A Background Paper Prepared by
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Digest*: This paper considers whether some form of legislative or executive branch action appears necessary following the controversial decision of the U.S. Supreme Court last June invalidating the federal Religious Freedom Restoration Act of 1993 ("RFRA") in the case of Boerne v. Flores. RFRA had imposed the toughest constitutional standard in the law, known as the "compelling interest" test, to maximize religious protection in religious expression cases. Since the High Court held RFRA invalid, several legislative proposals have been introduced in the California Legislature to enact a state version of RFRA, either by amending the state Constitution or by placing aversion of RFRA instate statute. This paper examines the arguments for and against these proposals in light of the pertinent federal and state case law. The paper recounts that most constitutional experts appear to conclude that it would be both unwise and unnecessary for California to amend its unique constitutional provisions protecting religious expression without clear evidence that such bold action is needed. However, these legal scholars have differing perspectives whether any new statutory protections or other government actions in this area are needed or warranted at this time.*

1. INTRODUCTION

On June 25, 1997, the United States Supreme Court issued a landmark decision invalidating the federal Religious Freedom Restoration Act of 1993 (RFRA) in the case of *City of Boerne v. P.F. Flores, Archbishop of San Antonio* (June 25,1997) 117 S.Ct. 2157, (hereafter *"Boerne,"* pronounced "Bernie"). In direct response to this controversial *Boerne* decision, Assembly Constitutional Amendment (ACA) 24 was introduced by Assemblyman Joe Baca on June 30, 1997. Assemblyman Baca intended this measure to place RFRA's religious expression protections into the California Constitution, in order to ensure Californians enjoy full protection of their religious beliefs.

ACA 24 was originally scheduled to be heard by the Assembly Judiciary Committee on August 26, 1997. However, at the time of the hearing Assemblyman Baca, at the urging of several Committee members, agreed to make ACA 24 a two-year bill to allow the Committee to more fully explore the important constitutional issues raised by the legislation at an interim hearing. Assemblyman Baca subsequently introduced AB 1617, which is a state statutory version of the federal RFRA. Following is a discussion of some of the key issues, and history, triggered by legislative proposals to strengthen religious expression in California.

II. THE LAW REGARDING RELIGIOUS FREEDOM

A. OVERVIEW OF FEDERAL LAW

Since ACA 24 and AB 1617 were introduced in direct response to the United States Supreme Courts *Boerne* decision, and since the courts have relied heavily on federal jurisprudence in interpreting the state constitution's religion clauses, it is important to briefly review the evolution of federal law regarding the federal Free Exercise Clause.

1. United States Constitution's Free Exercise Clause. The Free Exercise Clause of the First Amendment-of the U.S. Constitution has been made applicable to the states by incorporation into the Fourteenth Amendment (see *Cantwell v. Connecticut* (1940) 310 U.S. 296,303). The Free Exercise Clause provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …." (U.S. Const., Amendment 1.)

The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrines one desires. Thus, the free exercise clause of the First Amendment excludes all "governmental regulation of religious beliefs as such." (*Sherbert v. Vernier* (1963) 374 U.S. 398, 402.) The government may not compel support of religious beliefs (*Torcaso v. Watkins* (1961) 367 U.S. 488), punish the expression of religious doctrines it believes to be false (*United States v. Ballard* (1944) 3 22 U.S. 78), impose special disabilities on the basis of religious views or religious status (*McDaniel v. Paty* (1978) 435 U.S. 618), or lend its power to one or the other side in controversies over religious authority or dogma. (*Serbian Eastern Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696.)

2. Free Exercise Clause Challenges to Laws of General Applicability. The bulk of recent case law involving the Free Exercise Clause, including the high court's latest decision in *Boerne*, involve challenges to so-called "neutral laws of general applicability," i.e., laws, such as zoning ordinances, the principal purpose of which is unrelated to religion, but which are alleged to incidentally impinge on the free exercise of religion. A brief review of these federal cases is set out below.

a. Early Cases. In the earliest cases arising under the federal Free Exercise Clause, the high court held that, while freedom of religious hdkf was absolutely protected, the government might regulate conduct. The fact that a generally applicable law incidentally burdened a person's right to freely exercise his or her religion was not considered a valid objection to the laws enforcement. (E.g., *Reynolds v. United States* (1878) 98 U.S. (8 Otto) 145, 167 [upholding application of statute banning polygamy to person whose religious beliefs required polygamous marriages].)

b. Compelling Interest Test Adopted. In the late 1960's, the United States Supreme Court came to view the distinction between "belief" and "conduct" as an insufficient basis for resolving conflicts between religious exercise and

generally applicable laws. Thereafter, instead of simply distinguishing between laws affecting religious belief and conduct, the court developed a new balancing test where it weighed the burden on religious exercise against the governments interest in applying the law. If the burden was substantial and outweighed the government's interest, the government was required to accommodate the religiously motivated conduct by exempting it from the law. (E.g., *Sherbert*, supra, 374 U.S. at 406-409 [state's interest in avoiding fraudulent claims for unemployment compensation did not justify denying benefits to a person who quit his job because his religion prohibited working on Saturday]; *Wisconsin v. Yoder* (1972) 406 U.S. 205, 213-236 (hereafter "Yoder") [state's interest in compulsory education did not justify requiring Amish parents to send their children to public school beyond the eighth grade over the parents' religious objections].)

If, on the other hand, the government's interest was sufficiently compelling to outweigh the burden on religious exercise and could not be achieved by less restrictive means, no accommodation was required. An accommodation was also not required if the burden on religious exercise was not considered "substantial." This approach to cases involving generally applicable laws that incidentally burdened religious exercise -balancing the state's interest against the burden on free exercise -- came to be known as the "compelling interest" test after the language used in *Sherbert*, 374 U.S. at 404.

c. Compelling Interest Test Abandoned in Smith-U.S. The United States Supreme Court used the compelling interest test in analyzing religious exercise cases for nearly 30 years. However, in 1990, the Rehnquist Court in the case of *Employment Division, Oregon Dept. of Human Resources v. Smith*, 494 U.S. 872 (hereafter *"Smith-U.S."*), in a 5-4 decision, abandoned the compelling interest test for deciding religious-based challenges to so-called neutral laws of general applicability. Although the Smith-U.S. Court did not explicitly name the new test it was applying, presumably the Court was using the less stringent "rational basis" test. The rational basis test of constitutionality is less protective of religious freedom and practice since it is much more likely that laws of general applicability that incidentally burden a person's free exercise of religion will be upheld under this test.

d. Facts of *Smith-U.S.* The *Smith-U.S.* case was brought by employees of a private drug rehabilitation program in Oregon who were fired from their jobs and denied unemployment insurance benefits because they had used the drug peyote for sacramental purposes at a ceremony of the Native American Church. The employees challenged the denial of benefits as a violation of the Free Exercise Clause of the United States Constitution.

Justice Scalia authored the Supreme Court's majority opinion, which stated: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." (494 U.S. at 878-879.) The Court held that a state might exclude from its drug laws those who ingest various drugs incidental to some religious practice, but it is not constitutionally required to make such an exception. (*Id.*, at 890.)

In rejecting the compelling interest balancing test, the Supreme Court explained that:

> "[G]overnment's ability to enforce generally applicable prohibitions of socially harmful conduct ... cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. To make an individual's obligation to obey such a law contingent upon the laws coincidence with his religious beliefs, except where the State's interest is 'compelling' ... contradicts both constitutional tradition and common sense." (494 U.S. at 885, internal quotation marks and citation omitted.)

The Court further stated that continued application of the compelling interest test in Free Exercise cases would produce an unacceptable anomaly in the law: a constitutional right to ignore neutral laws of general applicability. (*Id.*, at 886.)

Many in the academic, legal and religious communities criticized the U.S. Supreme Court's reasoning in *Smith-U.S.*, finding the Court's full-scale rejection of the long-standing compelling interest test and application of the lesser rational basis test providing insufficient protection for religious freedom and practice. Members of Congress soon joined in the chorus, calling the *Smith-U.S.* decision an "infamous, disastrous, unfortunate, mischievous, dastardly, and ill-advised opinion that should and must be 'overruled.'" (See E. Gressman & A. Cannella, *The RFRA Revision of the Free Exercise Clause* (1996) 57 Ohio St. Law Journal 65, 93.) This disagreement culminated in the passage of RFRA, as discussed below.

3. Congress Seeks To Restore "Compelling Interest" Test by Adopting RFRA. In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA)(42 U.S.C. section 2000bb et seq.) in direct response to the Supreme Court's decision in Smith-U S. A broad and unusual coalition of over sixty religious and civil liberties groups, spanning the political and theological spectrum, came together for over two years to support the passage of RFRA.

RFRA's specific intent to "overrule" the Supreme Court's *Smith-US*. decision and restore the compelling interest test to maximize religious expression protections was contained in the Act's Congressional findings:

> "(1) [T]he framers of the Constitution, recognizing free exercise of religion as an inalienable right, secured its protection in the First Amendment to the Constitution;
>
> (2) laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
>
> (3) governments should not substantially burden religious exercise without compelling justification;
>
> (4) in *Employment Division v. Smith*, 494 U.S. 872, the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and,
>
> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." (42 U.S.C. section 2000bb(a).)

Similarly, RFRA's stated purposes were:

> "(1) [T]o restore the compelling interest test as set forth in *Sherbert* (citation) and *Yoder* (citation) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and,
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government." (42 U.S.C. section 2000bb(b).)

RFRA prohibited "[g]overnment" from "substantially burden[ing]" a person's exercise of religion, even if the burden results from a rule of general applicability, unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and, (2) is the least restrictive means of furthering that compelling governmental interest." (42 U.S.C. section 2000bb1.) The Act's mandate applied to any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States," as well as to any "State, or ... subdivision of a State." (42 U.S.C. section 2000bb2(l).) The Act's universal coverage was confirmed in section 2000bb3(a), which states that RFRA "applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [RFRA's enactment]."

4. Supreme Court Finds RFRA Unconstitutional This Year in *Boerne*. For three years, RFRA's "compelling interest" test was the controlling federal law for religious exercise cases. However,

reflecting the topsy-turvy history of this constitutional issue, on June 25, 1997, the U.S. Supreme Court, in a 6-3 decision, invalidated RFRA in the case of *City of Boerne v. Flores, supra*. The Court held that the Act exceeded Congress' authority under Section 5 of the Fourteenth Amendment. The case involved a challenge to a decision by local zoning authorities in a Texas municipality denying a church a building permit.

a. The Facts in *Boerne*: The *Boerne* Court surnmarized the facts in the case as follows:

> "Situated on a hill in the City of Boerne, Texas, some 28 miles northwest of San Antonio, is St. Peter Catholic Church. Built in 1923, the church's structure replicates the mission style of the region's earlier history. The church seats about 230 worshipers, a number too small for its growing parish. Some 40 to 60 parishioners cannot be accommodated at some Sunday masses. In order to meet the needs of the congregation the Archbishop of San Antonio gave permission to the parish to plan alterations to enlarge the building. A few months later, the Boerne City Council passed an ordinance authorizing the city's Historic Landmark Commission to prepare a preservation plan with proposed historic landmarks and districts. Under the ordinance, the Commission must preapprove construction affecting historic landmarks or buildings in a historic district.
>
> Soon afterwards, the Archbishop applied for a building permit so construction to enlarge the church could proceed. City authorities, relying on the ordinance and the designation of a historic district (which, they argued, included the church), denied the application. The Archbishop brought this suit challenging the permit denial... ."

b. The *Boerne* Court's Holding: The main focus of the Boerne Court's decision was on the scope of Congress' authority to enact RFRA. In reaching its decision, the court compared RFRA and the Voting Rights Act, noting that:

> "RFRA's legislative record lacks examples of modem instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years. ... Rather, the emphasis of the hearings was on laws of general applicability which place incidental burdens on religion. ... Congress' concern was with the incidental burdens imposed, not the object or purpose of the legislation."

The *Boerne* Court then turned its attention to what it found to be the overly broad scope of RFRA:

> "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. ..."

The *Boerne* Court went on to explain why it concluded RFRA's compelling interest test, otherwise known as the "substantial burden" test, placed too great a burden on modem governmental entities to justify reasonable laws:

> "RFRA's substantial burden test ... is not even a discriminatory effects or disparate impact test. It is a reality of the modem regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. ..."

C. Why RFRA Violated Fourteenth Amendment: The *Boerne* Court concluded by holding that Congress had exceeded its powers under the Fourteenth Amendment in enacting RFRA:

> "It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference. Katzenbach v. Morgan, 384 U.S. at 65 1. Congress' discretion is not unlimited, however, and the courts retain the power, as they have since Marbury v. Madison, to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."

5. Congress Reacts to *Boerne* Decision. Following the Supreme Court's holding in *Boerne* that Congress had exceeded its authority in enacting RFRA, members of Congress of all political stripes reacted strongly. For example, Senator Orrin Hatch, Chair of the United States Senate Judiciary Committee, commented that: "[The *Boerne*] decision shows the Court's blindness to a pervasive trend in society, which does not just discriminate against, but is expunging, religion. The Court appears to have left some doors open, but we will search all options open to us, and we'll work to ensure that the promises of the freedom to worship God according to the dictates of our own conscience, a founding principle of this nation, are real and realized for today's and tomorrow's citizens." A number of other Congressional members joined in Senator Hatch's consternation.

6. President Clinton Reacts to *Boerne* Decision. On August 14, 1997, President Clinton appeared to join Congress' concern about the Court's *Boerne* decision by issuing new guidelines on freedom of religious expression for federal offices. According to the President, the guidelines will ensure that federal employees and employers will respect the rights of those who engage in religious speech as well

as those who do not. The guidelines were developed in consultation with many of the religious organizations that made up the federal RFRA coalition.

B. OVERVIEW OF CALIFORNIA LAW

A determination of the advisability of amending California's Free Exercise Clause, as proposed in ACA 24, or passing a state statutory version of RFRA, as proposed in AB 1617, necessitates a review of California's own unique religion clauses and the California courts' interpretation of these provisions since, as noted below, it is the exclusive province of the state courts to say what the law is in this area.

1. California's Free Exercise Clause. Article I, section 4, of the California Constitution is the state's Free Exercise Clause. It provides, in pertinent part:

> "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace and safety of the State. The Legislature shall make no law respecting an establishment of religion." (Cal. Const., art. 1, § 4.)

2. The Unique Text of California's Free Exercise Clause. The free exercise provision of the California Constitution sets forth a guarantee of religious liberty that is textually distinct from the free exercise clause of the First Amendment to the federal Constitution. As noted above, the First Amendment states that government shall "make no law prohibiting the free exercise" of religion. (U.S. Const., Amend. I) In deliberately different language, the California Constitution declares that "[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed. ***This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace and safety of the State."*** (Cal. Const., art. I, § 4, emphasis added)

3. The Unique Nature of California's "No Preference" Clause. As noted above, both the federal and state Constitutions guarantee the freedom to practice one's own form of religion and forbid governmental involvement in the establishment of religion. However, the California Constitution, while mandating separation of religion and state in language virtually identical to the federal clause, additionally proclaims, without federal parallel, that: "Free exercise and enjoyment [of religion] <u>without</u> discrimination or <u>preference</u> are guaranteed." (Cal. Const., art. I, section 4, emphasis added.) "Thus, in our state, preference is forbidden even when there is no discrimination, leading California courts to suggest that this clause is more protective of the separation [of church and state] principle than the federal guarantee." (*Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal.App.3d 130, 145 (citations omitted).)

In *Sands v. Morongo Unified School District* (1991) 53 Cal.3d 863, Justice Mosk, in his concurring opinion, states the preference prohibition this way:

> [T]he preference clause seeks to prevent government from giving any advantage to religion in California. The relevant inquiry is whether government has granted a benefit to a religion or religion in general that is not granted to society at large. Once government bestows that differential benefit on religion, it has acted unconstitutionally in this state." (*Id*., at 911-912, emphasis in original.)

In this regard, the Attorney General of California has observed that "[i]t would be difficult to imagine a more sweeping statement of the principle of governmental impartiality in the field of religion" than that found in the 'no preference' clause." (25 Ops.Cal.Atty.Gen. 316, 319 (1955).) It is unclear what effect, if any, a constitutional amendment like ACA 24 would have on the state's "no preference" line of cases.

4. California's Free Exercise Clause Appears to Require Application of the "Compelling Interest" Test By Its Own Terms and History. By its terms, the second sentence of California's Free Exercise provision (emphasized above) expressly includes not only protection for religious beliefs, but also for religious acts. At the same time, this sentence also provides an explicit guide to interpretation and application of the section that is absent from the corresponding provision of the First Amendment in the U.S. Constitution. The California Free Exercise Clause already imposes ***express*** limitations on the interests government may assert as sufficiently substantial to override the exercise of religious liberty. In California, religious practices are expressly protected so long as they are not considered to be "licentious or inconsistent with the peace or safety of the State."

California's Free Exercise Clause was adopted when the state was admitted in 1849. The delegates to the California Constitutional Convention of 1849 specifically debated the issue of exemptions for religious conduct from civil laws. The language that was ultimately adopted provides that, before the state could restrict a religious practice, it had to demonstrate that the practice was either licentious or endangered the peace or safety of the state. This appears to be far more protective of religious freedom than the position announced by the U.S. Supreme Court in *Smith-U.S*., which requires that liberty of conscience always yield to the state's general laws. A free exercise right which requires "judges [to] weigh the social importance of all laws against the centrality of all religious beliefs," rejected in *Smith-U.S*. (494 U.S. at 890), is precisely the task set for our courts by the framers of California's Constitution when they "put it in the power of [our] courts to decide whether the exercise of any particular religious belief is compatible with the public safety and morality or not." (Report of the Debates in the Convention of California on the Formation of the State Constitution in September and October, 1849 (1850) at p. 292.)

Since its adoption in 1849, California's Free Exercise Clause has undergone only one substantive revision. When California drafted and adopted its second constitution in 1879, it changed the free exercise provision to read that "the free exercise and enjoyment of religious profession and worship ... shall forever be guaranteed in this state," instead of the previous

phrase "allowed in this state." (3 Debates and Proceedings of the Constitutional Convention of the State of California Convened at the City of Sacramento, Saturday, September 28, 1878 (1880) at p. 1171.) This amendment effected a significant substantive change in the section, yet left in place the express limitations on religious conduct set out in Article 1, section 4 of the California Constitution.

By replacing the word "allowed" with the word "guaranteed," the delegates to the Constitution Convention made it plain that individual liberties are not granted by the state. They exist independent of the state's authority, and the state is charged with their protection. When a person claims a religious exemption under the California Constitution from a generally applicable law, the proper inquiry therefore is not by what right this person seeks exception, but by what right the government justifies a restraint on "inalienable rights." This amendment made it clear that the government must be "compelled" to demonstrate a strong interest in order to overcome the high position afforded religiously motivated liberty of conscience in our state's constitutional order.

5. The 1969 Constitutional Revision Commission Found "Compelling Interest" Test Required. In 1969, California established a Constitutional Revision Commission. As part of its task, the Commission reviewed the scope of rights included under Article I. The Background Study prepared by the Commission on the rights guaranteed by Article I included a discussion of the protection available under the religion clauses. *The Commission expressed its understanding that the rights established by section 4 were intended to be broader than those rights guaranteed under the First Amendment.* The basis of this conclusion was Article 1, section 4's specific language regarding "liberty of conscience."

> "Although California and federal standards in this area appear to be analogous, it might be argued that Section 4 offers broader protection because it specifically refers to 'liberty of conscience.'" (California Constitution Revision Commission, "Proposed Revision of the Cal. Const., Article 1, XX, XXII" (1971) Part V, p. 14 (hereafter "Const. Rev. Comm. Rep. Of 1971 ").)

Significantly, the Commission recognized that the proper analysis to be applied to a claim of violation of rights under this provision was the "compelling state interest" test. (M., at p. 13.) This acknowledgment rested on specific references to the California Supreme Court's decision in *People v. Woody* (1964) 61 Cal.2d 716, applying that test, and the textual constraints imposed by the language of Article I, section 4 itself. (Const. Rev. Comm. Rep. Of 1971 at pp. 12-13.)

When the Commission issued its report two years later, it emphasized that the rights granted under Article I, section 4, were not intended to be coextensive with the rights granted under federal law. "[T]he California Constitution is a prime manifestation of the obligation of California law to provide for its own citizens independent of Federal law." (Const. Rev. Comm. Rep. Of 1971 at p. 15.)

6. The 1974 Voter Reaffirmation of the State Free Exercise Clause. The recommendations of the Commission were presented to and approved by the voters in 1974. The continued independent vitality of California's Constitution was then assured through reaffirmation of Article I, section 4, as well as through the adoption by the voters at the same time of Article I, section 24, expressly providing that rights guaranteed under the California Constitution are independent of the federal constitution, which is discussed in the next section below.

Under established rules of initiative construction, the voters must be presumed to have intended Article 1, section 4, to have the same force and effect as in prior decisions of the California Supreme Court when they readopted it without change. (*People v. Mims* (1955) 136 Cal.App-2d 828, 831.) Thus, it would appear that the "compelling state interest" test has become firmly embedded as the rule governing California's free exercise analysis, independent of federal case law.

7. California Supreme Court's Affirmation That State Courts Have Right to Independently Determine Scope of State Free Exercise Clause. The California Supreme Court recently commented on the independence of the state's Constitution, and the right of our state courts to separately determine the scope of the state's distinct Free Exercise Clause:

> "[I]t is well established that the California Constitution 'is, and always has been, a document of independent force'... and that the rights embodied in and protected by the state Constitution are not invariably identical to the rights contained in the federal Constitution. ... California cases long have recognized the independence of the California Constitution ... mak[ing] clear that even when the terms of the [state] Constitution are textually identical to those of the federal Constitution, the proper interpretation of the state constitutional provision is not invariably identical to the federal courts' interpretation of the corresponding provision contained in the federal Constitution." (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 97 Daily Journal D.A.R. 10141, 10145-46 (Internal citations omitted).)

Thus, although federal cases may supply guidance for interpreting the Free Exercise Clause, California courts must independently determine its scope. (See *Sands v. Morongo Unified School District*, *supra*, 53 Cal.3d at 883; *Smith v. FEHC*, *supra*, 12 CalAth at 1177.) However, as discussed below, this is not an easy task since the California courts have relied heavily on federal jurisprudence in interpreting California's religion clauses. The California Supreme Court recently noted that "a search for the independent meaning of California Constitution, Article I, section 4, entails a certain amount of frustration because California courts have typically construed the provision to afford the same protection for religious exercise as the federal Constitution before [*Smith-U.S.*]. Indeed, our more recent cases treat the state and federal free exercise clauses as interchangeable [applying] to both the compelling state interest

test articulated in *Sherbert v. Verner, supra*, 374 U.S. 398, and *Wisconsin v. Yoder, supra*, 406 U.S. 205." (*Smith v. FEHC*, 12 Cal.4th at 1177-1178 (citations omitted).)

8. The Earlier Religion Cases in California Adopted Compelling Interest Test. Since 1858, the California Supreme Court has consistently applied what has become known as the "compelling interest" test to analyze, under our state Constitution, conflicts between individual religious liberty and general laws. In *Ex Parte Newman* (1858) 9 Cal. 502, for example, the Court implicitly relied on the "liberty of conscience" language of Article 1, section 4 to strike down a Sunday closing law. The Court construed the language of Article I, section 4 to be an express restraint on the authority of government to restrict the exercise of religious conscience by commanding religious observance on a particular day. *Id*., at 507.

In a series of cases since, the California Supreme Court consistently has applied a compelling state interest test to claims raised under the state Free Exercise Clause. See e.g., *Application of Dart* (1916) 172 Cal. 47; *Hardwick v. Board of School Trustees* (1921) 54 Cal.App. 696. Prior to 1940, at the time these early cases were decided, First Amendment free exercise rights had not been expressly recognized as incorporated by the Fourteenth Amendment against violations by the state. See *Cantwell v. Connecticut, supra*. Thus, the only source for this test in these initial "compelling interest" decisions must be the rights established by the California Constitution, not the U.S. Constitution.

Between 1940 (when *Cantwell* was decided) and 1990 (when *Smith-U.S*. was decided), the California Supreme Court had not been required to consider the -scope of protection for free exercise rights under California law separately from the expansive protection provided under federal law predating *Smith-U.S*. Thus, in *People v. Woody, supra*, while the Court applied a compelling state interest test to find prosecution of Native Americans for using peyote in a religious ceremony violated free exercise rights under both Article I, section 4 and the First Amendment, it did so with reliance primarily on federal case law and the test applied therein. 47 Cal.3d at 722; see also *Walker v. Superior Court* (1988) 47 Cal.3d 112, 139 [treating the compelling state interest test as identical in the two Constitutions, but relying solely on U.S. Supreme Court decisions for authority]; *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1112-1119 [applying federal balancing test and compelling state interest test analysis as a matter of state constitutional law]; *In re Arias* (1986) 42 Cal.3d 667, 692 [same].

9. California Supreme Court's Most Recent Free Exercise Clause Decision Did Not Reach Which Constitutional Test Applies. In 1996, the California Supreme Court issued its most recent decision involving the state's Free Exercise Clause and found there was no need to determine the continuing viability of the compelling interest test in religion cases. In the case of *Smith v. FEHC* (1996) 12 Cal.4th 1143, cert. denied 117 S.Ct. 2531 (1997) (hereafter *"Smith-Calif."*) a landlord refused to rent an apartment to an unmarried couple on the basis of her religious belief that having a sexual relationship outside of marriage was sinful. The couple filed complaints with the Fair Employment and Housing Commission (FEHC), in which they alleged that the landlord had unlawfully discriminated against them on the basis of their marital

status. The FEHC found that the landlord had violated various provisions of the Fair Employment and Housing Act (FEHA) and the Unruh Civil Rights Act, awarded the couple damages, ordered the landlord to cease and desist from discriminating on the basis of marital status, and ordered the landlord to post notices setting forth the provisions of FEHA. The Court of Appeal reversed, concluding that the state could not prevent the landlord from discriminating against unmarried couples, in view of the Free Exercise Clauses of the federal and state constitutions and RFRA.

The California Supreme Court in *Smith-Calif* reversed the appellate court's decision. After concluding that Ms. Smith had violated FEHA, the Court had to determine whether the state is required to exempt her from that law to avoid burdening her exercise of religious freedom. As the Court noted, Smith's claim to an exemption implicated, at that time, three areas of the law: the First Amendment to the United States Constitution, RFRA, and the Free Exercise Clause of the California Constitution. (12 Cal.4th at 1161.)

The Court began by holding that the First Amendment does not support Smith's claim, relying on the U.S. Supreme Court's decision in Smith-U.S.:

> "[Smith's] religion may not permit her to rent to unmarried cohabitants, but the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes). The statutory prohibition against discrimination because of marital status (Gov. Code section 12955) is a law ... generally applicable in that it prohibits all discrimination without reference to motivation. The law is neutral in that its objective is to prohibit discrimination irrespective of reason -- not because it is undertaken for religious reasons. Consequently, section 12955 does not violate the free exercise clause as interpreted in [*Smith-U.S.*]." (12 Cal.4th at 1161-1162, internal quotations and citations omitted.)

After determining that Smith's claim to an exemption from FEBA was barred under the federal constitution, the *Smith-Calif*. Court turned to an evaluation of her claim under RFRA. Although RFRA has since been invalidated, as noted above, the Court's analysis of the Act in the *Smith-Calif*. case will help inform the Committee as it considers the merits of a constitutional amendment since legislation like ACA 24 would insert the same basic RFRA standard into the California Constitution.

The Smith-Calif Court set out the following four-part test for evaluating cases in which a neutral, generally applicable law is challenged under RFRA as a burden on the exercise of religion:

> "(1) The burden must fall on a religious belief rather than on a philosophy or a way of life. (2) The burdened religious belief must be sincerely held. (3) The plaintiff must prove the burden is substantial or, in other words, legally significant. (4) If all of the

foregoing are true, the government must 'demonstrate[] 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 interest.' (42 U. S.C. § 2000bb-1(b).)" (12 Cal.4th at 1166-67, footnotes omitted)

After applying this test to the facts in the case, the *Smith-Calif*. Court concluded that the requirement of not discriminating in housing on the-basis of marital status did not constitute a substantial burden on Mrs. Smith's exercise of her religion. (*Id.*, at 1175) Because analysis of this case under California law would also appear to require Mrs. Smith to demonstrate a substantial burden on her exercise of religion, the facts in the case did not require the Court to evaluate Mrs. Smith's claim under the state's Free Exercise Clause:

> "Because Smith's claim fails even under [the RFRA] test .... we need not address the scope and proper interpretation of California['s Free Exercise Clause]. These important questions should await a case in which their resolution affects the outcome." (*Id.*, at 1179, emphasis added)

10. California Free Exercise Cases Have Typically Involved Zoning Challenges. As discussed above, the *Boerne* case invalidating RFRA involved a church's challenge to a local ordinance regarding the preservation of historic districts. Before turning to arguments for and against legislative action in this area, it is important to note that state religion cases have typically arisen in the zoning context. Generally, our courts have upheld local governments' powers in the face of such constitutional challenges.

For example, in *Lucas Valley Homeowners Assn., supra*, the court noted that "[f]ree exercise challenges to zoning ordinances which exclude churches from residential zones have been unsuccessful in California." (233 Cal.App.3d at 143.) Likewise, in *Corp. Presiding Bishop v. City of Porterville* (1949) 90 Cal.App.2d 656, the court rejected a church's contention that application of such an ordinance was an unwarranted restriction of religious worship. The court reasoned that denial of the permit did not prevent anyone from worshipping according to his or her faith, and that nothing in the record indicated the building could not be erected in another, appropriate zone. (*Id.*, at 660.)

In addition, it is without question that a public entity can, consistent with respecting free exercise rights, require that a church obtain a use permit prior to locating in a residential zone. (*Matthews v. Board of Supervisors* (1962) 203 Cal.App.2d 800.) Similarly, the decision to issue such a permit will be upheld where there are adequate findings supported by substantial evidence in the record. (*Stoddard v. Edelman* (1970) 4 Cal.App.3d 544.) It is unclear what effect, if any, a constitutional amendment like ACA 24 will have on California jurisprudence regarding church zoning. Some have argued that RFRA amounts to an unconstitutional establishment of, or preference for, religion. This position is consistent with the concurring opinion issued by Justice Stevens in the *Boerne* case.

However, it should be noted that Assemblyman Baca requested the Legislative Counsel's office to opine whether his proposed constitutional amendment would comport with the state Constitution. In two separate opinions, the Legislative Counsel's office found that a statutory version of ACA 24 would be constitutional. (See Legislative Counsel Opinion No. 20211 (August 13, 1997) and No. 23 544 (September 23, 1997).)

III. THE CASE FOR LEGISLATIVE ACTION

With the above review of the federal and state Free Exercise Clauses, and the judicial interpretations of their scope, this paper shall now briefly note the principal arguments generally put forward in support of, and opposition to, legislative action in this area.

A. ARGUMENTS IN SUPPORT OF A CONSTITUTIONAL AMENDMENT

1. Statement of Assemblyman Baca. In arguing for amending our state Constitution, Assemblyman Baca, on behalf of proponents of constitutional change, states that "[a] close reading of *Boerne* indicates that nothing prevents states from placing RFRA's language into state constitutions, since state constitutions can offer greater constitutional protections than those contained in the United States Constitution. ... In enacting ACA 24, California would not be interpreting or enacting legislation in furtherance of the United States Constitution; it would be placing greater rights in its state constitution. ... Placing the RFRA standard into a state constitution would not be prohibited by the Establishment Clause of the United States Constitution, since the RFRA standard does not establish religion, but simply protects free exercise of religion."

Assemblyman Baca has also introduced AB 1617, which would place the provisions of RFRA into statute. He has indicated a willingness to' pursue a statutory approach rather than a constitutional amendment if that is the sentiment of various groups and the Judiciary Committee.

2. Statement of Reverend Lou Sheldon. Reverend Louis P. Sheldon, Chairman, Traditional Values Coalition, and member of the National Coalition for the Free Exercise of Religion, states the following:

> "While [the National Coalition] is seeking federal legislation that would provide uniform legal protection in every state, it is also important that state legislatures act. A federal bill cannot cover as broad a spectrum of religious exercise as a state legislature can. The National Coalition encourages California to enact a RFRA without exemptions."

3. Statement of Christian Science Committee. The Christian Science Committee on Publication for Southern California supports ACA 24, stating that "[i]n cases where free exercise of religion is substantially burdened, [the bill] would establish a compelling

interest test that has worked well in our country for decades. This test is workable and strikes a sensible balance between religious liberty and competing governmental interests."

4. Statement of Committee on Moral Concerns. The Committee on Moral Concerns also supports ACA 24 for the following reasons:

> "(1) Religious freedom is a Constitutional right. ... However, the U.S. Supreme Court ruled in [*Boerne*] that local ordinances can overrule church freedoms simply because the ordinance applies to businesses generally. Under this determination a church has no more protection than, say, a dry cleaner.
>
> (2) The pendulum is swinging wildly between religious freedom to use illegal drugs as a form of worship and city government's refusal to permit church remodeling. ... It is time to find the proper balance, once and for all. ACA 24 would protect religious freedom unless there is a compelling governmental interest, and then the government must use the least restrictive constraints.
>
> (3) Though the courts have lost their way, reasonable citizens know what this means. Drug abuse, infant sacrifice, prostitution, violence, and just plain laziness are not religious freedoms. And the government has a compelling interest in seeing churches are built to reasonable safety standards and that criminals actually perform work when on work release programs regardless of their religion. ... On the other hand, no government has the right to micro-manage church facilities, doctrinal teachings, employees, or church membership. ... The courts sometimes are confused, but reasonable people know what fair treatment is.
>
> (4) Upon passage of ACA 24, the court system will still have the duty of interpreting specific limits. Our hope is that the California Supreme Court will find a fairer balance than the U.S. Supreme Court. The present situation, with a church regarded as no more than just another insurance agent or tire store, is unreasonable and intolerable."

B. ARGUMENTS IN SUPPORT OF A STATUTE

1. Statement of Douglas Laycock. Douglas Laycock holds the Alice Mckean Young Regents Chair in Law at the University of Texas at Austin. Professor Laycock has studied, taught, and written about religious liberty for twenty years. He was the co-author of the federal RFRA legislation, and he represented Archbishop Flores in the *Boerne* case. In his written statement submitted to the Committee, Laycock states that a "California RFRA is urgently needed to protect the free exercise of religion from the Supreme Court's decisions" in *Smith-U.S.* and *Boerne*. Laycock argues that:

> "In a pervasively regulated society, [*Smith-U.S.*] means that religion will be pervasively regulated. In a society where regulation is driven by interest group politics, [*Smith-U.S.*] means that churches will be embroiled in endless political battles with secular interest groups. In a nation that sometimes claims to have been founded for religious liberty, [*Smith-US.*] means that Americans will suffer for conscience."

Professor Laycock continues that "*Boerne* means that the problem has been handed back to state legislatures. It is up to [the Assembly Judiciary Committee] to protect religious liberty in California. [¶] A California RFRA would greatly ameliorate the consequences of [*Smith-U.S.*] and *Boerne*. Such a bill would enact a statutory replacement for the Free Exercise Clause. The bill can work only if it is as broad as the Free Exercise Clause, enacting the fundamental principle of religious liberty and leaving particular disputes to further litigation."

According to Laycock, "[s]tate-level RFRAs would solve the problem of perpetual religious conflict with interest groups and also the problem of religious minorities too small to be heard in the legislature. ... A California RFRA has a chance to work because it would be as universal as the Free Exercise Clause. It would treat every religious faith and every government interest equally, with no special favors for any group, and no exceptions for any group. That is the only hope to rise above the paralysis of interest group politics and restore protection for religious liberty."

Professor Laycock concludes his written testimony:

> "The Supreme Court has withdrawn from the protection of religious liberty, it has barred Congress from filling the gap, and it has handed the problem to state legislatures. A California RFRA would plainly be constitutional, and it is needed now."

2. Statement of Oliver Thomas. Reverend Oliver Thomas is Special Counsel for Religious Liberty for the National Council on Churches, and chairman of the coalition that supported the federal RFRA. In his written testimony submitted to the Committee, Thomas states that the Court's *Smith-U.S.* decision in 1990 "abandoned decades of precedent and reduced the free exercise of religion to mere equal protection. Only in those rare cases where religion is intentionally discriminated against does the Free Exercise Clause now offer protection." Reverend Thomas continues that "RFRA sought to remedy the problem by codifying a decades-old standard (the compelling interest test) in a federal civil rights law." Thomas notes the special importance of California as "a bell-weather state -- a model for the rest of us -- [which] can do something for the nation. [California Assembly members] can start a trend that will be emulated by ... other state legislatures."

Thomas suggests starting with a statute, noting that "[c]onstitutional amendments are risky" and "should be a matter of last resort -- something to consider when all else has failed." "[I]f you start with a statute, ... even if it is struck down, that in itself will build political momentum for a subsequent constitutional amendment. In short, going from a statute to a constitutional amendment is a workable political strategy. Going from a failed constitutional amendment to a statute is not."

IV. CONCERNS ABOUT LEGISLATIVE ACTION

A. Problems Associated with the Federal RFRA and Cautions Against Adopting State RFRA Legislation.

1. Commentary and Statement of Marci Hamilton. Professor Marci Hamilton, lead counsel for the City of Boerne, Texas in the *Boerne* case, has published a number of articles strongly criticizing RFRA. See e.g., *The Religious Freedom Restoration Act: Letting the Fox Into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment* (1994) 16 Cardozo L. Rev. 357; and, *Boerne v. Flores: A Landmark for Structural Analysis*, forthcoming in William & Mary Law Review (1988) [hereafter *"Landmark"*]. In her latest article, Professor Hamilton strongly cautions against the legislative approach that was used to enact RFRA:

> "From many perspectives, the legislative process employed in RFRA is a prescription for constitutional disaster. Congress rubber stamped the views of a powerful interest group, rather than engage its independent judgment; it addressed an asserted social problem without ascertaining whether the problem in fact exists; it imposed a legalistic formula to be applied to the imagined problem without serious inquiry into the impact such a formula would have; it attempted to redress the imagined problem in every forum and arena imaginable; and it failed to inquire adequately into the constitutionality of its own actions. *Boerne* teaches that Congress [and state legislatures are] obligated to examine the constitutionality of [their] enactments, and where [they] do[] not, 'the presumption of validity [their] enactments now enjoy,' is brought into question." (Landmark at pp. 8-9, citation and footnotes omitted.)

In her written testimony submitted to the Committee, Hamilton argues that "RFRA is an abstract solution that only reveals its pervasive impact upon careful scrutiny." Professor Hamilton cautions that "[b]efore taking the extreme actions proposed in ACA 24 and AB 1617, the California Assembly should be fully aware that ***the language in the federal RFRA, which is repeated verbatim in AB 1617, sets a standard well beyond the United States Supreme Court's doctrine before or after Smith-U.S.*** (Emphasis added) She continues that "the claim that AB 1617 is necessary to 'restore' previous federal law is a red herring. ... From the perspective of federal constitutional law, the Coalition is asking California not to return

to a comfortable and familiar environment but rather to enter a new era in-which religion has a leg up in every circumstance."

Professor Hamilton contends that "without deep and wide fact-finding showing that religion is at risk under the [*Smith-U.S.*] rule, the huge expanse of a religious freedom restoration act makes it look as though religion is obtaining a benefit for no apparent reason other than it is religion. That appearance is likely to persuade reasonable judges that a religious freedom restoration act like AB 1617 violates the Establishment Clause." Hamilton concludes:

> "One of the reasons that the federal RFRA passed with such an overwhelming majority is that Congress did not stop to investigate the myriad ways in which RFRA would affect state and local government and the people. It is easy and politically expedient at times to be 'for religion.' It is especially easy if the pragmatic consequences to such a proposal are unexamined.
>
> The pragmatic consequences of AB 1617 will manifest themselves in cases involving everything from sick children to church parking lot zoning to animal carcass removal to prisoner requests for long hair, jewelry, candles, and religious items easily transformed into weapons. Whatever California decides to do for religion as a policy matter, it should be well aware of the likely consequences of its action."

2. Commentary of Ira Lupu. Ira Lupu is the Louis Harkey Mayo Research Professor of Law, The George Washington University Law School. Professor Lupu has published numerous articles regarding religious liberty and RFRA, including *The Failure of RFRA*, forthcoming in Symposium on Religious Liberty After *City of Boerne v. Flores*, U.Ark. at Little Rock L. Rev. (1998) [hereafter *"Failure of RFRA"*]. Professor Lupu states that "RFRA did not prove to be the guarantor of religious liberty that its proponents promised." (*Failure of RFRA, supra*, at p. 16.) He continues that "the overall record of RFRA successes is slim, and at least some of those victories represent highly questionable resolutions of competing social policies. In its brief life, RFRA generated a great deal of work for lawyers and judges, but it did not produce systematic gains for religion." (*Id*., at p. 17, footnote omitted.)

According to Lupu, "[t]he RFRA story demonstrates that blunt and codified rules are poor tools for the task of locating those special occasions when different and favorable treatment for religion is warranted. What made good political strategy in enacting RFRA -- the high road of generality and vigorous statutory language -- made perfectly bad legal strategy in implementing it. In the end, RFRA was too strenuous for judges to stomach; desiring to reach results they thought reasonable, they gutted RFRA by construction." (*Failure of RFRA*, at p. 4 1.)

Professor Lupu concludes by issuing a strong caution against state legislative action in this area:

> "General legislation to 'help' religion is politically tempting, but it inevitably will prove to be a mistake. Such legislation will foment litigation and aid religion but little. Indeed, to the extent that the litigation and costs of its defense generate anti-religious backlash, as is entirely possible, such legislation has the potential to hurt religion more than it helps. Accordingly, ***I have simple advice for legislators, especially for the short run. Trust the courts to reach reasonable results under existing state and federal law. Recognize that religious liberty is not broken, and the legislatures can't fix it. At the very least, be sure that any new enactment will produce results more religion-favorable than current law. In brief for most lawmakers, my recommendation is simply to let it be."*** (*Id*., at 41-42, emphasis added.)

B. Opponents Assert That The California Supreme Court's Decision in Smith-Calif. Does Not Appear to Support the Need for Legislative Action. Even though the *Smith-Calif*. Court did not reach the question of the scope of California's Free Exercise Clause, some opponents of legislative action have argued that the decision itself does not appear to support the need for ACA 24 or other legislative action. As discussed more fully above, had the federal RFRA been overturned prior to the *Smith-Calif*. decision, opponents contend, it still would not have affected the outcome in the case.

C. Opponents Assert That Other California Cases Do Not Appear to Support the Need for Legislative Action. Opponents further argue that other existing California cases do not support the immediate need for ACA 24 or other legislative action. As noted above, California courts are required to independently determine the scope of the state's religion clauses, and they have done so on a number of occasions. For example, in *Fox v. City of Los Angeles* (1978) 22 Cal.3d 792, the California Supreme Court rested its decision solely on state constitutional grounds in finding that the City's display of a lighted cross on the Los Angeles City Hall violated the California Constitution's prohibition against providing a preference to religion. And in *Mandel v. Hodges* (1976) 54 Cal.App.3d 596, the Court of Appeal struck down actions by the Governor which had proclaimed Good Friday a state holiday, and by the Controller which had sought to pay state employees for time taken off during the holiday, as violative of both the federal and state constitutions' bans against establishment of, and preference for, religion. Opponents contend these cases demonstrate that California courts are fully capable of exercising independent judgment when it comes to cases involving religious freedom and expression, and appear to undercut the argument advanced by some that our state judiciary will march in lock-step with the U.S. Supreme Court in this area and similarly restrict Free Exercise claims.

D. Concerns Expressed That Amending the Constitution is a Bold Step That Should Not Be Undertaken Lightly. Although California's voters have amended the state's constitution frequently, the Legislature has always shown caution in taking this bold step. Various constitutional experts have similarly cautioned against amending constitutions to achieve protections of freedom of expression. Reverend Oliver Thomas recently said that even if wording could be worked out between faiths and denominations, amending the Constitution should only be done reluctantly, and in the case of RFRA such an amendment might cause more problems than it solves. "It's risky," he said. "If we adopt a constitutional amendment we would not know what we had done for 20 to 30 years from now because

the court would have to interpret it. We might have made something worse." As noted above, however, Reverend Thomas supports a state statutory RFRA.

E. State Legislation May Be Premature Given the Likelihood of More Federal Legislation in this Area. In considering the desirability of amending the California Constitution's Free Exercise Clause, the committee may wish to consider the fact that there is a move afoot in Congress to enact a new RFRA that will survive Supreme Court review. Representatives of the federal RFRA coalition have been working with members of the United States Senate and House Judiciary Committees to identify and develop the most effective statutory response to the *Boerne* decision that would reassert Congressional authority and restore protections for the religious practices of all Americans.

Some opponents of state legislation have taken the position that states should not be stampeded into any rapid response to the high court's decision in *Boerne*, and that each of the states should allow additional time and consideration before passing legislation to enact statutory or constitutional amendments for a state RFRA. They further argue that a thoughtful delay in state action will not endanger religious freedoms, and may, in fact, provide the opportunity for Congress to pass a national resolution that works to the benefit of all the states. However, Reverend Lou Sheldon indicated in his testimony before the Judiciary Committee on August 26, 1997, that some members of Congress have informed him that they are supportive of states enacting their own RFRA legislation.

V. IF THE COMMITTEE DECIDES THAT LEGISLATIVE ACTION IS WARRANTED, WHAT FORM SHOULD IT TAKE?

Should it be concluded that some form of legislative action is warranted to appropriately protect religious freedom in California, several "action options" are available to the Legislative and Executive branches, including: (1) a constitutional amendment; (2) a statute; (3.) a resolution; or, (4) an Executive Order. This paper shall defer a discussion of the pro's and con's of such options to the interim hearing scheduled in Los Angeles on October 8, 1997, by the Assembly Judiciary Committee. An impressive array of experts shall explore the merits and pitfalls of these "action options" for California at that time.