House
Legislative
Analysis
Section

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FIA CONTRACTS WITH RELIGIOUS ORGANIZATIONS

House Bill 5316 (Substitute H-3)
First Analysis (12-11-01)

Sponsor: Rep. Mark Jansen
Committee: Family and Children Services

THE APPARENT PROBLEM:

The nation has a long history of developing social programs with the purpose of aiding needy individuals and families. Despite the continued expansion of these social programs, there are still many people in need. For decades, religious organizations, such as the Salvation Army, Catholic Charities, and Lutheran Social Services have been an integral partner in attempting to aid the poor. However, these organizations have created secular nonprofit tax-exempt organizations, often referred to as 501(c)(3) organizations, to be eligible to receive governmental funds to provide social services. In 1996, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), more commonly known as the welfare reform act, included a provision known as "charitable choice", designed to allow religious organizations to receive funding to provide social services, on the same level as other nongovernmental groups. The charitable choice provision allows religious groups to receive governmental funds without diminishing their religious character or encroaching on the religious freedoms of any beneficiaries of assistance from religious organization.

It is believed by many that despite recent expansion of a religious group's ability to receive governmental funds for social services, out-dated federal and state regulations greatly inhibit a religious organization from applying for governmental assistance. In addition, few states have enacted charitable choice legislation in congruence with current federal regulations. In many instances, it is assumed that an organization's religious nature automatically prohibits them from receiving any funds. In addition, it is believed that if a religious organization were even able to receive governmental assistance, its religious character could be greatly diminished. As a result, legislation has been introduced that would allow the Family Independence Agency (FIA) to contract out social programs to religious organizations, in a manner substantially conforming to current federal charitable choice provisions regarding federal Temporary Assistance to Needy Families block grants.

THE CONTENT OF THE BILL:

House Bill 5316 would amend the Social Welfare Act to allow the Family Independence Agency (FIA) to contract with religious organizations.

Legislative Intent. The bill specifies that it would be the legislature's intent to provide assistance to needy families and individuals in the most effective and efficient manner; to prohibit discrimination against religious organizations in the administration and distribution of assistance; to allow religious organizations to assist in the administration and distribution of assistance without impairing their religious character; and to protect the religious freedom of those in need who are eligible to receive governmental aid by expanding their opportunity to choose to receive services from a diversity of religious organizations in a manner consistent with the free exercise and establishment clauses of the Constitution.

FIA contracts with religious organizations. The FIA could contract with a charitable or religious organization to administer a program created under the Social Welfare Act or to perform a duty of the FIA under the act. The FIA could also allow a charitable or religious organization to receive certificates, vouchers, or other forms of indirect disbursement on the same basis as any other nongovernmental provider without impairing the religious character of the charitable or religious organization, and without diminishing the religious freedom of those receiving assistance.

Furthermore, any state or local government agency that receives funds under the act could not discriminate against an organization that provides

assistance on the basis that the organization is religious or has a religious character.

Any charitable or religious organization seeking to enforce its rights under the bill could initiate a civil action in an appropriate state court for injunctive relief against the official or agency that violated the provisions of the act.

Funding. The FIA could use either direct or indirect funding mechanisms in its contracts with charitable or religious organizations. The bill specifies that any federal, state, or local government funds or other direct or indirect assistance received by the charitable or religious organization would be considered to be aid to individuals and families in need, who are the ultimate beneficiaries of such services, and would not be considered to be support for, or endorsement of, religion or the organization's religious beliefs or practices.

Federal and state funds received by a religious organization would have to be maintained in a separate account and would be audited and accounted for separately. A charitable or religious organization that contracts with the state to provide assistance would be subject to the same regulations as any other nongovernmental agency that contracts with the state to account for the use of funds pursuant to the Social Welfare Act.

Any direct funds provided through a contract to a religious organization to provide assistance could not be expended for sectarian instruction, worship, or proselytization (to convert persons from one religion to another). If the religious organization offered any of these activities, it would have to be voluntary for the recipients and be offered separately from any program receiving funds. The charitable or religious organization would have to sign a certificate certifying that it is aware of and will comply with this requirement. The certificate would be filed with the governmental agency that distributes the funds.

Autonomy. The bill specifies that a religious organization that contracts with the FIA would retain its autonomy from the state and local government. The organization would retain control of the definition, development, practice, and expression of its religious belief, and would also retain the control of its employment policies as recognized in section 702 of Title VII of the federal Civil Rights Act of 1964 or Section 208 of the Elliot-Larsen Civil Rights Act (MCL 37.2208). The religious organization's exemption regarding employment practices pursuant to the Civil Rights Act of 1964 would not be affected by participating in or receiving funds for a program administered by the FIA. Furthermore, a provision in a procurement law inconsistent with or diminishing the exercise of a religious organizations' autonomy recognized in the bill or section 702 of Title VII of the 1964 Civil Rights Act would not affect the provisions of the bill.

In addition, the state could not require a religious organization to alter its form of internal governance or to remove any religious art, icons, scripture or other symbols due to their religious nature in order to provide assistance or accept certificates, vouchers, or other forms of disbursement.

Recipients of Services. If a recipient were to object to the religious character of the organization from which he or she receives assistance, the appropriate state or local governmental agency would have to provide the recipient, within a reasonable period of time, accessible alternative assistance that he or she does not object to on religious grounds. The alternative assistance would have to be at least of the same value as the initial assistance provided by the religious or nonreligious organization.

A religious organization that was under contract with the FIA, or was providing assistance through a voucher, certificate, or other indirect means, could not discriminate against an individual who receives benefits on the basis of religion. The state or local government would be required to notify recipients of their rights.

Intermediate Grantor. The bill defines an "intermediate grantor" to mean a nongovernmental organization acting under a grant or other agreement with the federal, state, or any local government. Under the bill, if an intermediate grantor were given the authority to select a nongovernmental organization to provide assistance under the Social Welfare Act, the intermediate grantor would have the same duties as the government has when selecting or dealing with subgrantors. If the intermediate grantor were a religious organization, it would retain all of the rights afforded to a religious organization under the bill.

MCL 400.14h

BACKGROUND INFORMATION:

Charitable Choice Provisions in Federal Law. Charitable Choice was added to the 1996 PROWRA with three main goals: encourage states to expand the role of faith-based organizations in providing social

services; protect the religious character of faith-based organizations that accept governmental funds; and protect the religious freedoms of the beneficiaries of assistance.

Current federal charitable choice provisions are found in section 604a of Chapter 42 of the United States Code. Charitable Choice provisions have also been added to govern the Community Services Block Grant, the welfare-to-work program added to the welfare reform act, and also drug treatment funds administered by the Substance Abuse and Mental Health Services Administration from the Children's Health Act (2000). In 2001, the Community Solutions Act (H.R. 7), introduced by Representatives J.C. Watts (R-Oklahoma) and Tony Hall (D-Ohio) would add programs covering hunger relief, juvenile delinquency, crime prevention, housing, child care, senior citizens, and domestic violence to those programs eligible to be operated by religious organizations with the assistance of governmental funds.

Under the charitable choice provisions of the 1996 welfare reform act, a state may contract with faith-based organizations to administer and provide social services. In addition, a state may provide beneficiaries of assistance under these social programs with certificates, vouchers, or other forms of disbursement, which are redeemable at contracted faith-based organizations. The ability of faith-based organizations to provide social services, and thus their eligibility to receive governmental funds, is based on the same criteria as other nongovernmental providers. Should a state elect not to involve nongovernmental providers in administering social programs, the state does not have to follow the charitable choice provisions. All federal welfare funds are subject to the charitable choice provision, should a state elect to involve the participation of nongovernmental social service providers.

Under the charitable choice provisions, a state must not discriminate against any religious organization applying for funds on the basis of that organization's religious character. Faith-based organizations that contract with a state maintain control over their religious character and convictions. In addition, faith-based organizations also retain the ability to base their employment practices on a person's religious beliefs, as afforded to them by Title VII of the 1964 Civil Rights Act. However, a faith-based organization is still subject to the federal prohibition against employment discrimination on a basis of an individual's race, color, national origin, gender, age, or disability. In addition, the federal government or any state government cannot require any religious organization to alter its form of internal governance or remove any religious art, icons, scripture, or other symbols.

Charitable choice is also intended to maintain the rights of recipients of any benefits from programs administered by religious organizations. Any religious organization contracting with the government cannot discriminate against any beneficiary because of the individual's religion, religious beliefs, or refusal to actively participate in a religious practice. Should an individual object to the religious character of the organization from which he or she receives assistance, the state is required to provide that person with an alternative provider, which he or she does not object to and which provides substantially the same value of service, within a reasonable period of time.

Though no direct funds can be expended for sectarian worship, instruction, or proselytization, this restriction is not necessary should a person select a particular faith-based organization through the use of a voucher, or other form of disbursement. Beneficiaries who receive vouchers can make their own decision as to which nongovernmental provider to utilize. Faith-based organizations cannot require a person to participate in a religious practice, nor can they require a person to convert to a particular faith.

Supreme Court Jurisprudence. One of the chief concerns with charitable choice revolves around its constitutionality. The First Amendment of the Constitution states that Congress (and the states through application of the 14th Amendment) shall make no law respecting the establishment of religion, nor shall it prohibit the free exercise of religion. Most of the cases pertaining to the use of governmental funds for religious aid involve schools. These cases involving schools constitute the Court's Establishment Clause jurisprudence, and could be applicable to any case pertaining to charitable choice.

In determining the constitutionality of public funding for religious organizations (schools, in large part) two philosophies begin to emerge: separation and neutrality. The separationist view subscribes to the Jeffersonian principle that there should exist a wall of separation between the church and state. Separationist decisions focus on the idea that the Establishment Clause was designed to safeguard against divisiveness amongst groups along religious lines, damaging religion by eroding away at church autonomy, and compelling an individual to hold a particular religious belief.

The guiding principle for public funding according to the separationist belief arises from *Everson v. Board of Education of Ewing Township* (1947). In *Everson*, the Court held that the Establishment Clause required a separation between church and state. In defining its separation, the Court found that, at the very least, there shall be no state or national church; no laws that aid one religion, all religions, or prefer one over another; no government action can promote or prohibit a person from holding a particular belief or disbelief; no laws punishing a person for professing religious beliefs or disbeliefs, for attending or not attending church; taxation to support religious activities or institutions to teach or practice religion was prohibited; and there shall be no governmental participation in the affairs of a religious organization, and, likewise, there shall be no religious participation in the affairs of the government. Though the Court did hold that there should be no aid to religion, it recognized that there were a few exemptions for a universal general benefit, such as allowing churches to receive police and fire protection, which were not considered aid to religion.

In *Everson*, the Court upheld a New Jersey statute that reimbursed parents for the costs of transporting their children to and from school. The statute applied to children who attended public schools or parochial schools. The Court ruled that, under the Establishment Clause, the state could not provide taxpayer dollars to a religious institution. However, the Court also held that at the same time, the state could not hinder the free religious exercise (including non-belief) of an individual, by excluding believers and non-believers from receiving the benefits of public welfare legislation. The Court recognized that the statute aided a child's efforts to get to a parochial school, and that he or she may not go to the parochial school if the state only reimbursed parents of children attending public schools. However, the Court held that the same could be said for police protection guarding against traffic hazards provided to children en route to parochial schools. Furthermore, not providing these essential services to religious institutions was clearly not the intent of the First Amendment. The Court held that the Establishment Clause created a wall of separation between church and state, which must remain high and impregnable.

After the *Everson* decision, it was asserted by many that there were four guiding principles regarding the Establishment Clause. First, any government aid to religion was forbidden. Second, a government provision of a universal welfare benefit did not constitute aid to religion. Third, there was no rule that required religious equal protection, such that any aid to religious schools is allowable as long as aid to public school pupils are favored in an identical manner. Finally, the government must maintain neutrality toward religion, in that it neither aids nor impedes any religion or religious activity. It is believed by many that this remains the guiding principle for cases involving public funds for religious schools.

In 1971, in *Lemon v. Kurtzman*, the Court established a three-pronged test to determine whether a law violated the Establishment Clause. First, the law should fulfill a secular public purpose. Second, the law should not have the primary effect of advancing religion. Finally, the law should not lead to excessive entanglement between church and state. In 1997, this test was modified in *Agostini v. Felton* by concentrating on the first two criteria, because many of the cases discussing excessive entanglement also used the same considerations as determining the primary effect of the law. In *Agostini*, the Court held that aid to parochial schools was allowable if aid was allocated based on neutral, secular criteria that neither favored nor disfavored religion, and was made available to both religious and secular beneficiaries on a non-discriminating basis.

Another factor in determining whether governmental aid to a religious organization was constitutional was whether or not it was "pervasively sectarian". This notion arose from *Hunt v. McNair* (1973). In general it is believed that if an organization's religious purposes and secular purposes were inextricably linked and could not be distinguished from one another, thereby making the organization pervasively sectarian, the religious organization would not be able to receive any governmental funds without a clear violation of the Establishment Clause. In its jurisprudence, the Court has offered no clear definition as to what constituted "pervasively sectarian".

In *Roemer v. Board of Public Works of Maryland* (1976) the court upheld a Maryland law allowing grants to private colleges and universities. A college or university was eligible to receive grant money if it offered at least one non-theological degree. Grants were based on the number of students attending who were not pursuing a theological or seminary degree. The Court upheld the grant with the requirement that grant money be spent only on secular functions.

In 1982, the Court ruled in *Larson v. Valente* ruled unconstitutional a Minnesota law requiring charitable organizations to register with the state's Department of Commerce and submit annual reports to the

department; prohibiting charitable organizations that spent more than 30 percent of their annual funds on administrative costs from soliciting contributions in the state; and exempting religious organizations who solicited more than 50 percent of their contributions from members or affiliated organizations from registering with the department. In its decision, the Court ruled that the law was unconstitutional because it intentionally discriminated against certain religions by placing a burden on only those few, which was not related to furthering any specific governmental interest.

In 1981, with *Widmar v. Vincent*, the present view of "neutrality" emerged as the guiding principle in Establishment Clause cases. While the notion of government neutrality toward religion was far from new, the definition as used in *Widmar* was new. In this case, neutrality was defined to mean that when government provides social services, eligibility should not be based on religion to determine eligibility. This was not a preferential treatment of religion, or no religion, but rather it held onto the belief that individuals and organizations should have the same access to benefits without regard to religion. Charitable choice is based on this idea of evenhandedness.

The *Widmar* decision was based on the Free Speech Clause of the First Amendment of the Constitution. In *Widmar*, the Court held that the Establishment Clause did not supercede the Free Speech Clause. Subsequent cases have upheld the notion of equal access in large part because of Free Speech and nondiscrimination. Based on this, a state cannot adopt a welfare program involving public and private entities and then exclude religious ones. Asserting similar logic, in *Rosenburger v. Rector and Visitors of the University of Virginia* (1995), the Court ruled that the university could not deny funding for the publication costs of a Christian-oriented student publication, since it provided funding to other student organizations for their printing costs. The Court held that denying funding was a violation of the organization's freedom of speech.

In recent years, the trend has been to move away from the notion of a wall of separation and toward a position of neutrality. *Bowen v. Kendrick* (1988) is probably the Supreme Court case most closely related to charitable choice. However, since the Court's decision in 1988, its establishment clause jurisprudence has continued to change. In *Kendrick*, the Court upheld the Adolescent Family Life Act (AFLA), which provided federal grants for research and services regarding premarital adolescent sexual relations and pregnancy counseling. Under the AFLA, grant money was available to public or nonprofit private organizations and agencies. Eligible grant recipients were required to demonstrate their capability of providing the necessary services. The bill allowed religious organizations to receive funding.

The Court ruled that, on its face, the AFLA did not violate the Establishment Clause. It held that the AFLA had a clear secular purpose – to eliminate and reduce the social problems cause by teenage sexuality, pregnancy, and parenthood. In addition, the Court found that, on its face, the AFLA did not have the primary effect of advancing religion. Grant money went to groups that were capable of providing certain services. There was no requirement that organizations be affiliated with any religious denomination. Finally, the service provided did not have a religious character. The Court concluded that the approach taken to provide the necessary services was not inherently religious, although it could coincide with the approach taken by certain religions.

In addition, the Court held that the AFLA did not create excessive entanglement of church and state. The Court found that monitoring grant money is necessary to ensure that it is being spent as intended and in a manner consistent with the Establishment Clause.

Though the Court ruled that the AFLA, on its face, appeared to be neutral, it then looked at whether the government aid, as applied by the act, advanced religion – that is if the grant money went to a pervasively sectarian institution. Should a pervasively sectarian institution receive federal funding, even though it is designated for a secular purpose, there still remains a risk that direct governmental funding could advance the religious mission of the institution. However, the Court ruled that the possibility the grant money could go to pervasively sectarian institutions was not a sufficient reason to conclude that no grants whatsoever could be given to religious organizations. The case was remanded to the lower court to determine if any of the institutions receiving funding were pervasively sectarian. Any organization found to be pervasively sectarian would then have their funding discontinued.

The role of neutrality as a determining factor for a violation of the Establishment Clause was at the heart of the Court's recent decision in *Mitchell v. Helms* (2000). In *Mitchell*, a fractured court ruled that a Louisiana statute providing educational materials and equipment to public and private schools did not

violate the Establishment Clause if the aid was neutral, in that is was based on equal treatment of religious and other institutions, without consideration to religion. The plurality opinion issued by Justice Thomas asserted that if funds were distributed to religious, irreligious, and areligious groups alike, one could not conclude that any governmental indoctrination had occurred. Furthermore, if the government seeks to further a secular purpose by offering aid to all groups on the same terms without regard to religion, then it can be said that any aid to a religious group has the effect of furthering the secular purpose. Under this logic, public funds to religious groups are allowable as long as the funds came from a program that included religious and secular groups, each with equal access. Furthermore, any funds that a religious organization receives, say, through a voucher that was a result of independent and private choices of individuals would also not be considered a violation of the Establishment Clause. Justice Thomas also rejected the claim that the Louisiana program violated the Establishment Clause because aid to religious schools carried the possibility of being diverted for religious indoctrination.

The plurality opinion also set forth several reasons as to why the "pervasively sectarian" principle disallowing aid to certain religious organizations no longer was applicable. First, Justice Thomas held that the reliance on the Court's precedents was declining, since no aid program has been struck down since 1985 because it was found to be pervasively sectarian. Furthermore, *Agostini* (1997) overturned the two cases from 1985 and upheld an aid program that was pervasively sectarian. Second, as long as the recipient advances a secular purpose the religious nature of the recipient should not matter in constitutional analysis. Third, focusing on the recipient as being pervasively sectarian was unnecessary and offensive. Determining whether or not an individual or organization is pervasively sectarian amounts to religious discrimination, which has been prohibited in several cases. Finally, Justice Thomas asserted that hostility toward pervasively sectarian schools has a "shameful pedigree", and that the doctrine of prohibiting aid to pervasively sectarian organizations was bigoted and "should be buried now". Had Justice Thomas' plurality opinion garnered enough support for a majority, it could have changed the law dramatically. However, Justice O'Connor's concurring opinion is controlling on the lower courts and legislative bodies.

The concurring opinion asserted that the Court's Establishment Clause jurisprudence has never relied solely on the neutrality test, as was the case in the plurality opinion. But rather, neutrality is one of several factors. Justice O'Connor concluded that neutral, indirect aid to a religious organization does not violate the Establishment Clause. However, in determining whether or not direct aid to a religious organization violates the Establishment Clause, neutrality was not a sufficient constitutional test.

In *Mitchell*, Justice O'Connor was concerned with the ability of governmental aid being diverted to religious indoctrination. Previous Court decisions in *Meek v. Pittinger* (1975) and *Wolman v. Walter* (1977) ruled that absent any actual diversion of governmental aid for religious indoctrination, a substantial risk of divertibility was sufficient to invalidate any governmental aid program on the grounds that it violated the Establishment Clause. Under the plurality opinion and the concurring opinion, the Court overruled *Meek* and *Wolman* and rid itself of any presumption that any aid with the mere possibility of being diverted was unconstitutional. Where the two opinions differed was whether or not the actual diversion of religious aid was unconstitutional. The plurality opinion based the constitutionality of the Louisiana program solely on the grounds that aid was allocated neutrally without regard to religion. However, Justice O'Connor required that there exist proof of any actual diversion of governmental aid toward religious indoctrination. Under this view, no government funds may be used for indoctrination. Any religious organization receiving direct assistance would have to separate its secular purposes from its religious purposes.

In ascertaining the constitutionality of the Louisiana program, Justice O'Connor applied the modified two-prong "Lemon test" from *Agostini*, by looking at whether the program had a secular purpose and whether or not it had the primary effect of advancing religion. Since the secular purpose of the program was not a point of contention in the case, she focused on the primary effect of the law. In doing so, Justice O'Connor used three criteria: whether any actual diversion of governmental aid occurred; whether the program is neutral with respect to religion; and whether the program resulted in an excessive administrative entanglement.

In approving the Louisiana program, Justice O'Connor cited several factors: aid was allocated on a neutral, secular basis; aid supplemented, rather than supplanted, governmental aid; aid did not reach the schools' coffers; the program had a secular purpose; and actual evidence of diversion of governmental funds was hardly substantial. Finally, under the

Louisiana program, aid was limited to "secular, neutral, and nonideological" uses and was expressly prohibited from being used for "religious worship and instruction", which sufficiently safeguarded against any violation of the Establishment Clause.

In an exhaustive dissent, Justice Souter asserted that the Establishment Clause prohibits favoring religion, any particular religion, and irreligion. Thus, the Establishment Clause prohibits any governmental funds for religious aid. However, Justice Souter did recognize that there was no clear distinction separating what was considered governmental aid to religion and what was a lawful benefit. In its Establishment Clause jurisprudence, the Court held that there are three overriding concerns: compelling an individual to support religion violated the fundamentals of freedom of choice; government aid corrupts religion; and government establishment of religion is inextricably linked with conflict. Justice Souter noted that in *Everson*, though the Court was divided as to what amounted to aid or support to religion and what would be considered hindering religion, the Court did hold that there shall be no aid to religion. He asserted that this prohibition of governmental aid to religion has remained the governing principle for Establishment Clause cases regarding public aid to religious schools.

Justice Souter also took issue with the plurality's use of neutrality in determining the constitutionality of governmental aid to religion. The extraordinary breadth Justice Thomas used in applying the neutrality test was, as Justice Souter stated, "unequaled in the history of Establishment Clause interpretation". Justice Thomas' view of neutrality superceded the Lemon/Agostini test. Under Thomas' logic any aid, appearing to be neutral, must not have the primary effect of advancing religion. The plurality opinion assumes that the per capita distribution is allowable because it safeguards the same principles of independent choice. Justice Souter felt that, asserting this logic, the government could donate money to churches based on the number of members, under the guise that membership was based on independent private choice.

In the course of the Court's Establishment Clause jurisprudence, never has neutrality been the sole determining factor for constitutionality. Justice O'Connor agreed with Justice Souter on this point. The Court has also taken into consideration the recipients (whether or nor they are pervasively sectarian, or in the instance of schools, whether or not they are or primary or secondary, or colleges/universities), the distribution of aid (direct or indirect, and whether the distribution is determined by genuinely independent choices), and the characteristics of the aid itself (religious content, cash form, divertibility or any actual diversion, supplantation of traditional expenses, and substantiality). Justice Souter believed that neutrality principle, used by Justice Thomas as the sole constitutional test, would end the long-standing principle of no aid to an organization's religious mission.

Justice Souter opined that in its jurisprudence, the Court has prohibited any governmental aid with religious content, and has invalidated any aid when it could be diverted to religious education. In *Everson*, the court held that no taxpayer funds should be used to support the tenets and faith of any church. The Court has looked at whether the aid is intended to benefit the religious education and whether it is likely to do so. The plurality opinion in *Mitchell* did not do this. As a result, said Justice Souter, the plurality opinion all but throws out the principle of the right of conscience against being compelled to support religion.

Though the Court failed to reach a majority opinion in *Mitchell*, there are several important conclusions that can be drawn. First, a five-person majority failed to recognize that neutrality is the sole constitutional test in Establishment Clause cases. In doing so, this majority continued to uphold the principle of no aid to religious mission in matters concerning governmental aid to religious organizations. Second, the rulings regarding no governmental aid to pervasively sectarian organizations are also no longer good law. Though Justice O'Connor did not denounce the "pervasively sectarian" doctrine as being bigoted, she did concur with the plurality that the concept has lost its relevance, by joining them in overruling *Meek* and *Wolman*.

Recent Litigation. During the last two years there have been several cases filed challenging the constitutionality of charitable choice. At issue in *American Jewish Congress and Texas Civil Rights Project v. Eric Bost* was a program funded by the Texas Department of Human Services and operated by a jobs partnership group in Washington County. The program provided funds to a faith-based employment training and placement program. The suit charged that Protestant evangelical Christianity "permeated" the program, and state funds were used to purchase Bibles and aid in proselytization, which was in direct violation of state and federal law prohibiting support for religious organizations. On January 29, 2001 the U.S. District Court for the

Western District of Texas ruled that there were no federal issues at stake and remanded the case to state court. In February 2001, the case was declared moot and dismissed after the program was discontinued.

In *Freedom from Religion Foundation, Inc. v. Governor Tommy Thompson*, filed in U.S. District Court for the Western District of Wisconsin in October 2000, it is alleged that Faith Works (a faith based drug treatment program in Milwaukee) violates the Establishment Clause of the Constitution. It is alleged that welfare-to-work funds provided direct support to the pervasively sectarian organization, which used the funds to indoctrinate clients in the Christian faith. The foundation alleges that program participants attend Bible studies, prayer, and chapel services, and are also interviewed about their attitude toward faith.

Filed in August 2000, *American Jewish Congress v. Michael Bernick et al.*, challenges a California Department of Employment Development program to fund job training programs offered by groups that had never contracted with the state. The program was available only to religious organizations, and thus allegedly contradicted the charitable choice requirement of neutrality.

Not involving charitable choice, *Pedreira v. Kentucky Baptist Homes for Children* was filed by the American Civil Liberties Union (ACLU) and the Americans United for Separation of Church and State in April 2000 in the U.S District Court for the Western District of Kentucky. Pedreira was fired by the KBHC on the grounds that her homosexual lifestyle conflicted with the organization's religious values. It was alleged that the state could not contract with the KBHC because the organization's employment policy maintained religious standards. Though this case does not involve a charitable choice program, it does have clear implications on the religious-based employment practices of charitable choice-funded religious organizations.

Religious discrimination and the 1964 Civil Rights Act. The bill allows religious organizations receiving governmental funds to base their employment practices on religious grounds, following section 702 of Title VII of the 1964 Civil Rights Act. Under the act the prohibition against discrimination in employment practices does not apply to "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities".

The Michigan Constitutional Provisions. Article 1, Section 2 of the 1963 state Constitution states: "*No person shall be denied equal protection of the laws; nor shall any person be denied enjoyment of his civil liberties or political rights or be discriminated against in the exercise thereof because of religion, race, color, or national origin. The legislature shall implement this section by appropriate legislation*".

Article 1, Section 4 of the 1963 state Constitution states: "*Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or against his consent, to contribute to the erection or support of any place of religious worship, or pay tithes, taxes, or others rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief*".

Elliot-Larsen Civil Rights Act. Under the Elliot-Larsen Civil Rights Act, an employer is prohibited from failing or refusing to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege, because of, among others, an individual's religion (MCL 37.2202). The act continues to state that an employer shall not limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant, or otherwise adversely affects the status of an employee or applicant because of the individual's religion.

Elliot-Larsen does, however, allow a person to apply for, and be granted with sufficient showing, an exemption on the basis that religion, among others, is a bona fide occupational qualification reasonably necessary to the normal operation of the business or enterprise. An employer that does not obtain a prior exemption shall have the burden of establishing that the qualification is reasonably necessary to the normal operation of the business. In obtaining such an exemption, there must exist a nexus between the job duties and the person's religion.

Furthermore, the act specifies that a contract to which the state, a political subdivision of the state, or an agency of the state or a political subdivision is a party shall contain a pledge by the contractor and his

subcontractors not to discriminate against an employee or applicant for employment with respect to hire, tenure, terms, conditions, or privileges of employment, because of, among others, religion. A breach of this pledge may be regarded as a material breach of the contract. [Note: The bill contains a provision that any provision inconsistent with the bill or section 702 of the 1964 Civil Rights Act would not affect the provisions of the bill.]

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill would not have any significant fiscal impact on either the state or local governments. (12-10-01)

ARGUMENTS:

For:

There exists an underlying belief that any aid to religious organizations is automatically constitutionally suspect. In many instances, governmental officials rightly prohibit funding to religious organizations. However, many of these prohibitions go beyond prudent constitutional restrictions and court requirements. These antiquated policies, though they are often good-faith efforts to reduce constitutional conflict, greatly restrict a religious organization's ability to receive governmental assistance for providing social programs. The bill, substantially coinciding with federal law, is designed to merely open the door to equal funding opportunities. The bill in no way ensures that religious organizations will receive funding.

Furthermore, the bill maintains the autonomy of the religious organization. Under the bill, religious organizations would maintain control over their religious beliefs and employment practices, would not have to alter their form of internal governance, and would not be required to remove any art, icons, or other religious symbols. It is believed that many religious organizations have had to all but disavow themselves from any religious affiliation as a necessary requirement to receive governmental assistance. Many other organizations have steered clear of governmental aid out of fear that should they receive funding, their religious nature would be compromised. This bill seeks to allow religious organizations to receive funding *and* maintain their religious identity, and thereby remove the anti-religious bias that often persists in funding.

Against:

The bill will inevitably result in an increase in the number of potential social service providers. However, with these added providers, there is no increase in funding. Given the state's current fiscal status, additional funding seems unlikely. Current service providers, with proven track records of their services, will see drastic cuts in state funding, something many simply cannot handle as state dollars become more scarce. Many smaller congregations, who currently run self-supported services, would be able to receive funding to provide social services. However, many of these organizations are not capable of providing the requisite level of services in order to make up for the diminished services of current providers. The bill will provide fewer dollars to more organizations. As a result, organizations, secular and religious alike, will not be able to provide an adequate level of services.

For:

Charitable choice focuses on what each organization can do, not who it is. Religion is not taken into consideration. Any organization, religious or secular, not capable of providing the necessary services will be passed over. By opening the door to more potential service providers, the state will see greater accountability and efficiency in the expenditure of its funds. More providers will result in greater competition. In the end, only those organizations capable of providing services will receive funding.

For:

The bill would protect the religious freedom of the beneficiaries of the program. The bill maintains that if a recipient were to object to the religious character of the organization from which he or she receives assistance, he or she would be provided a viable alternative provider. In addition, no person would be denied service because of his or her refusal to hold a particular religious belief or non-belief. Unlike federal charitable choice, the bill states that recipients would be notified of their rights. Furthermore, no grant money would be used for proselytization, worship, or instruction.

Response:

The bill contains no provisions as to how a person objecting to a service will be provided with an alternate provider. What sort of process must a person go through to receive an alternate provider? The bill would require an alternate provider be accessible to an individual. However, in many rural areas throughout the state, this may not be a viable option, especially as current providers will have to scale back services as funding decreases. In some parts of the state, the number of service providers is

limited, not only in number, but also in available services. What great lengths must an individual go through to receive an "accessible" alternate provider?

Against:

Though the bill explicitly states that no governmental funds would be used for proselytization, worship, and instruction, it provides no substantive safeguards to ensure against this. In addition, the bill does not contain any language that would prevent a grantee from using private funds for religious services as part of the program. What would happen if an organization were proselytizing, or violating the act in another way? Would they be subject to a fine? Would their funding be stripped? Would their contract with the FIA be revoked? Without adequate safeguards and penalties, program recipients could be subject to religious coercion.

Furthermore, government funding of any program or organization requires oversight to ensure that funds are properly expended. Any taxpayer dollars appropriated without adequate oversight could be considered promotion of that religion, especially in light of the state's constitutional prohibition against funding religious organizations. However, creating such safeguards to ensure that funds are spent as the law intends and within the context of the Constitution could amount to excessive entanglement. Either way, funding becomes problematic.

Response:

In the *Mitchell* decision, Justice O'Connor opined that the court should do away with all presumptions of unconstitutionality because aid has the mere possibility of being diverted to a religious purpose. Justice O'Connor required an actual diversion of governmental aid to religious indoctrination. A possibility of occurring and an actual occurrence are very different. Simply because a program could proselytize, that does not mean that actual proselytization has occurred. One could reasonably conclude that the court would require actual proof of proselytization, worship, or instruction before it rules that a program violates the Constitution.

Against:

The bill allows a religious organization to use religious discrimination in its hiring practices, and still receive taxpayer dollars. The prohibitions against discrimination are fairly well supported in both state and federal law. Under the bill, a religious organization is afforded extraordinary breadth in its employment practices. For instance, a religious organization could fire or refuse to hire an individual because he or she is a homosexual (which is not protected under state law), regardless of whether or not that individual is a member of the same denomination. An unwed mother could also be denied employment, though she may be of the same denomination, because it is apparent that her ideals are not consistent with those of the denomination. While religion-based employment decisions are sensible in areas when faith is an issue, that should not be the case in other areas. A Catholic church should not be expected to hire a Lutheran to serve as its minister. However, religion should not be an issue when hiring secular employees, such as janitors or secretaries. Furthermore, what would happen should a religious organization's doctrine mandate, say, the disparate treatment of men and women or certain races? While the Civil Rights Act allows for religious discrimination, it explicitly prohibits gender-based and race-based discrimination. When these two come in conflict, which takes precedence? Furthermore, while religious discrimination is allowed under the Civil Rights Act of 1964, that should not be the case when government dollars are involved. Funding an organization that is free to discriminate against an individual under the guise of religious privilege, sets a bad precedent and amounts to nothing more than government sanctioned discrimination.

Response:

The bill maintains an exemption already contained in the Civil Rights Act of 1964. Requiring a religious organization to not base its employment decisions on religion would contradict the act. This exemption only applies to religion. An organization would still be prohibited from other forms of discrimination its employment practices and in the provision of services.

Against:

Quite simply, this bill is not necessary. Religious organizations, such as the Salvation Army, Catholic Charities, and Lutheran Social Services, have been providing social services for decades, with governmental assistance. In order to receive these funds, these organizations have created separate 501(c)(3) nonprofit tax-exempt organizations, with the intent to separate their secular and sectarian purposes. Religious-affiliated organizations are treated in the same manner as other secular organizations, something this bill claims to address. This bill, however, will not treat religious organizations and non-religious organizations equally. Current practice takes out the religious aspect of an organization in the provision of social services. Essentially, current practices already focus on what an organization is capable of, not who it is.

This too, is something the bill claims to address. This bill, while ignoring the religious aspect of an organization, allows it remain.

Against:

This bill states that religion will not be a factor when deciding which organizations should receive governmental assistance to provide social services. In theory, all religious organizations and secular organizations will be treated equally. In practice, this will surely not be the case. Will an organization affiliated with the Nation of Islam, Ku Klux Klan, or Wiccan beliefs have equal funding opportunities as more common Jewish, Catholic, or Lutheran organizations? In light of recent events, will Muslim organizations be able to complete equally for government funds? Charitable Choice is allegedly designed to look past who the organization is, and concentrate on what it is capable of doing. That will hardly be the case when a minority or offensive religion could receive funding. The program will soon develop a double standard resulting in religious discrimination. Conventional and generally acceptable religions will receive equal funding opportunities. However, minority religions will implicitly be denied funding, regardless of whether they are qualified. Furthermore, what would be the response of the public if one of these minor religions received funding?

POSITIONS:

The Empowerment Network supports the bill. (12-7-01)

The Family Independence Agency does not have a position on the bill. (12-6-01)

The American Civil Liberties Union of Michigan opposes the bill. (12-6-01)

The Michigan Jewish Congress opposes the bill. (12-6-01)

The Anti-Defamation League opposes the bill. (12-7-01)

The Detroit Chapter of the National Association for the Advancement of Colored People (NAACP) opposes the bill. (12-7-01)

The Commission on Jewish Eldercare Services opposes the bill. (12-7-01)

The Metro Detroit Chapter of the Americans United for the Separation of Church and State opposes the bill. (12-10-01)

Analyst: M. Wolf

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.