Memorandum

Date: November 19, 2012

To: Joseph Pojman, Ph.D.
Executive Director
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From: Paul Benjamin Linton, Esq.

Re: Potential Impact of Committee Substitute for House Joint Resolution No. 135 on the authority of the State of Texas to regulate and/or prohibit abortion

Introduction

This memorandum addresses the potential impact that Committee Substitute for House Joint Resolution 135 (C.S.H.J.R. No. 135) would have on the authority of the State of Texas to regulate and/or prohibit abortion. Under C.S.H.J.R. No. 135, art. I, § 6, would read as follows (added material underscored):

> (a) All men have a natural and indefeasible 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.
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> (b) Government may not, directly, indirectly, or incidentally, substantially burden an individual's or a religious organization's conduct that is based on a sincerely held religious belief, unless the government is:
>
> (1) acting to further a compelling governmental interest; and
>
> (2) using the least restrictive available means to do so.
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> (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.

Background

C.S.H.J.R. 135 was 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 Religious Freedom Restoration Act of 1993. At issue in *Employment Division* was whether Oregon could deny unemployment compensation benefits to persons who had been dismissed from their jobs because of their religiously inspired use of peyote, a controlled substance, in violation of the criminal law of the State. The dismissed employees argued that "their religious motivation for using peyote place[d] them beyond the reach of a criminal law that [was] not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons." 494 U.S. at 878. They claimed, in other words, that the Free Exercise Clause of the First Amendment, as made applicable to the States through the Fourteenth Amendment, bars the State from "requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires)." *Id*. The Court rejected this claim, stating that "if prohibiting the exercise of religion . . . is not the object of the [law in question], but merely the *incidental effect* of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id*. (emphasis added). The Court thus held that "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)." 494 U.S. at 879. In so holding, the Court declined to extend the reasoning it had applied in cases, such as *Sherbert v. Verner*, 374 U.S. 398 (1963), involving the denial of unemployment compensation benefits to persons who refuse to work on the Sabbath. *Employment Division*, 494 U.S. at 882-89. In *Sherbert*, the Court held that governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. 374 U.S. at 402-03. Under that test, the Court has, on three occasions, "invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion." *Employment Division*, 494 U.S. at 883 (citing *Sherbert* and two other cases). In *Employment Division*, however, the Court noted "[w]e have never invalidated any government action on the basis of the *Sherbert* test except the denial of unemployment compensation. *Id*. Although the Court has "sometimes purported to apply the *Sherbert* test in [other] contexts," it has "always found the test satisfied . . . ." *Id.* In *Employment Division*, the Court essentially limited *Sherbert* to its facts (the denial of unemployment compensation benefits based on a person's refusal to work on the Sabbath in violation of his religious beliefs). *Id*. at 884-85.

In *Employment Division*, the Court observed that to apply *Sherbert* beyond its own facts would have far-reaching consequences: "The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" *Id*. at 885 (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988)). "To make an individual's obligation to obey such a

a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' – permitting him, by virtue of his belief, 'to become a law under himself,' *Reynolds v. United States*, 98 U.S. [145,] 167 [1879] – contradicts both constitutional tradition and common sense." *Id*. A requirement that a law affecting religious practice satisfy the "compelling government interest" test may seem "benign, because it is familiar from other fields. But using it as the standard that must be met before government may accord different treatment on the basis of race, . . . or before the government may regulate the content of speech, . . . is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields – equality of treatment, an unrestricted flow of contending speech – are constitutional norms; what it would produce here – a private right to ignore generally applicable laws – is a constitutional anomaly." *Id*. at 885-86.

Because of the difficulty of determining the "centrality" of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds, "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Employment Division*, 494 U.S. at 887. Accordingly, "[i]f the 'compelling interest' test is to be applied at all, then, it must be applied across the board to all actions thought to be religiously commanded. Moreover, if 'compelling interest' really means what it says . . . , many laws will not meet the test." *Id*. at 888.

> Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," . . . and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind – ranging from compulsory military service, . . . to the payment of taxes, . . . to health and safety regulations such as manslaughter and child neglect laws, . . . compulsory vaccination laws, . . drug laws, . . . and traffic laws, . . . to social welfare legislation such as minimum wage laws, . . . child labor laws, . . . animal cruelty laws, . . . environmental protection laws, . . . and laws providing for equality of opportunity for the races . . . . The First Amendment's protection of religious liberty does not require this.

Id. at 888-89 (emphasis in original) (citations omitted). Under *Employment Division*, the Free Exercise Clause of the First Amendment does *not* require the State to justify, under the "strict scrutiny" standard of judicial review, otherwise valid and neutral laws of general application (*e.g*., abortion laws) when they are challenged on free exercise grounds. C.S.H.J.R. No. 135, however, *would* require such justification of state and local laws. Indeed, that *is* its intent.

Overview of Committee Substitute for House Joint Resolution No. 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 "substantially burden[s]" an individual's or a religious organization's conduct "that is based on 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 available means" to achieve that interest. That reverses the usual presumption of constitutionality and requires the State (or other governmental entity or officer defending the law in question) 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. Moreover, 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 C.S.H.J.R. No. 135 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 language of the proposed amendment departs from current federal free exercise doctrine in two critical respects:

First, in contrast to *Employment Division*, 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 C.S.H.J.R. No. 135. That is apparent from the language in the proposed amendment referring to government action that "directly, *indirectly*, *or incidentally*, substantially burden[s] . . . conduct that is based on a sincerely held religious belief . . . ." Emphasis added. This point was made by Rep. Geren in the last debate on C.S.H.J.R. No. 135. *See* House Journal, 82nd Leg. Reg. Sess., Seventh-Fifth Day, May 12, 2011, 3779-80 (instancing examples in which "incidental" burdens on religious conduct could be challenged under the proposed amendment).

Second, unlike the Supreme Court's pre-*Employment Division* free exercise jurisprudence, government action *could* be challenged under C.S.H.J.R. No. 135 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 "substantially burden[s]" "an individual's or a religious organization's conduct that is based on a sincerely held religious belief . . . ." "Substantially burden," it must be noted, is *not* defined in the amendment and nothing in the proposal's text suggests that the amendment would be limited to what would constitute a valid free exercise claim under the Supreme Court's pre-*Employment Divisions* decisions interpreting the Free Exercise Clause of the First Amendment.

Application of C.S.H.J.R. No. 135 to Abortion

As the foregoing indicates, it is not difficult to imagine the manifold ways in which C.S.H.J.R. No. 135 could affect state and local law. For purposes of this memorandum, however, the issue is what impact the proposed amendment would have on the regulation and/or prohibition of abortion. Before giving examples of what state court challenges might be brought against abortion laws under C.S.H.J.R. No. 135, if it were adopted, it is important to recognize that the possibility of a "free exercise," "right of conscience" or "freedom of worship" challenge to an abortion law is *not* a theoretical concern, but a practical one. There have been many such challenges to abortion regulations and/or prohibitions (even under current Texas law), and, as noted below, some have been successful.

McRae v. Califano

In *McRae v. Califano*, 491 F. Supp. 630 (E.D.N.Y. 1980), the United States District Court for the Eastern District of New York declared unconstitutional the Hyde Amendment, which limits the circumstances under which federal reimbursement is available to pay for the cost of abortions for indigent women. The district court's decision was based in part on the Free Exercise Clause of the First Amendment. The court explained:

> A woman's conscientious decision, in consultation with her physician, to terminate her pregnancy because it is medically necessary to her health, is an exercise of the most fundamental of rights, nearly allied to her right to be, surely part of the liberty protected by the Fifth Amendment, doubly protected when the liberty is exercised in conformity with religious belief and teaching protected by the [Free Exercise Clause of the] First Amendment. To deny necessary medical assistance for the lawful and medically necessary procedure of abortion is to violate the pregnant woman's First and Fifth Amendment rights. The irreconcilable conflict of deeply and widely held views on this issue of individual conscience excludes any legislative intervention except that which protects each individual's freedom of conscientious decision and conscientious nonparticipation.

Id. at742.

The Supreme Court reversed. *Harris v. McRae*, 448 U.S. 297 (1980). Without reaching the merits of the district court's free exercise analysis, the Court determined that none of the plaintiffs had standing to challenge the Hyde Amendment on the basis of the Free Exercise Clause. *Id*. at 320-21. More specifically, none of the named plaintiffs alleged or proved that she was pregnant, Medicaid-eligible *and* seeking an abortion "under compulsion of religious belief." *Id*. at 320. Although *Harris* did not address the merits of the plaintiffs' arguments concerning the Free Exercise Clause, the Court's subsequent decision in *Employment Division v. Smith* would appear to preclude such a claim.

Jane L. v. Bangerter

In *Jane L. v. Bangerter*, 794 F. Supp. 1537 (D. Utah 1992), and *Jane L. v. Bangerter*, 794 F. Supp. 1528 (D. Utah 1992), plaintiffs raised both state and federal free exercise of religion claims against Utah's law prohibiting most abortions throughout pregnancy (which was ultimately struck down on other grounds following the Supreme Court decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), reaffirming *Roe v. Wade*, 410 U.S. 113 (1973)). The federal district court rejected the *federal* free exercise claim on the authority of the Supreme Court's decision in *Employment Division v. Smith*. *Jane L.*, 794 F. Supp. at 1546-47. The court also rejected the *state* free exercise claim because there was no basis in Utah law for applying a different standard of review under the state constitution, *Jane L.*, 794 F. Supp. at 1535, a conclusion that obviously would *not* apply to any analysis of an abortion law under C.S.H.J.R. No. 135, which would establish a more rigorous standard than is required by *Employment Division v. Smith*.

Planned Parenthood of Middle Tennessee v. Sundquist

In *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000), the Supreme Court of Tennessee derived a state constitutional right to abortion from an implied right of privacy that was based at least in part upon the state's "right to worship" guarantee. *Planned Parenthood of Middle Tennessee*, 38 S.W.3d at 13. Under the court's analysis, a woman's right to legally terminate her pregnancy is "fundamental" under the state constitution and, therefore, requires application of the "strict scrutiny" standard of judicial review, *id*. at 15-17, the very same standard (without so describing the standard) that C.S.H.J.R. No. 135 would mandate. In *Planned Parenthood of Middle Tennessee v. Sundquist,* the Tennessee Supreme Court relied heavily upon its earlier decision in *Davis v. Davis*, 842 S.W.2d 588 (1992), which concerned the proper disposition of pre-implanted fertilized ova. In *Davis*, the court derived a fundamental state constitutional right to "procreational autonomy" from an implied right of privacy that, in turn, was based in part upon the state's "right to worship" guarantee. *Davis*, 842 S.W.2d at 600. In *Planned Parenthood of Middle Tennessee*, the Tennessee Supreme Court struck down, on state grounds, the same kind of informed consent legislation that had been upheld by the Supreme Court eight years earlier in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

Armstrong v. State

In *Armstrong v. State*, 989 P.2d 364 (Mont. 1999), the Montana Supreme Court held that the express privacy guarantee in the state constitution confers a fundamental right to obtain an abortion. *Armstrong*, 989 P.2d at 372-80 (in its decision, the court struck down a statute that prohibited non-physicians from performing abortions). In a coda to its privacy analysis, the court added that "the rights of personal and procreative autonomy at issue here also find protection in more than just Article II, Section 10 [the privacy guarantee]," *id*. at 383, citing, among other provisions of the Montana Declaration of Rights, art. II, § 5, which prohibits the establishment of religion and guarantees the free exercise thereof. In the court's view, art. II, § 5, "protect[s] . . .

the freedom to accept or reject any religious doctrine, *including those about abortion . . . .*" *Id*. at 383 (emphasis added).

Pro-Choice Mississippi v. Fordice

In *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645 (Miss. 1998), the plaintiffs challenged the State's informed consent and parental consent statutes, which had previously been upheld by the United States Court of Appeals for the Fifth Circuit. In *Pro-Choice Mississippi*, the plaintiffs claimed that the statutes violated their rights under the state constitution, including the "freedom of conscience" guarantee. 716 So.2d at 649. Although the state supreme court held that the state constitution protects an implied right of privacy that extends to abortion, it did not expressly rely upon the "freedom of conscience" guarantee in its holding.[1]

Right to Choose v. Byrne

In *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982), the New Jersey Supreme Court, distinguishing between *interference* with the free exercise of religion, and *facilitation* of free exercise, held that a statute restricting abortion funding did not violate the state free exercise of religion guarantee. *Right to Choose*, 450 A.2d at 939 (noting that "[t]he constitutional right to the free exercise of religion is not a promise that following one's faith will be free from cost").[2] Even assuming that "for some an abortion represents the fulfillment of a religious duty," that duty "cannot serve as the basis for requiring public funding, for to compel facilitation of the exercise of that religious duty may well violate the prohibition against the establishment of religion." *Id*. The opinion in *Right to Choose* clearly implies that a prohibition of abortion might violate the state free exercise guarantee because, unlike a restriction on public funding of abortion, a prohibition *would* constitute "interference" with the free exercise of religion.

Hope v. Perales

In *Hope v. Perales*, 571 N.Y.S.2d 972 (Sup. Ct. 1991), *aff'd* 595 N.Y.S.2d 948 (App. Div. 1993), *rev'd on other grounds*, 634 N.E.2d 183 (N.Y. 1994), a state trial court rejected a "free exercise" challenge to a statute that provided prenatal care and childbirth assistance, but not abortion services, to women who are slightly above the poverty level (in a ruling ultimately reversed by the court of appeals, the trial court struck down the program on other grounds). On appeal, plaintiffs renewed their state free exercise claim, 595 N.Y.S.2d at 950, a claim the Appellate Division did not address (plaintiffs abandoned the claim in the court of appeals).

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[1] Applying the "undue burden" test the United States Supreme Court adopted in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Mississippi Supreme Court upheld both statutes. If C.S.J.H.R. No. 135 were adopted, however, Texas state courts would have to apply the more rigorous "strict scrutiny" standard of review to religiously based claims.

[2] The court held the funding limitation invalid on other state constitutional grounds.

Low-Income Women of Texas v. Raiford

In *Low-Income Women of Texas v. Raiford*, Travis County District Court, 126th Judicial District, Case No. 93-02823, Order of March 23, 1998, *rev'd sub nom. Low-Income Women of Texas v. Bost*, 38 S.W.3d 689 (Tex. Civ. App. Austin 2000), *rev'd sub nom. Bell v. Low-Income Women of Texas*, 95 S.W.3d 253 (Tex. 2002), the plaintiffs challenged the Texas Medical Assistance Program's restrictions on public funding of abortion for indigent women. In the state district court, the plaintiffs claimed that the funding restrictions violated, among other provisions of the Texas Constitution, the "freedom of worship" guarantee of art. I, § 6. *See* Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment at 8-9, 17-20 (citing multiple provisions of the Texas Constitution, including art. I, § 6). Although the district court did not specifically address this claim in its order granting the defendants' motion for summary judgment (which was ultimately upheld by the Texas Supreme Court) and although plaintiffs did not pursue this claim in the Texas Court of Appeals or the Texas Supreme Court, the mere fact that the claim was raised demonstrates that such challenges are possible. And adoption of C.S.H.J.R. No. 135 would make them much more likely because of the rigorous standard of judicial review ("strict scrutiny") the proposed amendment would mandate for religiously based claims.

Planned Parenthood of Mid-Michigan, *Inc. v. Attorney General*

In *Planned Parenthood of Mid-Michigan*, *Inc. v. Attorney General*, Michigan Circuit Court, Kalamazoo County, Case No. D 91-0571 AZ, a state trial court rejected a state freedom of religion challenge to a parental consent statute that prohibits anyone who is employed by or serves as a volunteer to an organization that provides abortions or abortion counseling and referral services from acting as a "next friend" of a minor in a judicial bypass hearing.

> While the statute may cause some people to make a choice between providing volunteer services to abortion consulting or referral services versus representation of pregnant minors in the probate court, the law neither directly nor indirectly concerns the religious beliefs of the plaintiff [a Unitarian-Universalist Church minister] or anyone else similarly situated. [Plaintiff] is free to believe as he sees fit and may work or volunteer uninhibited in abortion related matters to the extent that he chooses. On its face, the statutory disqualification is constitutional.

Order and Opinion of April 29, 1994, at 10.

Preterm Cleveland v. Voinovich

In *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570 (Ohio Ct. App. 1993), the Ohio Court of Appeals held that an abortion statute requiring informed consent and mandating a twenty-four hour waiting period did not violate the "right of conscience" protected by the state constitution. *Preterm Cleveland*, 627 N.E.2d at 578-79.

Planned Parenthood Ass'n, Inc. v. Dep't of Human Resources

In *Planned Parenthood Ass'n, Inc. v. Dep't of Human Resources*, 663 P.2d 1247 (Or. Ct. App. 1983), the Oregon Court of Appeals declined to consider a state free exercise of religion challenge to an administrative regulation restricting public funding of abortion because of an inadequate appellate record. *Planned Parenthood Ass'n*, 663 P.2d at 1261.[3]

The foregoing cases demonstrate that "free exercise," "right of conscience" or "freedom of worship" challenges to statutes regulating and/or prohibiting abortion are not hypothetical and that, in at least some instances, such challenges have succeeded (when those state guarantees have been interpreted in conjunction with other state constitutional provisions). It is not difficult to imagine the circumstances under which Texas abortion laws could be challenged under C.S.H.J.R. No. 135. For example, a minor could claim that the State's parental consent law "substantially burden[s]" her in the practice of her religion, by allowing a third party (a parent or legal guardian) to deny her the opportunity to obtain an abortion that she sincerely believes is required or allowed by her religion. Even assuming that the State could demonstrate that it has a "compelling interest" in ensuring parental involvement in a minor child's decision to obtain an abortion, is a parental consent law the "least restrictive available means" to achieve that interest? Or, as the Alaska Supreme Court asked in striking down the State's parental consent law, *see State of Alaska v. Planned Parenthood of Alaska*, 171 P.3d 577, 583-85 (Alaska 2007), is there a *less* restrictive means available, to wit, a parental *notice* law, which leaves the ultimate decision to obtain an abortion up to the minor? Does an informed consent statute, requiring a pregnant woman considering an abortion to be informed that human life begins at conception, "burden" a woman who, based on her "sincerely held religious belief," does not accept the State's view? Does the state statute prohibiting non-physicians from performing abortions "substantially burden" the "sincerely held religious belief" of an otherwise qualified health care professional (*e.g.*, a physician's assistant, as in the *Armstrong* case) that she is called by her religion to provide abortion services? And what effect would C.S.H.J.R. No. 135 have on the ability of the State of Texas to prohibit abortions if *Roe v. Wade* is overruled? Under the proposed amendment, would a pregnant woman be able to challenge the pre-*Roe* laws (or any new enactments banning abortion) on the ground that they "substantially burden" her in the practice of her religion by forbidding an abortion that her "sincerely held" religious belief would require or allow? In order to defeat such a challenge, the State would have to prove *both* (a) that a criminal prohibition of abortion promotes a "compelling governmental interest" *and* (b) that the prohibition "us[es] the least restrictive available means" to achieve that interest. Would a state court find that the State has a "compelling interest" in the life of the unborn child? And if it did, would the court also find that the State has selected the "least restrictive available means" to achieve that interest (*i.e.*, a criminal prohibition, as opposed to civil sanctions and/or disciplinary remedies)?

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[3] The regulation was held unconstitutional by the Oregon Court of Appeals under provision of the Oregon Constitution in a decision which was affirmed on administrative law grounds only by the Oregon Supreme Court. *Planned Parenthood Ass'n, Inc. v. Dep't of Human Resources*, 687 P.2d 785 (Or. 1984), *aff'g* 663 P.2d 1247 (Or. Ct. App. 1983).

Recommendation

Assuming that any other concerns regarding the potential effect of C.S.H.J.R. No. 135 are adequately addressed, the proposal 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 amendment confers or shall be construed to confer any right to obtain an abortion or the public funding thereof." More broadly, it might be asked why, given the very strong interpretation the Texas Supreme Court has given to the Texas Religious Freedom Restoration Act, Tex. Civ. Prac. & Rem. Code Ann. § 111.001 *et seq*., *see Barr v. City of Sinton*, 295 S.W.3d 287 (Tex. 2009), there is any need for a state constitutional amendment on the same subject. Of course, unlike a state constitutional amendment, a state statute may be amended or repealed by the legislature, but that observation cuts both ways. An unreasonable, unforeseen or undesirable interpretation of a state *statute* may be corrected by subsequent legislative action; an unreasonable, unforeseen or undesirable interpretation of a state *constitutional* provision could be corrected only by a subsequent state constitutional amendment. The more prudent course of conduct may be to allow state courts to continue to interpret the state Religious Freedom Restoration Act and, if necessary, amend the Act if the courts give too broad or too narrow a reading to the Act. That would not be an option with the adoption of C.S.H.J.R. No. 135 if it were adopted and interpreted in a manner that was not foreseen or intended by its sponsors. And, as the foregoing analysis of the case law suggests, that possibility cannot be discounted.