

MINUTES OF THE HOUSE COMMITTEE ON FEDERAL AND STATE AFFAIRS.

The meeting was called to order by Chairperson Bill Mason at 1:30 p.m. on February 5, 2003 in Room 313-S of the Capitol.

All members were present except: Representative Gilbert - E

Committee staff present: Russell Mill, Legislative Research Department
Mary Torrence, Office of Revisor of Statutes
Rose Marie Glatt, Committee Secretary

Conferees appearing before the committee: Representative Dan Williams
Keith R. Landis, Christian Science Committee on
Publication for Kansas
Secretary Roger Werholtz, Department of Corrections
Kimberly Gulley, League of Kansas Municipalities

Others attending: See Attached

Without objection, a bill was introduced by Representative Rehorn, on behalf of Representative Thimesch regarding Persian Gulf War veterans health initiative board renamed Kansas veterans health commission, separate agency within executive branch.

Without objection, a bill was introduced as requested by Representative Peterson regarding the operation of electronic gaming machines in a single specified location in Dodge City, KS for the promotion of tourism and economic development.

Without objection, a bill was introduced as requested by Representative Huy, that the Kansas Lottery shall provide for selection of winning numbers in the lottery game "Power Ball" to be televised on broadcast television stations in the Kansas City, Topeka and Wichita markets.

Without objection, a bill was introduced as requested by Representative O'Neal that would authorize employees that are sixteen or more years of age to take orders and payment for cereal malt beverages or alcohol in service establishments that have more than fifty percent of their revenue from food.

HB 2040 - Religious Freedom Restoration Act.

Representative Dan Williams stated **HB 2040** requires that before a governmental entity can substantially burden the free exercise of religion, it must first show a compelling interest. And even when there is a compelling interest, the burden may only be implemented by the least restrictive means (Attachment 1). The bill is a replica of 2002 **HB 2782**, that passed the House but was not heard in the Senate. He provided history of the non-partisan bill referencing the 2002 testimony of Joel Oster. He cautioned that the Religious Land Use and Institutionalized Person Act (RLUIPA) may be limited and that this bill would provide additional protection from government regulation for all religions. After discussion there was agreement that for clarification purposes, Section 3, should be re-worded. It was suggested that the word *group* could be added to line 40 to read *substantially burden a person's/group's exercise of religion, etc.* Discussion followed regarding the need or importance of this bill to religious freedom in Kansas.

Keith R. Landis, Christian Science Committee on Publication for Kansas, spoke in support of **HB 2040** stating that this bill could meet the need in Kansas by restoring the balance of rights and interests thought to exist before the recent Supreme Court action (Attachment 2).

Secretary Roger Werholtz, Department of Corrections, presented a balloon that altered language on page 2, line 1 from *The person is in custody in a correctional institution, as defined in K.S.A. 75-5202, and amendments thereto:* to *The burden is related to the management and operation of the department of corrections;* (Attachment 3) He cited two examples that illustrated the need for change in order to cover the balance of the Department's operation.

Kim Gully, Director of Policy Development, League of Kansas Municipalities appeared in opposition to **HB 2040** (Attachment 4). She cited three reasons the League was opposed to the bill; the large number of pending cases at the federal level that need to be settled, belief that numerous court cases would be required to determine the definition of "substantially burdens" and the expense to the taxpayers to meet the requirement for payment of attorney fees. It was noted during discussion that the fiscal note reflected no fiscal effect on the state.

The hearing on **HB 2040** was closed.

In the January 28 minutes, in the last paragraph, the words *malt liquor* were corrected to *cereal malt beverage*. Representative Ruff moved that the January 16, 27 and the 28, with the above revision, be approved. It was seconded by Representative Dahl. The motion carried.

The meeting adjourned at 2:55 p.m. with the next meeting scheduled for February 10, 2003.



TOPEKA

DAN WILLIAMS

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February 5, 2003

House Federal and State Affairs Committee

Chairman Mason and fellow members of the Federal and State Affairs Committee,

Thank you for the opportunity to present House Bill 2040 to you. This bill is an exact replica of 2002 House Bill 2782, which was passed by the House. It was passed too late in the 2002 Session to be heard in the Senate, so it died upon the end of the Session.

Thus, I am here today with a new bill, and a new two years to make this important edition to religious freedom in Kansas. It is my belief that, just like in 2002, the vast majority of my House colleagues will agree with the underlining principles of this bill.

House Bill 2040 simply requires that before a governmental entity can substantially burden the free exercise of religion, it must first show a compelling interest. And even when there is a compelling interest, the burden may only be implemented by the least restrictive means.

In plain language this principle is obvious, and is clearly consistent with the intent of our nation's founders as they penned and debated the First Amendment. If the government is going to restrict the freedom of religion, it must have a very good reason for doing so and it must do so with the least possible interference of that freedom of religion.

Originally, the RFRA (Religious Freedom Restoration Act), as House Bill 2040 is known, was passed by the U.S. Congress in 1993. The House vote was unanimous and the Senate vote was 97-3. It was signed by President Clinton.

In 1997, the U.S. Supreme Court ruled that Congress did not have the power to pass the RFRA as it related to the states. In this ruling, the Supreme Court opened the door for states to pass their own acts. Since 1997, at least ten other states have enacted an RFRA.

Critics of this bill will contend that it is wrong to impose the costs of opposing attorney's fees on governmental entities. Yet the attorney fee provision is only relative if the state loses the case. I would suggest that it is far more wrong to deprive a Kansas citizen of

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perhaps his most important freedom, and then tell him that the only way he will receive justice is if he can afford thousands of dollars in attorney's fees.

The federal RFRA boasted a kind of non-partisan cooperation that we can only dream of in most legislation. Legal groups as diverse as the ACLU and the Christian Legal Society supported this bill. Religious groups as diverse as the American Muslim Council, the American Jewish Congress, and the Southern Baptist Convention supported this bill. And politicians as diverse as Ted Kennedy and Strom Thurmond supported this bill. Yes, Bob Dole and Nancy Kassebaum also voted for this bill.

This principle held true in our chamber in 2002. More than half of each party's caucus supported this bill. It is my hope that we can continue this bi-partisan approach to protecting religious freedom by enacting House Bill 2040 into Kansas law in 2003.

Thank you for the opportunity to address you today. I will be happy to stand for questions.

Sincerely,

Dan Williams

Testimony

Kansas House Federal and State Affairs Committee

March 11, 2002

Thank you Representative Williams for inviting me to address the House Federal and State Affairs Committee to speak about an incredible opportunity that exists for this Kansas Legislature. The Kansas Legislature has the opportunity to create meaningful, lasting law that will restore to Kansas the proper protection of religious freedoms.

My name is Joel Oster, and I am an attorney for Liberty Counsel. Liberty Counsel is a national civil liberties legal organization headquartered in Orlando, Florida. While my office is located in Orlando, my roots are in Kansas. **I am a homegrown Kansan.** I was raised in Kansas and attended Kansas public schools, graduating from Olathe South High School. Not wanting to stray too far from home, I then attended and received my undergraduate degree from MidAmerica Nazarene University in Olathe, Kansas. I then went to law school at the University of Kansas and received my juris doctorate from that fine university. The first bar that I became a member of was the Kansas bar, and indeed, I maintain my Kansas bar license to this day even though I work out of Orlando, Florida.

Not only do I have significant educational roots in Kansas, but I also have significant spiritual roots in Kansas. Living in Olathe, I attended the Nazarene Church in Olathe, Kansas, and was actively involved in various religious activities ranging from attending church services and Bible studies in people's homes to engaging in door-to-door witnessing. I am eternally grateful for the rich heritage that Kansas has for protecting religious freedoms, and the opportunity that I had to grow up in the religious heritage and faith of my parents.

I mentioned that I grew up in the Nazarene Church. The Nazarene Church has been very influential in the Johnson County area with a liberal arts college, several Nazarene churches, and an international headquarters nearby. Few can doubt the positive impact that the Nazarene Church has had in Olathe and throughout Kansas, for that matter, with the building of one of the largest private liberal arts colleges in Kansas called MidAmerica Nazarene University. It was not that long ago, however, that the Nazarene Church was considered a "cult." It was a start-up religious organization that had splintered off from several larger established denominations because of significant doctrinal differences, including disagreements concerning care for the homeless and entire sanctification. Without the protection of religious freedoms that exist in this nation, the Nazarene Church would never have existed, nor been allowed to prosper. It was not that long ago in world history that religious freedom was not an option for citizens. A citizen had to belong to the "official state church" and any person who was not a member of the "official state church" was considered a heretic. **But thanks to the fundamental right of religious freedoms that Americans cherish and treasure, the Nazarene Church was able to organize, develop, and make a lasting impact on Kansas.**

The Bill of Rights of the Kansas Constitution, Section 7, embodies the protection for religious freedoms and states:

"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 or interference with the rights of conscience be permitted."

Kansas should be proud of its fine history of religious freedoms.

Unfortunately, the legal landscape has changed. Religious freedoms no longer enjoy the status of a "fundamental" right, and religious freedoms **do not have the protections** that go along with being a fundamental right. As I mentioned, I am an attorney with Liberty Counsel. Consequently, I have personally come into contact with citizens across the United States, including Kansas, who have been denied the right to worship according to their conscience. Religious freedom is a fundamental right that our founding fathers thought they were preserving for all future American generations. Our founding fathers understood the **primacy** of the fundamental right to religious freedom. In the very first amendment to the United States Constitution, our founding fathers etched in constitutional stone these words:

"Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or of the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."

George Washington, the father of our country, understood the importance of protecting the free exercise of religion, and said:

"I assure you very explicitly that in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness, and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interest of the nation may justify and permit."--A Documentary History of Religion in America, 278 (Edwin Gaustad, ed., 2d ed 1993)

While the right to religious freedom is guaranteed by the same amendment that protects our right to freedom of speech and freedom of assembly, the right to religious freedom has been singled out by the Supreme Court and was severely crippled by the United States Supreme Court in 1990 in a decision called *Employment Division v. Smith*. Prior to the Supreme Court's ruling in *Smith*, a governing body could pass a law that substantially burdened a person's religious beliefs and practices only if the governing body could show that the law served a **compelling governmental interest** and was narrowly tailored to achieve that interest. **This level of review is called "Strict Scrutiny"** and is the highest level of review. Strict Scrutiny is the level of review that is used to protect **fundamental rights** from being infringed by a governing body. This is the level of review that George Washington spoke about when he said, "The conscientious scruples of all men should be treated with great delicacy and tenderness."

To give you an example of how strict scrutiny has been used to protect freedom of religion, pre-*Smith*, consider *Wisconsin v Yoder*, a 1972 Supreme Court case. In *Yoder*, the Supreme Court permitted Amish families to disregard the state's compulsory education laws where the laws required all children to receive formal education until age 16. While the state had a compelling interest to require formal education for all children under the age of 16, that same interest did not apply to the Amish religious communities who had in place a system of educating their children to the Amish agrarian lifestyle. Or, consider the plight of the Roman Catholics during the

prohibition era. During the prohibition era, Roman Catholic churches were allowed to use wine during communion as their religion required, despite a national prohibition against drinking alcohol. For while the state had a compelling interest to prohibit drinking to address the problems associated with drunkenness, the state did not have a compelling interest in prohibiting Roman Catholics from using wine during communion.

(Substituting Rational Basis Review for Strict Scrutiny Reduced the Level of Protection for Religious Freedoms)

In *Smith*, the Supreme Court **reversed centuries of jurisprudence** concerning the proper level of protection for religious freedoms. In *Smith*, the Supreme Court rejected strict scrutiny as the proper level of protection for religious freedoms and replaced it with a "**Rational Basis Review.**" Under a rational basis review, a governing body only needs to show that it had "**a**" reason to pass a law that substantially burdens a person's religious freedom. The reasons do not have to be good reasons, nor compelling. **A rational basis review is the lowest level of review by a court.** As most constitutional scholars would agree, applying a rational basis review to a law means that the law will be sustained, **and the persons whose religious freedoms have been substantially burdened, will lose.**

In response to the Supreme Court's decision in *Smith*, Congress passed the Religious Freedom and Restoration Act to restore strict scrutiny review whenever a person's religious freedoms have been substantially burdened by a law. RFRA had an incredible amount of public support. RFRA passed unanimously in the U.S. House of Representatives and passed the Senate by a vote of 97-3. RFRA was then signed into law by President Clinton.

Despite the broad public support behind RFRA, the Supreme Court struck down RFRA on federalism grounds in the case of *City of Boerne v. Flores*. The Supreme Court stated that Congress did not have the power to force RFRA onto the individual states. Two main outcomes resulted from *Boernes*. **First**, the Federal RFRA **was** Constitutional as it applied to federal agencies and federal law. The Supreme Court said only that Congress lacked the power to force states to adopt strict scrutiny review. It did not say that Congress lacked the power to force federal agencies themselves to the higher standard. **Second**, the states were free to pass and adopt their own RFRA's. Since 1997, many states have adopted RFRA for their state including Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, New Mexico, Rhode Island, South Carolina, and Texas. These states have taken the lead by the Supreme Court and have restored adequate protection for religious freedoms by adopting a state RFRA. **No state has had their RFRA struck down as unconstitutional.**

The Kansas Legislature has an opportunity to make a landmark decision. I do not use the term landmark loosely, but deliberately. First, RFRA has brought together under one bill such groups as the ACLU and the religious right. Any bill that can bring these two groups together must be considered a landmark achievement. While, I make light of the polarity of these two groups, the fact that RFRA has received such widespread support indicates the broad public support behind this bill. I would like to direct your attention to Representative Williams' handout that lists the members of a coalition that worked to get RFRA passed. This coalition includes the ACLU, Americans United for Separation of Church and State, American Jewish Congress, Christian Legal Society, National Association of Evangelicals, National Council on Islamic Affairs, and

the Native American Rights Funds. **Religious freedom is a fundamental right that all Americans treasure.**

Religious freedom is unmistakably an American invention in the realm of world governments. Before America instituted the principle of religious freedom as a governing principle, this right did not exist in any government in recorded history. The first colonists came to this continent in large part in search of religious freedom. Religious freedom is more American than apple pie and baseball. The wide support that RFRA has received by the American public underscores this concept.

Secondly, RFRA is a landmark bill because it guarantees to current Kansans and future generations of Kansans, that religious freedom will be protected in Kansas.

In Summary

In a nutshell, let me tell you what RFRA is all about. RFRA is about making a governing body come to the bargaining table with a religious group before that governing body passes a law that will substantially burden the group's religious beliefs. Governing bodies have awesome power over the common individual. Governing bodies can criminalize conduct that they do not wish to continue. Governing bodies can tax conduct that they wish to discourage. Generally speaking, there is no real limit on a government's ability to regulate a person's conduct. The only real limit on a government is that the government cannot easily take away a person's **fundamental rights** as those rights are articulated in the United States Constitution and the Kansas Constitution. Before a government takes away a person's fundamental rights, the proposed law must pass strict scrutiny--it must serve a compelling governmental interest and be narrowly tailored to achieve that interest. In *Smith*, the Supreme Court essentially **removed religious freedoms from the list** of fundamental rights deserving of strict scrutiny review. Instead, the Supreme Court made religious freedom a **secondary**, not a primary right. RFRA **restores** religious freedom as a fundamental right and thus it requires that a governing body have a very good, or compelling, reason before it passes a law that substantially burdens a person's religious beliefs and practices.

Without RFRA Roman Catholic hospitals **could** be forced to provide abortions. Without RFRA, bible studies in private homes **could** be prohibited. Without RFRA, ministers of the gospel **could** be forced to obtain state licenses. Without RFRA, churches **could** be forced to employ people as ministers who openly engage in conduct that is sinful according to the church's doctrine.

Religious freedom is a fundamental right, and has been since our founding fathers guaranteed its protection in the very first amendment to the U.S. Constitution. As it stands today without RFRA, religious freedom is a "homeless" right that is without shelter for protection. **RFRA provides that shelter to protect religious freedoms from legislation, ordinances, and other laws that substantially burden religious beliefs.**

Religious Freedom Restoration Act

Components of RFRA:

- A government may not substantially burden a person's exercise of religious freedom or the function of a religious organization unless:
 - The burden is in furtherance of a compelling governmental interest, and
 - The burden is the least restrictive means of furthering that compelling governmental interest.

Congressional Action:

- 1993 - United States House of Representatives passed RFRA unanimously.
- 1993 - United States Senate passed RFRA 97-3.
 - Senators voting no: Byrd, D-WV; Helms, R-NC; Mathews, D-TN
- 1993 - Signed into law by President Clinton

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 Adventists
Guru 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

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.

Christian Science Committee on Publication For Kansas

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To: House Committee on Federal and State Affairs

Re: House Bill No. 2040

I'm here in support of House Bill 2040.

Our nation has been strong because of our ability to balance a variety of rights and interests. The religious world was turned upside down in the 1990s when the U.S. Supreme Court lowered the standard required for government intervention in religious practice, thus appearing to upset that balance. Congress responded to that change by passing the religious freedom restoration act which was subsequently found unconstitutional. Congress then passed a second act which remains in place.

But it wasn't just Congress that passed these acts. A large coalition was formed, crossing political party and denominational lines, to work together to find acceptable wording. It was not an easy task, but it was done – twice.

There is a need for similar state legislation addressing these same issues. This bill could meet the need in Kansas by restoring the balance of rights and interests thought to exist before the recent Supreme Court action.

My recollection of the restoration process at the federal level is that it was opposed by some corrections officials who expected inmates to use it to disrupt the order in their facilities. And, some questions arose from others who thought it might impede the providing of medical care to children whose parents objected to that care for religious reasons.

It is my understanding that the federal acts were able to answer these questions responsibly. It has been my own experience that it is not difficult for a state to prove that it has a compelling interest in the welfare of children for the purpose of obtaining court-ordered medical care. My experience with correctional facilities is more limited. I did spend most of one day in the Lansing facility on a tour in 1959; however, I was allowed to leave at the end of the day.

I will gladly do my best to answer questions or gather information that may be helpful as this bill advances.



Keith R. Landis
Committee on Publication
for Kansas

Hs Federal & State Affairs

Date: 2-5-03

Attachment # 2

Page 1

KANSAS


KANSAS DEPARTMENT OF CORRECTIONS
ROGER WERHOLTZ, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

Memorandum

DATE: February 5, 2003

TO: House Federal and State Affairs Committee

FROM: Roger Werholtz
Secretary of Corrections 

RE: HB 2040

HB 2040 provides for the enactment of the Religious Freedom Restoration Act. HB 2040 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 2040 apply to statutes and actions even if the governmental rule is one of general application. The religious activities covered by HB 2040 need not be mandated by the person's religion or be central to a larger system of religious beliefs. HB 2040 provides for the recovery of monetary damages, attorney's fees and costs. HB 2040 provides an exception to the application of the "compelling interest" test in regard to persons confined in correctional institutions, juvenile facilities, and local detention facilities. However, HB 2040 does not provide an exemption from the application of the "compelling interest" test to released offenders under the Department of Correction's supervision. Additionally, HB 2040 would subject the Department to the "compelling interest" test in the management of Department staff and equipment.

A similar proposal was introduced during the 2002 Legislative Session in HB 2782. During the 2002 session, the Department of Corrections presented testimony in regard to the uncertainty and interjection of judicial intervention upon the daily operation of correctional facilities. At that time, the Department requested that HB 2782 be amended. At the hearing on HB 2782, the Department was requested to provide an amendment that would address the Department's concerns. In response, the Department prepared a proposed amendment to HB 2782 which provided an exception to the "compelling interest test" in regard to the operation and management of the Department of Corrections, including actions taken by persons acting on the Department's behalf pursuant to contract.

The Department appreciates the response to its concerns provided by the exemption in HB 2040 relative to persons in custodial confinement. However, the same issues that caused concern to the Department relative to inmates are also applicable to offenders under release supervision in the community. As of February 3, 2003, the Department has under its supervision over 4,000 released offenders. The exemption provided for by HB 2040 does not include those released offenders.

The Department has been subject to litigation brought by released offenders who claim that their rights under the 1st Amendment of the United States Constitution to the free practice of religion are violated by the Department's rules of general application. These claims have arisen in regard to among other things, participation in Sexual Abuse Treatment while on release supervision. Offenders convicted of sex offenses have claimed that discussions regarding sexual abuse, and the use of polygraph and plethysmograph testing violates their religious rights. The Department also provides supervision of civilly committed sexually violent predators on behalf of the Kansas Department of Social and Rehabilitative Services when those persons are released from a secure treatment facility.

Just as was described by the Department last year regarding the effect of HB 2782 on the decisions that correctional officials confront daily in regard to the scheduling and management of an Islamic call to prayer, without an exemption, the "compelling interest-least restrictive manner" test of HB 2040 subjects the management and supervision of released offenders to the same uncertainty and judicial intervention rejected by the United States Supreme Court in O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) and Turner v. Safley, 482 U.S. 78 (1987).

Finally, HB 2040 impacts the management of the Department's personnel. The Department of Corrections, due to its operational needs, must assign staff to its facilities on a 24 hour basis, seven days a week. Additionally, correctional officers are trained in the use of firearms and are required to use deadly force when necessary. A religious belief regarding work on the Sabbath, or the use of firearms, even if not compulsory or central to the officer's larger system of religious beliefs, would trigger judicial review into whether the Department's staffing and firearms policies were the least restrictive possible.

The Department urges that HB 2040 be amended to provide an exception for the management and supervision of all offenders as well as the operation of its facilities. A copy of a proposed amendment is attached.

HOUSE BILL No. 2040

By Committee on Federal and State Affairs

1-21

9 AN ACT enacting the religious freedom restoration act.

10
11 WHEREAS, It is the finding of the Legislature that the framers of the
12 Kansas Constitution, recognizing free exercise of religion as an unalien-
13 able right, secured its protection in the Kansas Constitution; and

14 WHEREAS, Laws which are "neutral" toward religion may burden
15 the free exercise of religion just as laws intended to interfere with the
16 free exercise of religion; and

17 WHEREAS, Governments should not substantially burden the free
18 exercise of religion without compelling justification; and

19 WHEREAS, The compelling interest test as set forth in certain federal
20 court rulings is a workable test for striking sensible balances between
21 religious liberty and competing prior governmental interests; and

22 WHEREAS, It is the intent of the Legislature of the State of Kansas
23 to establish the compelling interest test as set forth in *Sherbert v. Verner*,
24 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), to
25 guarantee the application of the test in all cases where free exercise of
26 religion is substantially burdened, and to provide a claim or defense to
27 persons whose religious exercise is substantially burdened by government:
28 Now, therefore,

29 *Be it enacted by the Legislature of the State of Kansas:*

30 Section 1. As used in this act:

31 (a) "Demonstrates" means to meet the burden of going forward with
32 the evidence and of persuasion.

33 (b) "Exercise of religion" means an act or refusal to act that is sub-
34 stantially motivated by a religious belief, whether or not the religious
35 exercise is compulsory or central to a larger system of religious belief.

36 (c) "Government" or "state" includes any branch, department,
37 agency or instrumentality of the state; any state official or other person
38 acting under color of law of the state; and any county, special district,
39 municipality or any other subdivision of the state.

40 Sec. 2. (a) The government shall not substantially burden a person's
41 exercise of religion, even if the burden results from a rule of general
42 applicability, except that government may substantially burden a person's
43 exercise only if:

1 ~~(1) The person is in custody in a correctional institution, as defined~~
2 ~~in K.S.A. 75-5202, and amendments thereto; juvenile correctional facility~~
3 ~~or juvenile detention facility, as defined in K.S.A. 38-1602, and amend-~~
4 ~~ments thereto; community corrections facility for detention or confine-~~
5 ~~ment of offenders; or city or county jail; or~~

6 (2) the government demonstrates that application of the burden to
7 the person is in furtherance of a compelling governmental interest and is
8 the least restrictive means of furthering that compelling governmental
9 interest.

10 (b) A person whose religious exercise has been burdened in violation
11 of this section may assert that violation as a claim or defense in a judicial
12 proceeding and obtain appropriate relief.

13 Sec. 3. The prevailing party in any action or proceeding to enforce a
14 provision of this act is entitled to reasonable attorney fees and costs to be
15 paid by the government.

16 Sec. 4. (a) This act applies to all state law, and the implementation
17 of that law, whether statutory or otherwise and whether adopted before
18 or after the effective date of this act.

19 (b) State law adopted after the effective date of this act is subject to
20 this act unless such law explicitly excluded such application by reference
21 to this act.

22 (c) Nothing in this act shall be construed to authorize the government
23 to burden any religious belief.

24 Sec. 5. This act shall take effect and be in force from and after its
25 publication in the statute book.

The burden is related to the management and operation of the department of corrections;



League of Kansas Municipalities

To: House Federal and State Affairs Committee
From: Kim Gulley, Director of Policy Development & Communications
Date: February 5, 2003
Re: HB 2040

Thank you for allowing me to appear today on behalf of the 556 member cities of the League of Kansas Municipalities (LKM). Because HB 2040 includes municipalities in the definition of "Government" or "state," this legislation has a potential impact in all of the 626 cities in Kansas. We appear today in opposition to this bill and offer the following concerns for your consideration:

- **Pending Litigation.** The U.S. Congress has been very active in recent years in passing legislation concerning religious rights and freedoms. The result of the federal activities has been a flurry of litigation in the area. I have attached information from a website which promotes one of the federal acts, Religious Land Use and Institutionalized Persons Act (RLUIPA). As of this morning, the site listed 28 pending cases and 11 potential cases concerning the effect of the federal act on local land use requirements. The federal law in this area has not yet been settled and there is a great deal of confusion as to what is allowed under current federal law. We believe that HB 2040 would add a second layer of confusion which is unwarranted at this time. It is important to let the federal cases run their course in order to determine exactly what the current scope of authority for the State of Kansas and municipalities is in this area.
- **Preemption.** HB 2040 prohibits any action by a city which "substantially burdens" a person's exercise of religion, "even if the burden results from a rule of general applicability." We believe that this preemption goes beyond the current scope of federal preemption in the area and would, therefore, erode the constitutional Home Rule authority of cities. Because the term "substantially burden" is not specifically defined in HB 2040, it would require a series of court cases in this state to determine exactly what is allowed under the act.
- **Litigation.** Section 3 of HB 2040 requires the government to pay attorneys fees and costs. The requirement for the payment of attorneys fees is not usually the rule in Kansas. Further, this section requires the government in question to pay the fees, even if the government prevails in the litigation. We believe that this will result in a tremendous flurry of litigation, at great expense to the taxpayers of Kansas.

For the reasons enumerated above, LKM stands opposed to HB 2040 at this time and respectfully requests that you do not recommend it favorably for passage. Again, thank you for the opportunity to appear before you today. I would be happy to answer questions at the appropriate time.

Hs Federal & State Affairs

Date: 2-05-03

Attachment # 4

Page 1

RLUIPA**Background****The Act****Court Cases****Law Review
Articles****News Media****Home**

*An Internet
resource
provided by The
Becket Fund for
Religious Liberty*

RLUIPA**Religious Land Use and Institutionalized Persons Act****Court Cases**

As lawsuits are filed under provisions of RLUIPA, we'll provide information about them, and about federal, state and administrative decisions interpreting the Act.

Cases Decided:**Religious Land Use**

- *Calvary Chapel O'Hare v. Village of Frankin Park*
- *Christ Universal Mission Church v. City of Chicago*
- *Church of Jesus Christ of Latter Day Saints v. Town of Harrison*
- *Dunamis Community and Outreach Ministries v. Volusia County*
- *Fifth Avenue Presbyterian Church v. City of New York*
- *Foothills Christian Ministries v. City of El Cajon*
- *Freedom Baptist Church v. Township of Middletown*
- *Haven Shores Community Church v. City of Grand Haven, Michigan*
- *Greenwood Community Church v. City of Greenwood Village*
- *Living Waters Bible Church v. Town of Enfield*
- *Oblates of St. Joseph v. Mary D. Nichols, et al.*
- *Pine Hill Zendo, Inc. v. Town of Bedford Board of Zoning Appeals*
- *Refuge Temple Ministries of Atlanta v. City of Forest Park*
- *Shepherd Montessori Center Milan v. Ann Arbor Charter Township*
- *Trinity Baptist Church, et al., v. City of Newport, Kentucky*
- *Unitarian Universalist Church of Akron v. City of Fairlawn*

Institutionalized Persons:

- *Kikumura v. Hurley*
- *Love v. Evans*
- *Mayweathers et al. v. Terhune et al.; Mayweathers et al. v. Newland et al.; Mayweathers et al. v. Sutton et al.*

Cases Pending:**Religious Land Use**

- Castle Hills First Baptist Church v. City of Castle Hills
- Cedar Rapids Zen Center, et al. v. City of Cedar Rapids
- C.L.U.B., et al., v. City of Chicago (on appeal)
- Congregation Etz Chaim v. City of Los Angeles
- Congregation Kol Ami v. Abington Township (on appeal)
- Cottonwood Christian Center v. City of Cypress
- Court Street Christian Church of Salem, Oregon v. City of Salem
- Elsinore Christian Center v. City of Lake Elsinore
- Falwell v. City of Lynchburg
- First Congregational Church of Hamilton
- Gallart v. City of Frederick and Frederick Presbyterian Church
- Grace United Methodist Church v. City of Cheyenne
- Hale O Kaula Church v. Maui Planning Commission, et al.
- House of Fire Christian Church v. Clifton, NJ
- Hyde Park Baptist Church v. City of Austin, Texas
- Lighthouse Institute for Evangelism v. City of Long Branch
- Maranatha High School, et al. v. City of Sierra Madre
- Missionaries of Charity, Brothers v. City of Los Angeles
- Murphy v. Zoning Commission of the Town of New Milford
- New Life Church Hilliard and Makoy Center, Inc. v. City of Hillard, et al.
- Primera Iglesia Bautista Hispana v. Broward County
- Redwood Christian Schools v. County of Alameda, et al.
- Robinson v. City of Colorado Springs
- San Jose Christian College v. City of Morgan Hill (on appeal)
- Second Baptist Church of Homestead v. Borough of West Mifflin
- Sts. Constantine & Helen Greek Orthodox Church v. City of New Berlin
- Temple B'nai Sholom v. City of Huntsville, et al.
- Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston

Institutionalized Persons

- Cancel v. Mazzuca
- Charles v. Verhagen (on appeal)
- Cotton v. Florida Department of Corrections
- Johnson v. Martin (formerly Jenkins v. Martin)
- Madison v. Riter
- Miller v. Wilkinson (on appeal)
- Ulmann v. Merrimack Jail Superintendent, et al.
- Williams v. Bitner

Cases Resolved Prior to Litigation:

Religious Land Use

- Come As You Are Fellowship

- Iglesia Misionera
- Holy Apostles Hermitage
- Zoroastrian Association of Metropolitan Washington

Institutionalized Persons:

- (none reported)

Potential Litigation

Religious Land Use:

- Abundant Blessings Family Worship Center: a "business?"
- Boone County, Indiana refuses exeption from plan requirements for churches
- Catholic Life Teen group blocked from building a religious camp in Arizona
- Grace Centers of Hope (Pontiac, Michigan) denied permission to expand homeless shelter
- Hallandale Beach, Florida: Miami suburb considers banning churches along South Federal Highway
- King County (Washington) proposal to limit new church construction
- New Song Community Church (Michigan) seeks permit to convert a bar into a church
- Praise Christian Center (California) ordered out of warehouse for lack of permits
- Rabbi Josef Konikov cited by officials in Orange County, Florida for holding prayer services in his home
- Sephardic Community of Greater Boston faces opposition to construction of new synagogue
- Tri-City Union Gospel Mission challenges proposed Pasco, Washington zoning ordinance that would bar churches from central business district

Institutionalized Persons:

- People v. Johnson