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WHITE HOUSE
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Name of Correspondent: David Zwiebel

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Subject: 1st Amendment issue / action-forcing - also, Urban Families Commission

ROUTE TO:

Office/Agency (Staff Name)	ACTION: Action Code	ACTION: Tracking Date YY/MM/DD	DISPOSITION: Type of Response	DISPOSITION: Code	DISPOSITION: Completion Date YY/MM/DD
CUOFC	ORIGINATOR	92/03/04		C	92/03/13
	Referral Note:				
CUAT10	A	92/03/04		C	92/03/13
	Referral Note: 3/13/92 NL Note to File				
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- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

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THE WHITE HOUSE
WASHINGTON

Date 3/13/92

TO: FILE

FROM: NELSON LUND
Associate Counsel
to the President

Spoke with Zwiebel on the phone. Suggested that he get back in touch with us on the 1st Amendment issue if action-forcing event appeared on the horizon. (I told him that it didn't look as though the Commission thing was going to work out.)

Agudath Israel of America
אגודת ישראל באמריקה

בס"ד

RI 3/9/92
1030

David Zwiebel, Esq.
Director of Government Affairs
General Counsel

March 4

Nelson:

This is for your information. I really would like to follow up with Boyden, and I'd appreciate anything you can do to facilitate such a follow-up.

Any news on the Urban Families Commission? I've not heard anything since speaking to Sharon Rogers some three weeks ago. Please let me know, one way or the other.

Thanx!

Regards,
David

84 William Street, New York, N.Y. 10038 (212) 797-9000

בס"ד

David Zwiebel, Esq.
Director of Government Affairs
General Counsel

Agudath Israel of America
אגודת ישראל באמריקה

March 4, 1992

The Honorable Boyden C. Gray
Counsel to the President
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

Dear Boyden:

Permit me to call your attention to a matter of grave concern to Agudath Israel of America and numerous other religious groups across the country.

I refer to the congressional effort to overturn the Supreme Court's 1990 ruling in Employment Division v. Smith (the "peyote case"), in which the Court drastically curtailed -- many say totally eviscerated -- the protections available under the First Amendment's Free Exercise Clause. That ruling dealt a severe blow to the bedrock priniciple of religious liberty, and many of us in the religious community regard it as a matter of the highest priority for Congress to restore that which the Court removed.

There are now two competing bills on this subject: Congressman Steve Solarz's "Religious Freedom Restoration Act" (H.R. 2797), and Congressman Chris Smith's "Religious Freedom Act" (H.R. 4040). The difference between the two is that H.R. 2797 is neutral on its face, and would subject every free exercise claim to the compelling governmental interest test; while H.R. 4040 would exclude certain specified free exercise claims -- most notably a religious claim to abortion -- from the scope of the bill's protection.

I am enclosing a copy of the memorandum we have sent to Congressman Smith, explaining our opposition to H.R. 4040. As you will see, we took this position notwithstanding our firm pro-life perspective on the abortion issue. So too have a number of other prominent pro-life groups.

I would very much appreciate it if you would give this matter your personal attention. I know that the issue is a sensitive one for the Administration, but the stakes are extremely high for Americans of all faiths. It would be especially unfortunate, in my view, if the Administration were to remain totally silent on the religious liberty issue, thereby ceding it to the other side of the political aisle.

If at all possible, I'd like to pursue this issue with you one of the next times I'm in town. Would you be amenable to that?

All best wishes.

Sincerely,

David Zwiebel

David Zwiebel

DZ/kas
Enclosure

84 William Street, New York, N.Y. 10038 (212) 797-9000

THE WHITE HOUSE

WASHINGTON

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Agudath Israel of America
אגודת ישראל באמריקה

Abba Cohen, Esq.
Director

February 14, 1992

M E M O R A N D U M

TO: The Honorable Christopher H. Smith

FROM: David Zwiebel, Esq., Director of Government Affairs and General Counsel

Abba Cohen, Esq., Director of Washington Office

SUBJECT: H.R. 4040, the "Religious Freedom Act of 1991"

As the lead sponsor of H.R. 4040, the "Religious Freedom Act of 1991," you are to be commended for recognizing the importance of developing a legislative response to the Supreme Court's ruling in Employment Division v. Smith, 494 U.S. 872 (1990) -- a ruling that all but eviscerated the First Amendment's protection for the free exercise of religion. The Smith decision dealt a devastating body blow to the bedrock principle of religious liberty, and it should be a matter of the highest priority for Congress to reaffirm the nation's historic commitment to this most basic of all freedoms. It certainly is a matter of the highest priority for Agudath Israel of America, the nation's largest grassroots Orthodox Jewish organization, to work for the legislative restoration of the free exercise protection we had always assumed inherent in the Bill of Rights.

Regrettably, however, and with all due respect, we have concluded that H.R. 4040 is seriously flawed in several respects, and that we have no choice but to oppose the bill. This memorandum details the basis for that conclusion.

NATIONAL OFFICE: 84 William Street, New York, N.Y. 10038 (212) 797-9000 • FAX: (212) 269-2843
REGIONAL OFFICES: California, Illinois, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio.

H.R. 4040 vs. H.R. 2797

In introducing your bill, you candidly noted that H.R. 4040 is specifically designed to be an alternative to H.R. 2797, the "Religious Freedom Restoration Act" introduced earlier last year by Congressman Stephen J. Solarz. Your bill, like the Solarz bill, would overrule Employment Division v. Smith by making it clear that the protections of free religious exercise apply even in cases where a government action burdens religious freedom only incidentally; and that only a compelling governmental interest, applied through the least restrictive means, can overcome an assertion of free exercise of religion. However, unlike the Solarz bill, which is entirely neutral on its face and in no way limits the types of claims that may be entitled to the bill's protections, your bill expressly excludes several substantive areas from the scope of free exercise protection.

Thus, section 3(c)(2) of H.R. 4040 provides as follows:

> "(2) Nothing in this Act shall be construed to authorize a cause of action by any person to challenge --
>
> (A) the tax status of any other person;
>
> (B) the use or disposition of government funds or property derived from or obtained with tax revenues; or
>
> (C) any limitation or restriction on abortion, on access to abortion services or on abortion funding."

In your remarks from the floor, you explained that the first two of these exceptions are designed to protect the tax exempt status of religious organizations and the capacity of religious organizations to participate in government benefit programs. The third exception, as is obvious from its face, is designed to preclude an assertion of a free exercise right to abortion or abortion funding. It is this series of exceptions that troubles us so greatly and leads us to oppose H.R. 4040 -- notwithstanding our longstanding support for the right of religious entities to gain access to constitutionally permissible forms of government assistance and our firm opposition to legalized abortion on demand.

As detailed below, our objections to section 3(c)(2) of your bill come under three broad headings: (1) the specific claims it inappropriately seeks to exclude from free exercise consideration; (2) its questionable constitutional validity under the First Amendment's Free Exercise and Establishment Clauses; and (3) the dubious strategy of offering a politically divisive alternative to the neutral approach embodied in the Solarz bill.

1. The Specific Claims Excluded From Free Exercise Protection

Sections 3(c)(2)(A) and (B): Tax Exemptions and Government Benefits for Religious Organizations. Agudath Israel's support for the notion that religious organizations should be exempt from taxation, and that they should be able to participate equitably in government benefit programs, is longstanding and unequivocal. Thus, for example, we have for many years advocated the rights of religious organizations, and especially religious schools, to receive a full measure of constitutionally permissible government benefits. We have testified in support of such programs as tuition tax credits and educational vouchers. We have fought to ensure that religious child care providers would be eligible to receive child care grants on an equitable basis with secular providers. We have made our views known in legislative bodies across the country and in the courts, and we are certainly sympathetic to the goals sections 3(c)(2)(A) and (B) are apparently designed to achieve.

But we wonder, quite frankly, how your bill's attempt to shield religious organizations' tax exemptions and receipt of government funds from potential free exercise challenge would afford them meaningful protection in this regard. For even in the absence of a free exercise basis for challenging the ability of religious organizations to retain their tax exemptions and to receive various forms of government benefits, there still remains the problem of the constitutional prohibition against establishment of religion. In order for sections 3(c)(2)(A) and (B) to provide any meaningful protection, one would have to envision a scenario in which a court would reject an Establishment Clause challenge to a religious organization's tax exemption or receipt of government funds, either on standing grounds or on the merits, yet would entertain a similar free exercise challenge. We are aware of not a single judicial ruling that embraces that unlikely legal scenario.

Not only do we have difficulty understanding how H.R. 4040 would provide any practical protection against challenges to a religious organization's ability to retain its tax exemption or gain equitable access to public funds, we are concerned that it could have precisely the opposite effect. If, under section 3(c)(2)(B) of your bill, "the use or disposition of government funds or property derived from or obtained with tax revenues" is beyond the reach of free exercise challenge, a religious organization (or, for that matter, a religious individual) could never challenge its (or his/her) exclusion from a government assistance program on the theory that the program inhibits its (his/her) free exercise rights.

Consider, for example, the following hypothetical (though by no means far-fetched) scenario: A state decides to award grants to agencies that provide family planning services. It decides further to condition the award of such grants upon a recipient agency's agreement to provide a "full range" of planning services to its clients, including the distribution of condoms to unmarried teens and counseling concerning the availability of abortion as a means of birth control. Clearly, that requirement would be religiously objectionable under the tenets of certain faiths, and would indirectly preclude many religiously sponsored agencies from applying for such grants. Section 3(c)(2)(B) of your bill would make it impossible for a religious agency to challenge such preclusion on free exercise grounds -- despite the fact that the very purpose of that section is to enable religious organizations to participate equitably in government benefit programs.

In short, our view of sections 3(c)(2)(A) and (B) of H.R. 4040 is that they would accomplish little if anything in terms of practical benefit; and that section 3(c)(2)(B), at least, might undermine the very cause it is designed to promote.

Section 3(c)(2)(C): Religious Freedom and Abortion. The other free exercise claim section 3(c)(2) would exclude from consideration under the Religious Freedom Act is any religiously based abortion claim. Here again, Agudath Israel is essentially sympathetic to the objective of avoiding the creation of a broad new statutory basis for abortion. We have repeatedly voiced our opposition to the Supreme Court's ruling in Roe v. Wade and the "pro-choice" agenda of legalized abortion on demand, and we would enthusiastically support efforts to declassify abortion on demand as a "fundamental right." In fact, as we did in the 1989 Webster case, we plan to submit an amicus curiae brief in Planned Parenthood v. Casey, the Pennsylvania abortion case the Supreme Court has now accepted for review, urging the Court once and for all expressly to abandon Roe v. Wade. We further plan to oppose H.R. 25, the "Freedom of Choice Act," which pro-abortion activists are promoting as an eventual legislative replacement for Roe v. Wade.

Our opposition to abortion on demand notwithstanding, we strongly object to H.R. 4040's effort to foreclose any possibility of a religiously-based claim to an abortion. Such objection reflects a concern that for us is by no means abstract; in certain exceptional cases, our very own constituents may have no choice but to advance a free exercise claim to abortion. Although Jewish law would prohibit abortion in the large majority of cases in which abortions are performed under the pro-choice banner of Roe v. Wade, there are extraordinary circumstances in which women of the Jewish faith would be required to terminate their pregnancies as a matter of religious obligation. Are the religious beliefs of such women not worthy even of consideration under the rubric of free religious exercise? That, after all, is the upshot of your bill.

The concern that led you to include section 3(c)(2)(C), as we understand it, is that legal protection for the free exercise of religion could provide a new alternative basis for broad access to abortion even if Roe v. Wade were to be overturned. You are worried, it seems, that many women will "find religion" for the specific purpose of advancing a "religiously motivated" claim to abortion. We believe this concern is grossly exaggerated. As is true for all free exercise claims, the only persons who could claim religious protection for abortion are those who in good faith are genuinely exercising their sincerely held religious beliefs. Citing this reason and others, the Congressional Research Service has concluded, in a memorandum dated November 18, 1991, that "it is improbable that enactment of [H.R. 2797, the Solarz version of the bill] would lead to the successful presentation of an argument that a religious claim would trump state limitations upon abortion access."

Moreover, even if there is some potential for abuse of the free exercise claim in the abortion context -- just as there is some potential for abuse of the free exercise claim in other contexts -- that is no reason to foreclose consideration of a woman's genuinely held religious claim in those exceptional cases where abortion is indeed an expression of religious faith. We too would condemn the tragic and offensive misuse of religion to justify the inherently anti-religious agenda of those who would seek to justify abortion on demand. But throwing out the baby with the bath water is never an appropriate course; concern for bogus religious claims does not justify callous disregard of genuine religious claims.

We are aware of the argument that the likelihood of a state banning abortion even in those extraordinary cases where Jewish religious law would require an abortion is remote; and that even if a state were to do so, there may be legal grounds other than the statutory free exercise right to challenge that ban. Perhaps. But even if so, our objection to section 3(c)(2)(C) extends beyond the practical legal question of whether the rights of Jewish women to terminate their pregnancies when their religion demands it will likely be preserved. It extends to the far more fundamental question of whether the law of the land should so denigrate this particular expression of religious faith as not even to subject it to the compelling state interest test by which all other expressions of religious faith -- no matter how far they may be from the mainstream -- are measured.

Stated simply, and with all due respect, we find this section of H.R. 4040 profoundly offensive. It is most ironic -- to put it charitably -- that a bill carrying the noble title "Religious Freedom Act" would expressly exclude a tenet of the Jewish faith from legal consideration as an expression of free religious exercise.

2. Constitutional Considerations

In the first sentence of this memo, we described Employment Division v. Smith as a ruling that "all but eviscerated the First Amendment's protection for the free exercise of religion." All but, but not all -- for even in the aftermath of Smith, the Free Exercise Clause still affords protection in what Justice O'Connor's concurring opinion refers to as "the extreme and hypothetical situation in which [an act of government] directly targets a religious practice." 494 U.S. at 894.

Section 3(c)(2) of H.R. 4040 is precisely such an extreme (though unfortunately not hypothetical) situation. Explicitly and directly, it targets certain religious practices -- abortions motivated by religious faith and religiously based challenges to the tax exemptions and public benefits enjoyed by religious organizations -- for disfavorable treatment under the law. Its very purpose is thus to impose a direct burden on the free exercise of religion. We cannot fathom any compelling governmental interest that would justify precluding consideration of such religious claims by the same standard used to consider other religious claims.

The conclusion, as we see it, is inescapable: Even under Smith's cramped reading of the First Amendment, H.R. 4040 would violate the constitutional protection for free exercise of religion. This bill, ironically, proves that those of us who waxed apocalyptic after Smith about the total demise of the Free Exercise Clause may have been wrong after all.

In addition, section 3(c)(2)(C) raises serious Establishment Clause concerns as well. Jewish religious law, as noted above, mandates abortion in certain extreme circumstances. To the best of our knowledge, other faiths do not share this religious perspective. (The CRS memo cited above makes the same point: "So far as we are aware, only within the Jewish faith is there a religious tenet, under which it would be an obligation compelled by her faith for a pregnant woman whose life would be endangered if she carried her baby to term to have an abortion in order to save her life.") If so, section 3(c)(2)(C)'s exclusion of abortion from the list of claims entitled to statutory free exercise protection favors other religious faiths over the Jewish faith -- a plain violation of the Establishment Clause's insistence "that one religious denomination cannot be officially preferred over another." Larson v. Valente, 456 U.S. 228, 244 (1982).

3. Strategic Considerations

Even were we entirely to agree with the substance of what you are trying to accomplish and the language you have introduced in H.R. 4040 to accomplish those purposes, and even were we to perceive no serious constitutional problem with section 3(c)(2), strategic considerations would still lead us to oppose your bill as an alternative to the Solarz proposal. Given the highly controversial nature of the issues you would exclude from free exercise protection -- particularly the abortion issue, in an election year in which abortion is likely to be one of the most sharply divisive issues of the campaign -- we think it a fair assumption that H.R. 4040 has no real chance of passage. Worse, it is likely to do nothing but delay, if not outright sabotage, the eventual legislative overruling of the Smith decision. We would regard that as a tragedy of immense proportion.

Indeed, it would be a tragedy not only for the cause of religious freedom generally, but also for some of the very causes section 3(c)(2) of your bill seeks to protect. Religious entities seeking equitable access to public funds and pro-life Americans -- especially health care providers asked to engage in an abortion procedure or any other life-curtailing procedure they find religiously objectionable -- are among the groups who have the greatest stake in a more expansive legal view of free exercise protection. How tragically ironic it would be if Smith were to survive, to the substantial detriment of these very groups, as a result your well-intentioned but potentially counterproductive effort on their behalf.

The beauty of H.R. 2797, the Solarz bill, is that it carefully refrains from taking positions on any substantive issue that might arise under the legislation (just as the First Amendment itself refrains from taking any such position). It is indeed a "Religious Freedom Restoration Act" -- restoring the law of free exercise to where it was prior to the Supreme Court's ruling in Smith. That is why it was able to attract such a broad coalition of supporters, a coalition whose members are frequently on different sides of specific issues arising along the boundaries of church and state.

Each member of the RFRA coalition no doubt has its own list of claims it disfavors and would be happy to see excluded from free exercise protection. But each recognizes that it would be folly to try to improve upon the First Amendment's conceptual general approach, especially in view of the fact that there is no national consensus on many of the specific issues that may come up under this type of legislation; and that the urgency of developing a legislative remedy to Smith does not permit the luxury of waiting until such a consensus develops.

H.R. 4040 takes an approach diametrically opposed to that of the Solarz bill. It is a consensus buster, not a consensus builder. It effectively holds religious freedom hostage to certain irresolvably controversial causes. Important though those causes may be, Agudath Israel firmly believes they do not justify the derailment of the overriding concern of restoring religious liberty to its rightful status in our nation's hierarchy of protected freedoms.

D.Z.
A.C.

cc: The Honorable Stephen J. Solarz
All Co-Sponsors of H.R. 4040
All Co-Sponsors of H.R. 2797
All Members of the Coalition for the Free Exercise of Religion

DZ, AC/ws