

Department of Legislative Services  
Maryland General Assembly  
1999 Session

**FISCAL NOTE**

House Bill 966 (Delegate Rosenberg)

Commerce and Government Matters

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**Civil Rights - Religious Exercise**

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This bill provides that a government may not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, unless the government demonstrates that application of the burden to the person: (1) is in furtherance of a compelling governmental interest; (2) is the least restrictive means of furthering that compelling governmental interest; and (3) that the alternative proposed by the person will unduly interfere with the fulfillment of the compelling governmental interest. However, the bill provides that a government may substantially burden the exercise of religion of a person confined in a State or federal penological institution if it is reasonably related to legitimate penological interests.

In a civil action, a person aggrieved by a violation of this bill may recover injunctive relief and compensatory damages. A person aggrieved by a violation of this bill by an official or employee of a governmental authority may seek injunctive relief against the governmental authority, and may seek injunctive relief and compensatory damages against the official or employee of the governmental authority. A claim for damages is subject to the local government Tort Claims Act or the Maryland Tort Claims Act. Unless futile, a person must first exhaust all administrative remedies for resolving the contested governmental action.

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**Fiscal Summary**

**State Effect:** Potential indeterminate increase in general fund expenditures.

**Local Effect:** Potential indeterminate increase in expenditures due to the effect on the ability of local governments to enforce zoning and building codes, and other government legislation regarding land use and health and safety matters.

**Small Business Effect:** None.

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## Fiscal Analysis

**Background:** The First Amendment of the U.S. Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

Both the Establishment and Free Exercise Clause of the First Amendment apply to the states under the Fourteenth Amendment. The Free Exercise Clause prohibits the government from punishing someone on the basis of the person’s religious *beliefs* unless the government can demonstrate a compelling government interest and the least restrictive means. The Supreme Court has never found an interest that was so “compelling” that it would justify punishing a religious *belief*.

In Sherbert v. Verner (1963), the Supreme Court introduced a new standard for the review of free *exercise* claims and held that if a law substantially burdens the claimant’s free *exercise* of a sincerely held religious belief, the state must show a compelling governmental interest in the enforcement of the law in order to prevail (the Supreme Court in a subsequent case stated that it did not apply the least restrictive means standard). In Sherbert, the Supreme Court held that a Seventh Day Adventist who was terminated from her job rather than work on Saturday, her Sabbath, was entitled to unemployment compensation.

However, in Employment Division v. Smith (1990), the Supreme Court held that the states may prohibit or regulate conduct of general applicability even if the prohibition incidentally interferes with a person’s religious practices unless it can be shown that the law was motivated by a desire to interfere with religion. In Smith, the Supreme Court held that two members of the Native American Church were not exempt from a law prohibiting the use of peyote on religious freedom grounds.

In response to the Smith decision, Congress passed the 1993 Religious Freedom Restoration Act (RFRA) which provides that governments may not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability unless it demonstrates that application of the burden to the person is in furtherance of a compelling state interest and is the least restrictive means of furthering that compelling state interest.

In Flores v. City of Boerne (1997), a decision by a local zoning authority to deny a church a building expansion permit was challenged under RFRA. In Boerne, the Supreme Court held that RFRA exceeded the power of Congress and was therefore unconstitutional as applied to State and local governments. Maryland and many other states have responded to the Boerne decision by introducing RFRA-like legislation at the state level of government.

**State Effect:** The bill applies to nearly all State government action ranging from Education Law to Civil Rights Law to Health Care Law to Employment Law. Because the bill applies

so broadly and the interpretation of the standard by the courts is unclear it is difficult to reliably estimate the effect the bill could have on State finances. The bill could cause expenditures to increase to handle increased litigation. However, it is assumed that most, if not all, of these costs could be handled with existing resources.

Additionally, the bill could require the State as an employer to alter its operations. The Department of Legislative Services (DLS) is unable to determine the potential extent of any State operational expenditures because it is not known how the courts will interpret the “compelling government interest/least restrictive means/unduly interfere” standard set forth in the bill. Assuming that the courts apply pre-Smith jurisprudence, any additional costs to the State would likely be minimal. This estimate is based on Maryland’s experience with free exercise cases from the time that the Supreme Court decided Sherbert (1963) to the time that it decided Smith (1990).

However, if the courts interpret the bill to adopt a new and stricter standard than pre-Smith jurisprudence, the costs to the State could be significant depending on the nature of the cause of action and the outcome of the case. For example, the Department of Health and Mental Hygiene (DHMH) advises that it may have to provide specialized diets to accommodate a person’s exercise of religion. Furthermore, the State as an employer may have to modify daily and weekly work hours to accommodate a person’s religious exercise.

*Argument supporting the position that the bill adopts pre-Smith jurisprudence:* First, the intent of the legislature is stated in the bill’s preamble: “The General Assembly believes that the legal standards and burdens developed and applied by the courts with respect to claims brought under the Free Exercise Clause of the First Amendment and Article 36 of the Maryland Declaration of Rights prior to the Supreme Court’s decision in *Employment Division v. Smith*, should be preserved through the adoption of a statutory cause of action under this Act.” Second, a letter from the Assistant Attorney General advises that the bill would have the effect of invoking the pre-Smith body of case law in Maryland courts when someone claims that his or her exercise of religion is substantially burdened by State or local government action. Thus, the courts would adopt pre-Smith jurisprudence.

*Argument supporting the position that the bill does not adopt pre-Smith jurisprudence:* The express language of the bill’s provisions conflict with the stated legislative intent contained in the preamble. In the Boerne decision, the Supreme Court stated that it never applied the “least restrictive means” test in free exercise cases in the course of its pre-Smith jurisprudence. However, the bill explicitly requires the government to demonstrate that the burden to a person’s exercise of religion is the “least restrictive means” of furthering a compelling governmental interest. Thus, despite the language of the preamble, the bill imposes a new and stricter standard than the standard applied in pre-Smith jurisprudence.

*The bill provides a “rational basis” standard of review for the prison system:* The governmental burden on religion must be reasonably related to a legitimate penological interest. In any case, the “compelling governmental interest/least restrictive means/unduly interfere” standard does not apply to the prison system. Thus, the bill would not affect general fund expenditures by the Department of Public Safety and Correctional Services. According to a study prepared by a professor from the George Washington University Law School, the most pervasive effect of the federal RFRA was on state prisons. According to the study, over half of the reported cases under RFRA involved prison inmates.

**Local Effect:** The bill could affect the ability of local governments to enforce zoning laws, land use laws, and laws relating to health and safety. For example, a city that zones a particular new neighborhood as strictly residential may be challenged in court by a person who would like to build a church or synagogue in that area and who claims that the zoning ordinance violates the person’s exercise of religion under this bill. Any uncertainty regarding local zoning laws and property rights would cause litigation and planning costs to increase.

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**Information Source(s):** Department of Health and Mental Hygiene; Department of Public Safety and Correctional Services; Judiciary; Caroline County; Prince George’s County; City of Salisbury; Leonardtown; Maryland Association of Counties; Department of Legislative Services

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