

Memorandum

Date: April 9, 2013

To: Joseph Pojman, Ph.D.
Executive Director
Texas Alliance for Life

From: Paul Benjamin Linton, Esq.

Re: Potential Impact of House Joint Resolution No. 110 on the authority of the State of Texas to regulate and/or prohibit abortion

Introduction

This memorandum addresses the potential impact that House Joint Resolution No. 110 (HJR. 110) would have on the authority of the State of Texas to regulate and/or prohibit abortion. Under HJR 110, art. I, § 6, of the Texas Constitution would read as follows (added material underscored):

(a) All men have a natural and infeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship.

(b) Government may not burden a person's or religious organization's Freedom of Religion. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be burdened unless the government proves it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. A burden includes indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.

(c) But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.

HJR 110 has been introduced in the 83rd Regular Session as an alternative to Committee Substitute for House Joint Resolution No. 135 (CSHJR 135), considered in the 82nd Regular Session. Both HJR 110 and CSHJR 135 have been proposed in response to the Supreme Court's decision in *Employment Division, Department of Human Resources, State of Oregon v. Smith*, 494 U.S. 872 (1990), and the Court's subsequent decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), striking down Congress' attempt to overturn *Employment Division* in the federal Religious Freedom Restoration Act of 1993.

I would refer you to my memorandum of November 19, 2012, for an understanding of the Supreme Court's decisions in *Employment Division* and *City of Boerne* and the background of these amendments. In this memorandum, I will address the language of HJR 110 and the letter submitted by Professor Laycock and others, dated April 2, 2013, in support of HJR 110.

Overview of HJR 110 and Comparison of HJR 110 to CSHJR 135

Under the proposed amendment, *any* state statute, administrative rule, municipal ordinance or governmental policy or action could be challenged on the basis that it “burden[s]” an individual’s or a religious organization’s conduct “that is motivated by a sincerely held religious belief.” The statute, rule, ordinance, policy or action would be presumptively *invalid* under this amendment and would be upheld *only* if the government were able to demonstrate *both* (a) that the burden in question promoted a “compelling governmental interest” *and* (b) that it had selected “the least restrictive means” to achieve that interest. That reverses the usual presumption of constitutionality and requires the government to prove that the challenged statute, rule, ordinance, policy or action is constitutional under a very rigorous standard of review (strict scrutiny). Although in some, perhaps most, cases, the State would be able to satisfy that test, in others it would not be able to do so.

The proposed amendment would *potentially* embroil the State and its political subdivisions into having to defend countless statutes, rules, ordinances, policies or actions that would otherwise never be challenged. It is readily apparent what the drastic impact of H.J.R. 110 could have on a wide range of issues – taxes, regulation of the medical profession, compulsory vaccination laws, drug laws, traffic laws and so forth. The fact that the Texas Religious Freedom Restoration Act (RFRA), TEX. CIV. PRACTICE & REMEDIES CODE, § 110.001, has not led to a flood of litigation does not mean that H.J.R. 110 would not, and that is for two reasons:

First, a state court has a “freer hand” to interpret a state *constitutional* provision, which can be overturned only by a state *constitutional* amendment, than it has in interpreting a state *statute*, where the court’s interpretation may be overturned by an amendment to the *statute* enacted by the legislature. Second, as is explained in more detail below, the language of H.J.R. 110 is *not* simply a codification of the Texas RFRA, but is different in many significant respects.

The language of the proposed amendment departs from current federal free exercise doctrine in two critical respects:

First, in contrast to the Supreme Court’s decision in *Employment Division v. Smith*, an otherwise valid and neutral law of general applicability (*i.e.*, one that does not single out religious conduct for regulation, as such) *could* be challenged under HJR 110. That is apparent not only from the general language in the first and second sentences of the amendment, which refer to any “burden” upon a person’s or religious organization’s freedom of religion and to “[t]he right to act or refuse to act in a manner motivated by a sincerely held religious belief,” but also from the third sentence which defines a “burden” for purposes of the amendment as including “*indirect* burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.” Emphasis added.

Second, unlike the Supreme Court’s pre-*Employment Division* free exercise jurisprudence, government action *could* be challenged under HJR 110 even though the action in question neither forbids conduct that one’s religion mandates, nor mandates conduct that one’s religion forbids. The language in the proposed amendment extends to *any* government action that “burden[s] a person’s or a religious organization’s Freedom of Religion” where the person’s or organization’s act or refusal to act is “motivated by a sincerely held religious belief . . .”

The language of HJR 110 departs from that of CSHJR 135 in two critical respects:

First, unlike CSHJR 135, which would have prevented the government from “*substantially*” burdening “an individual’s or a religious organization’s conduct that is based on a sincerely held religious belief,” HJR 110 applies to *any* burden on such religiously motivated conduct. In other words, HJR 110 would require the government to demonstrate *both* that it has a “compelling governmental interest in infringing the specific act or refusal to act” *and* that it has used “the least restrictive means to further that interest” whenever it has infringed upon a person’s or a religious organization’s religiously motivated conduct (acting or refusing to act), even though the burden imposed may be *insubstantial*.

Second, the third sentence of HJR 110 defines the term “burden” to include “indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.” This language is arguably broader than the language set forth in CSHJR 135, which did not define “burden” (or “substantially burden”). To take but one example, if HJR 110 were to be adopted, would an indigent pregnant woman seeking an abortion for religious reasons be able to claim that her “freedom of religion” had been infringed by the State’s refusal to pay for her abortion (“withholding benefits”)?

HJR 110 does not even begin to attempt to address the problems that were identified in my memorandum of November 19, 2012, with respect to CSHJR 135 and, in fact, it aggravates those problems.

Analysis of Professor Laycock’s Letter

In a letter dated April 2, 2013, Professor Douglas Laycock and several of his colleagues strongly endorse HJR 110. The letter, however, overlooks or ignores a number of considerations that should be of importance to the Texas Legislature.

First, Professor Laycock flatly states, without qualification, that HJR 110 “would simply place the substantive heart of the Texas Religious Freedom Restoration Act into the state constitution . . .” Even a cursory examination of the Texas RFRA, however, demonstrates multiple conflicts and inconsistencies between the provisions of HJR 110 and the Act.

- Under RFRA, the government may not “*substantially* burden a person’s free exercise of religion.” Sec. 110.003(a) (emphasis added). HJR 110 contains no such limitation, but refers to *any* burden on free exercise (substantial or insubstantial). It goes without saying that the self-executing rule set forth in HJR 110 would control the scope of the amendment, *not* the statutory standard set forth in the Texas Religious Freedom Restoration Act.

- Under RFRA, “free exercise of religion” means an act or refusal to act that is “*substantially* motivated by sincere religious belief.” Emphasis added. Section 110.001(a)(1). HJR 110 contains no such qualification, but applies to *any* act or refusal to act that is “motivated by a sincerely held religious belief,” without regard to whether the act or refusal to act is “substantially” motivated by a sincerely held religious belief. The language of HJR 110, not the provisions of RFRA, would control the interpretation of HJR 110.

- Under RFRA, in determining whether an interest is a compelling interest, for purposes of meeting the test imposed under § 110.003, “a court shall give weight to the interpretation of compelling interest in federal case law relating to the free exercise of religion clause of the First Amendment of the United States Constitution. Section 110.001(b). Although a court interpreting HJR 110 *might* give weight to such interpretations, it would not be *required* to do so.

- Under RFRA, the Texas Legislature has the authority to exempt laws from the application of RFRA, “by reference to this chapter.” Section 110.002(c). HJR 110 confers no such authority on the Legislature. *No* law would be exempt from the scope of HJR 110.

- Under RFRA, a government agency may “substantially burden” a person’s free exercise of religion if it demonstrates that the burden “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that interest.” Section 110.003(b). However, under § (c), the government agency is *not* required to prove that “the remedy and penalty provisions of the law, ordinance, rule, order, decision, practice, or other exercise of governmental authority that imposes the substantial burden are the least restrictive means to ensure compliance or to punish the failure to comply.” And, under § 110.006(d)(2), in removing a substantial burden on a person’s free exercise of religion, the remedy “*need not* be implemented in a manner that results in an exercise of governmental authority that is the least restrictive means of furthering the governmental interest, notwithstanding any other provision of this chapter.” HJR 110 is not so limited. The amendment states, without qualification, that the government must use “the least restrictive means to further [its] [compelling] interest.”

- Under § 110.010 of RFRA, “a municipality has no less authority to adopt or apply laws and regulations concerning zoning, land use planning, traffic management, urban nuisance, or historic preservation than the authority of the municipality that existed under the law as interpreted by the federal courts before April 17, 1990 [the date *Employment Division v. Smith* was decided].” No such exception for municipal authority appears in HJR 110. Municipalities would be subject to the same rules as other government entities, not the exception in RFRA.

- Under RFRA, notwithstanding § 110.012(b), “this chapter does not affect the grant or denial of an appropriation or other grant of money or benefits to a religious organization, nor does it affect the grant or denial of a tax exemption to a religious organization.” Section 110.012. H.J.R. 110 contains no such exclusion. In fact, HJR 110 defines “burden” to *include* “indirect burdens, such as *withholding benefits . . .*” Emphasis added. Would “the denial of an appropriation or other grant of money or *benefits* to a religious organization,” or the “denial of a tax exemption to a religious organization” fall within the scope of HJR 110’s definition of a “burden” on the free exercise of religion?

The scope, application, interpretation, exceptions and exemptions of the very detailed Texas RFRA are fundamentally different from the single paragraph of HJR 110. If HJR 110 were adopted, the Texas Legislature would have to rewrite the Texas RFRA substantially (or repeal it in its entirety and start over again with new legislation) to bring it into conformity with the language of HJR 110. Needless to say, to the extent that HJR 110 conflicts with RFRA, HJR 110 would control. A constitutional provision always “trumps” a statute.

Second, Professor Laycock does not acknowledge the *multiple* occasions on which religious freedom arguments, based on state or federal constitutional provisions, have been advanced in state and federal court in support of challenges to restrictions on abortion or public funding of abortion. My memorandum of November 19, 2012, identified *eleven* cases in which such arguments were raised. In two of those cases (*Planned Parenthood of Middle Tennessee v. Sundquist* and *Armstrong v. State*), a state supreme court relied, in part, upon state religious freedom guarantees, in recognizing a *state* constitutional right to abortion and, in a third case, *McRae v. Califano*, a federal district court struck down the Hyde Amendment, in part, on the basis of a federal free exercise of religion claim (a judgment that was reversed by the Supreme Court on standing grounds, *not* on the merits). Adoption of HJR 110 would make such arguments more likely in Texas.

Third, Professor Laycock states that “[s]imilar legislation or constitutional amendments have been enacted at the federal level (to govern federal law) and in seventeen States” The use of the word “amendments” suggests that several States have adopted state constitutional amendments similar to HJR 110. But that suggestion is mistaken. No constitutional amendment addressing religious freedom has been enacted at the state or federal level (in response to *Employment Division v. Smith*) except in Alabama. All of the other measures are (as in Texas) *statutes*. For the reasons previously explained, a court is much less likely to give a *statute* an absurd or unreasonable interpretation than it would a state *constitutional amendment*, which may explain why no “terrible things” or “horror stories” (to use Professor Laycock’s phrases) have happened in the States that have enacted such statutes.

Fourth, Professor Laycock states that, in addition to the “seventeen States” that have enacted “[s]imilar legislation or constitutional amendments,” “[a]nother thirteen states have interpreted their state constitution to provide similar protection.” That statement is incorrect. Although the supreme courts in *some* of the named States continue to follow the pre-*Employment Division v. Smith* federal free exercise jurisprudence in interpreting their own state religious freedom guarantees, HJR 110 does *not* embody that jurisprudence (as explained above).

The Indiana Supreme Court and the New York Court of Appeals have developed their own standards for evaluating state religious freedom claims and defenses which do not reflect either the pre-*Employment Division v. Smith* federal free exercise jurisprudence or anything remotely approaching the standard that would be imposed by HJR 110.¹

¹ See *City Chapel Evangelical Free, Inc. v. City of South Bend*, 744 N.E.2d 443 (Ind. 2003); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006).

There are no post-*Employment Division v. Smith* decisions from the Kansas, Mississippi or North Carolina Supreme Courts applying the pre-*Employment Division* standard to state religious freedom claims or defenses. It would be more accurate to state that *no* state court has interpreted its state constitutional guarantee of religious freedom in a manner that is the same (or substantially the same) as the language of HJR 110.²

Recommendation

HJR 110 needs to be amended to make it “abortion neutral,” *i.e.*, to ensure that it could not be used to strike down Texas laws regulating or prohibiting abortion. For example, the following language would suffice:

Nothing in this section confers or shall be construed to confer any right to obtain an abortion or the public funding thereof.

² Under the applicable case law, Massachusetts requires proof of a “*substantial* burden,” not, as with H.J.R. 110, *any* “burden.” Similarly, Minnesota requires proof of an “*excessive* burden.” The Supreme Courts of Alaska, Michigan, Montana, Ohio and Washington all require evidence that the challenged law compels conduct that one’s religion forbids, or forbids conduct that one’s religion compels, a much narrower standard than H.J.R. 110 would impose (it is not clear whether the Wisconsin Supreme Court requires evidence of “coercion”).