SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: April 14, 1998 Revised: _____ _____ _____ _____

Subject: Religious Freedom

	Analyst	Staff Director	Reference	Action
1.	Geraci	Moody	JU	Favorable/CS
2.			GO	
3.			RC	
4.				
5.				

I. Summary:

Committee Substitute for Senate Joint Resolution 298 proposes amending the Florida Constitution to provide that a governmental entity shall not substantially burden the free exercise of religion, unless the governmental entity can demonstrate that application of such a burden is in furtherance of a compelling state interest and is the least restrictive means of furthering that interest.

The joint resolution substantially amends section 3, Article I of the Florida Constitution.

II. Present Situation:

A. Constitution Amendment Process

Article XI of the Florida Constitution sets forth the various methods of proposing amendments to the State Constitution and the method of approval or rejection of those proposals. One method by which constitutional amendments may be proposed is by joint resolution agreed to by three-fifths of the membership of each house of the Legislature. s. 1, Art. XI, Fla. Const. Any such proposal must be submitted to the electors, either at the next general election held more than 90 days after the joint resolution is filed with the secretary of state, or, if pursuant to law enacted by the affirmative vote of three-fourths of the membership of each house of the Legislature and limited to a single amendment or revision, at an earlier special election held more than 90 days after such filing. s. 5, Art. XI, Fla. Const. If the proposed amendment is approved by a vote of the electors, it becomes effective as an amendment to the State Constitution on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment. *Id*.

B. The Free Exercise of Religion

Section 3, Art. I of the Florida Constitution states:

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

The application of s. 3, Art. I, Fla. Const., by Florida courts has largely paralleled the Federal law regarding the application of the federal First Amendment's clause stating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

1. The *Sherbert* Analysis

In 1963, the United States Supreme Court created a balancing test to determine whether a facially neutral state law of general applicability could place unacceptable pressure on an individual to abandon the precepts of his or her religion. *Sherbert v. Verner*, 374 U.S. 398 (1963). In this case, the appellant, a member of the Seventh-Day Adventist Church, lost her job because she refused to work on Saturday, the Sabbath Day of her religion. *Id.* at 399. She was unable to obtain other employment because of her observation of the Sabbath, but was denied unemployment benefits because her refusal to work on Saturday was not a good cause justification. *Id.* at 400.

To apply the balancing test, the Court must first determine whether the regulation imposes any burden on the free exercise of the claimant's religion. *Id.* at 402. If it does, the Court must then determine whether some compelling state interest justifies the substantial infringement of the claimant's First Amendment rights. *Id.* at 403. The compelling interest test constitutes the highest level of scrutiny, strict scrutiny, that the Supreme Court has applied in analyzing claims against state actions alleged to be unconstitutional. Under this level of scrutiny, the burden is on the state to prove that any interference with an individual's religious practice meets two criteria. First, the state must show that interference is "justified by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate." *Id.* Second, in the process of making such a showing, the state must "demonstrate that no alternative forms of regulation would [meet the state interest] without infringing First Amendment rights." *Id.* at 407.

2. Exceptions to the *Sherbert* Analysis

In applying the compelling interest test, the Supreme Court has given a great degree of deference to a person's subjective assertion of religious deprivation in First Amendment free exercise of religion cases. However, later Supreme Court rulings instituted certain exceptions to the application of the compelling interest test. The test was found inapplicable to free exercise challenges against government actions in the following three circumstances:

a. Military "Free Exercise" Cases

In *Goldman v. Weinberger*, 475 U.S. 503 (1986), the United States Supreme Court ruled that the compelling interest test was not applicable to free exercise claims in military situations. The *Goldman* Court found this exception justifiable because the military is a "specialized society separate from civilian society," whose mission necessitates fostering "instinctive obedience, unity, commitment, and esprit de corps" through, among other things, regulations enforcing a heightened degree of uniformity. *Id.* at 506.

b. Prison "Free Exercise" Cases

In *Turner v. Safley*, 482 U.S. 78 (1987), the United States Supreme Court held that prison regulations were not subject to the compelling interest test, because, although prisoners still retain their constitutional rights, the "institutional order" necessary for a corrective environment justifies a lessened level of scrutiny. *Id.* In prison free exercise cases, a court must only inquire "whether a prison regulation that burdens fundamental rights is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns."*Id.* at 87.

In *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), the United States Supreme Court reaffirmed the *Turner* holding. In *O'Lone*, the Court asserted several criteria for weighing the reasonableness of prisoners' religious rights claims against a particular prison policy:
(1) Whether the policy in question serves a legitimate penological interest;
(2) Whether the prisoners bringing the claim have an alternative means of religious worship;
(3) Whether the costs of accommodating prisoners' religious requests are excessive; and
(4) Whether there exist any "obvious, easy alternatives" to the prisoners' request.
Id.

c. Generally Applicable Laws

A generally applicable law is a facially neutral law which is applied, in a generalized fashion and without discrimination, to a general population in a blanket manner. *See Bowen v. Roy*, 476 U.S. 693, 703-705 (1986); *City of Boerne v. Flores*, 117 S. Ct. 2157, at 2160-2161 (1997).

In *Bowen v. Roy*, 476 U.S. 693 (1986), the United States Supreme Court rejected a free exercise challenge to a state law which required that all residents utilize social security numbers in order to get governmental assistance. The Court differentiated between a "facially neutral" state law which "indirectly and incidentally" affects a particular religious practice, and a state law which "criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons." *Id.* at 706. The Court found the two to be "wholly different," and that "absent proof to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest." *Id.* at 707.

In *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), the Court, applying the reasoning in *Roy*, rejected a free exercise challenge to a road construction project planned for a tract of federally owned land. Against a claim that the construction would disrupt an area containing ritualistic value to certain Native Americans, the Court differentiated between state actions that coerce, penalize, or prohibit the exercise of religion and state actions which "may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs." *Lyng* at 450. Under the ruling in *Lyng*, only state actions that coerce, penalize, or prohibit the exercise of religion are subject to the compelling interest test. Accordingly, generalized state actions which are merely "inconvenient" but are not specifically prohibitive or coercive of religious practice are not subject to the compelling interest test. *Id.* at 449.

The *Goldman*, *Turner*, *O'Lone*, *Roy*, and *Lyng* cases reaffirmed the *Sherbert* analysis, but created exceptions to its application. In those cases where the compelling interest test does not apply, proving a case against the state for infringement of free exercise of religion is much more difficult.

3. The Religious Freedom Restoration Act of 1993

The *Sherbert* analysis continued to be controlling until 1990, when the Court decided *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872 (1990). In that case, the claimants were denied unemployment benefits because of their use of peyote for sacramental purposes in their Native American Church. *Id.* at 874. The Court chose not to use the compelling interest test, finding that the right of free exercise does not excuse an individual from complying with a law forbidding an act, that may be required by his religious beliefs, if the law is not specifically aimed at religious practice, and is otherwise constitutional as applied to others who engage in the act for nonreligious reasons. *Id.* at 878. The Court distinguished *Sherbert* on the grounds that the test was created in a context related to unemployment compensation eligibility rules that allowed individualized governmental assessment of the reasons for the relevant conduct. *Id.* at 884. Also, the Court explained that the only decisions where it has been held "that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press." *Id.* at 881.

In response to the *Smith* decision, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA). 42 U.S.C. s. 2000bb. The Act revived the compelling interest test, but included a least restrictive means analysis not present in the original case. RFRA resulted in an increased opportunity to bring lawsuits against the state for alleged infringement upon the free exercise of religion, and the standard of strict scrutiny made it more difficult for a state to win such a case. This produced an increase in the number of First Amendment religious freedom cases entertained by state and federal courts. According to the Florida Department of Corrections (DOC), there was a 587 percent increase of grievances filed by inmates after the passage of the federal RFRA. Such grievances increased from 38 grievances in 1992-92 to 261 grievances in 1996, the last year before the federal RFRA was repealed.

In June of 1997, in *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), the Court held RFRA unconstitutional because it was not a proper exercise of Congress' enforcement power. The Court stated that the "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." *Id.* The Court found that the RFRA was an intrusion into the states' general authority to regulate for the health and welfare of their citizens, and by imposing a least restrictive means requirement, Congress created legislation broader than is appropriate. *Id.* This case upholds the ruling in *Smith,* and at this time, *Smith* is the controlling case law.

III. Effect of Proposed Changes:

The resolution provides that government shall not substantially burden the free exercise of religion, even if the burden results from a rule of general applicability, unless the government demonstrates that the burden:

- Is in furtherance of a compelling governmental interest, and
- Is the least restrictive means of furthering that interest.

RFRA had established the compelling interest test for all claims against the state for infringement upon the free exercise of religion, including claims from incarcerated individuals or groups. This had created debate as to whether the greater capacity for successful litigation by inmates had hindered the security and order of corrections facilities, and whether it produced an inordinate degree of inmate litigation. *See, e.g. Brief for Amici States of Ohio, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, The Commonwealth of Pennsylvania, and the Territories of American Samoa, Guam and The Virgin Islands in Support of Petitioner* at 3-6.

> [RFRA] has spawned a remarkable wave of inmate litigation in the years since it was passed. Based on a Lexis/Nexis search conducted on November 12, 1996, no fewer than 189 inmate cases have been decided involving RFRA-based challenges. . . . The litigation wave generated by RFRA disrupts State prisons and State prison administrations in many ways. As an initial matter, RFRA cases are harder to dispose of than most due to the difficulty (if not impossibility) of determining the accommodations that are truly necessary for the proper exercise of a given religion. . . . For like reasons, RFRA lawsuits are expensive. New attorneys and experts must be hired to defend them; dispositions and other discovery must be taken to respond to them; and successful lawsuits require costly reconfigurations of corrections programs, sometimes even prison buildings. . . . Besides the difficulty of responding to this litigation and the cost of handling it, RFRA lawsuits compel corrections officials to divert extensive staff time to handling the litigation. They must investigate the 'religious' nature of each claim and the 'religious' necessity to each inmate of bringing the claim. Making matters worse is the "least restrictive means" test, which regularly compels corrections staff to develop ways to accommodate even the most unusual and isolated demands.

City of Boerne v. Flores, 117 S. Ct. 1257 (1997) *but see Brief of the States of Maryland, Connecticut, Massachusetts and New York As Amici Curiae in Support of Respondent* at 3-9, *City of Boerne v. Flores*, 117 S. Ct. 1257 (1997):

> Properly interpreted, RFRA does not and will not impede the States' ability to operate their prisons effectively. . . . With respect to prison management, RFRA requires courts to provide substantial deference to the States and to those responsible for administering the state penal systems. . . . The limitations inherent in the requirement of proving a "substantial burden" preserves State authority in many instances where RFRA may be invoked. Although the lower courts, prior to *O'Lone*, disagreed among themselves as to whether the *Sherbert/Yoder* compelling interest test applies to religious freedom claims in the prison context, even those courts that had applied that test accorded a great deal of deference to the judgements of prison administrators. . . . This deference applied at two distinct levels. First, following this Court's statements in earlier decisions, the lower courts recognized that, in the prison context, order, safety, security, and discipline are paramount government interests. . . . Second, those courts recognize that prison officials are entitled to great deference in determining whether a particular prison regulation is tailored with sufficient precision to the state interest at issue.

The Department of Corrections has expressed concerns that the heightened standard of review will give inmates greater latitude in asserting unreasonable demands which conflict with a correctional institution's need for order and security. The Department of Corrections is concerned not only with the ability to win lawsuits under the resolution, but with the possibility that the resolution's compelling interest standard may give incarcerated individuals an increased capacity to go to trial on frivolous matters. In this, the Department of Corrections' assertions parallel similar criticisms by amici in the *Bourne* case. *See Brief for Amici States of Ohio, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, The Commonwealth of Pennsylvania, and the Territories of American Samoa, Guam and The Virgin Islands in Support of Petitioner* at 3, *City of Boerne v. Flores*, 117 S. Ct. 1257 (1997) (Many of the cases . . . involve recycled claims that were defeated years ago under the reasonableness test applied to inmate free exercise claims. Thus, though many of the claims now confronting State prison officials could not have met the pleading requirements of Rule 11 under prior law, [under RFRA's "compelling interest" standard] they are now being litigated anew in every corner of the country.)

The provisions of this resolution only apply to governmental actions that affect the free exercise of religion, not the establishment of religion. This means that the provisions of this resolution are not available against the private sector and cannot be used as a claim or defense in private sector litigation.

The resolution would re-establish the compelling interest test in cases where state actions were alleged to have violated a person's free exercise of religion. In that instance, the state would be required to meet the requisite standard by the least intrusive means possible. The effect of this resolution in Florida could parallel the experience with RFRA at the national level. RFRA

produced a broadened capacity for legal action against the state for alleged infringement upon free exercise of religion. Proponents of RFRA had affirmed this effect as indicative of a greater protection for religious practice. Conversely, the greater deference to the subjective claims of individuals that RFRA provided, over even facially neutral state laws, created concerns that the basic regulatory and security functions of government could be adversely affected.

The resolution provides no effective date for the constitutional amendment. As such, it would take effect on the first Tuesday after the first Monday in January following the election at which it was approved by the electorate. s. 5, Art. XI, Fla. Const.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The fiscal impact of this resolution is indeterminate. The degree of possible fiscal impact will vary according to the extent of increased litigation. To the extent increased litigation against a governmental entity results from this resolution, then state and local governments will have to defend against such litigation. Litigation involves expenses, including attorney's fees. Furthermore, any relief granted against the state may have a fiscal impact. This indeterminate amount of resulting litigation will also have a fiscal impact on the courts.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.