provided by the Supreme Court in *O'Lone* is whether the regulation in question is reasonably related to legitimate penological interests. The Supreme Court adopted this standard due to the necessity of ensuring the ability of corrections officials to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration, avoiding the unnecessary intrusion of the judiciary into problems particularly ill suited to resolution by court decree. The Supreme Court in *O'Lone* applied the "reasonableness" test enunciated in *Turner v. Safley*, 482 U.S. 78 (1987), which provides that in determining the reasonableness of prison officials actions, relevant factors include: (a) whether there is a "valid, rational connection" between the regulation and a legitimate and neutral governmental interest put forward to justify it, which connection cannot be so remote as to render the regulation arbitrary or irrational; (b) whether there are alternative means of exercising the asserted constitutional right that remain open to inmates, which alternatives, if they exist, will require a measure of judicial deference to the corrections officials' expertise; (c) whether and the extent to which accommodation of the asserted right will have an impact on prison staff, on inmates' liberty, and on the allocation of limited prison resources, which impact, if substantial, will require particular deference to corrections officials; and (d) whether the regulation represents an "exaggerated response" to prison concerns, the existence of a ready alternative that fully accommodates the prisoner's rights at de minimis costs to valid penological interests being evidence of unreasonableness.

The unsuitability of a "compelling interest and least restrictive alternative" test to resolve situations confronting correctional officials on a daily basis is not the only area of concern caused by HB 2782. In *O'Lone*, the prominence of Jumu'ah congregational prayer in the Muslim faith is well recognized. However, the scope of HB 2782 is not limited to accommodating religious practices fundamental to the religious faith. HB 2782 subjects the actions and policies of prison officials to the subjective "compelling interest least restrictive manner" test irrespective of whether a fundamental aspect of the offender's faith is affected.

Finally, the Department of Corrections as a governmental entity required and committed to religious nondiscrimination, does not license or "validate" religions. Rather, it applies its security policies on a religiously neutral basis. HB 2782, however, precludes application of prison policies of general application to entities claiming religious status

except pursuant to the subjective "compelling interest and least restrictive manner" test. A double standard relative to prison operations is not good correctional practice.

The language of HB 2782 is modeled on federal statutory law, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). RLUIPA was adopted as a response to its federal statutory predecessor, the Religious Freedom Restoration Act (RFRA), being found by the United States Supreme Court to be an unconstitutional intrusion by the federal government into matters properly left to state authorities. The Constitutionality of the federal RLUIPA is also being challenged by state prison officials throughout the country. The "compelling interest" test embodied in the provisions of RLUIPA, the unconstitutional federal RFRA, and HB 2782, all create the uncertainty and judicial intervention upon the ability of correctional officials to manage prisons in a reasonable manner found necessary by the Supreme Court in *O'Lone* and *Turner*.

While the language of HB 2782 is modeled on federal statutory law, HB 2782 is significantly different from the federal statute. The difference between RLUIPA and HB 2782 is due to fact that legislation enacted by Congress has special Constitutional restrictions relative to its application to states. For example, monetary damages pursuant to RLUIPA are not available in lawsuits against states. Additionally, it is anticipated that litigation involving religious activities in prisons would be diverted to state courts, increasing the burden on those courts.

The Department urges that HB 2782 be amended to provide an exception for the operation and management of correctional facilities.

KANSAS ASSOCIATION OF SCHOOL BOARDS

1420 SW Arrowhead Road • Topeka, Kansas 66604-4024
785-273-3600

Testimony on
HB 2782 (Religious Freedom Restoration Act)
Before the
House Committee on Federal and State Affairs

By

Cynthia Lutz Kelly, Attorney
Kansas Association of School Boards

March 11, 2002

Mr. Chairman, Members of the Committee:

On behalf of our membership, thank you for the opportunity to comment on HB 2782. This bill is an attempt to broaden the right to freely exercise one's religion at the state level, even though the United States Supreme Court found such an attempt to be beyond the power of Congress at the federal level in *City of Boerne v. Flores*, 521 U.S. 507 (1997). The federal law was an attempt to overrule the Supreme Court ruling in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In that case the Court concluded the Free Exercise Clause of the First Amendment does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground the law proscribes conduct his religion prescribes or vice-versa. Applying this rule, the Court concluded Native American employees who were fired for ingesting peyote at a religious ceremony were fired for "misconduct" and not entitled to unemployment benefits under Oregon law.

The high Court's decision in *City of Boerne* shows why legislation of this nature is both unnecessary and unwise. First, the Court found no evidence that laws of general applicability have passed because of religious bigotry or animus. Further, the Court noted the test set forth in RFRA, the same test used in HB 2782, added a least restrictive means requirement to the *Sherbert v. Verner* balancing test, and ignored the fact that when additional constitutional rights are coupled with free exercise rights, courts continue to require a compelling state interest. (See, e.g. *Wisconsin v. Yoder*, free exercise rights coupled with parental right to control their children's education). Additionally, the Court has consistently applied the compelling interest, least restrictive means test, the strictest of all tests, to cases involving religious speech. (See, *Good News Club v. Milford Central School*, 121 S. Ct. 2093 (2001); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 810 (1995).

Passage of this legislation will produce a right, based on any religious belief, to ignore neutral laws of general applicability. Further, an unprecedented right under state law to recover attorney fees for a state created civil rights action will only fuel litigation, requiring schools and other public entities to incur expenses defending against such actions, whether or not they are meritorious. The current lack of litigation in Kansas in this area belies the existence of any problem. This legislation is unnecessary and should not be passed.