



September 12, 2006

U.S. House of Representatives  
Washington, DC 20515

**RE: THE PUBLIC EXPRESSION OF RELIGION ACT (H.R. 2679)**

Dear Representative,

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On behalf of the American Civil Liberties Union (ACLU), and its hundreds of thousands of members, activists, and fifty-three affiliates nationwide, we urge you to oppose H.R. 2679, the “Public Expression of Religion Act of 2005.” This bill was voted out from the Judiciary Committee on September 2, 2006 and will soon be on the House floor. H.R. 2679 would limit damages to injunctive and declaratory relief and bar the award of attorneys’ fees to prevailing parties asserting their fundamental constitutional rights in cases brought under the Establishment Clause of the First Amendment to the U.S. Constitution.<sup>1</sup> This bill would bar damages and awards of attorneys’ fees to prevailing parties asserting their fundamental constitutional rights in cases brought under the Establishment Clause of the First Amendment to the U.S. Constitution.<sup>2</sup> H.R. 2679 would limit the longstanding remedies available in cases brought under the Establishment Clause under 42 U.S.C. 1988, which provides for attorneys’ fees and costs in *all* successful cases involving constitutional and civil rights violations.

**H.R. 2679 Shuts the Courthouse Doors.**

If this bill were to become law, Congress would, for the first time, single out one area protected by the Bill of Rights and prevent its full enforcement. The only remedy available to plaintiffs bringing Establishment Clause lawsuits would be injunctive relief. This prohibition would apply even to cases involving illegal religious coercion of public school students or blatant discrimination against particular religions.

Congress has determined that attorneys’ fee awards in civil rights and constitutional cases, including Establishment Clause cases, are necessary to help prevailing parties vindicate their civil rights, and to enable vigorous enforcement of these protections. The Senate Judiciary Committee has found

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<sup>1</sup> The Establishment Clause of the First Amendment requires the separation of church and state. *See* U.S. CONST. amend. I, cl. 1.

<sup>2</sup> The Establishment Clause of the First Amendment requires the separation of church and state. *See* U.S. CONST. amend. I, cl. 1.

these fees to be “an integral part of the remedies necessary to obtain . . . compliance.”<sup>3</sup> The Senate emphasized that “[i]f the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.”<sup>4</sup>

Unfortunately, H.R. 2679 would turn the Establishment Clause into a hollow pronouncement. Indeed, the very purpose of this bill is to make it more difficult for citizens to challenge violations of the Establishment Clause. It would require plaintiffs who have successfully proven that the government has violated their constitutional rights to pay their legal fees -- often totaling tens, if not hundreds, of thousands of dollars. Few citizens can afford to do so, but more importantly, citizens should not be required to do so where there is a finding that our government has engaged in unconstitutional behavior.

The elimination of attorneys’ fees for Establishment Clause cases would deter attorneys from taking cases in which the government has violated the Constitution; thereby leaving injured parties without representation and insulating serious constitutional violations from judicial review. This effectively leaves religious minorities unable to obtain counsel in pursuit of their First Amendment rights under the Establishment Clause.

#### **H.R. 2679 Favors Enforcement of the Free Exercise Clause Over the Establishment Clause.**

Among the greatest religious protections granted to American citizens are the Establishment Clause and the Free Exercise Clause.<sup>5</sup> The right to practice religion, or no religion at all, is among the most fundamental of the freedoms guaranteed by the Bill of Rights. Religious liberty can only truly flourish when a government can both equally protect the free exercise of religion as well as prohibit state-sponsored endorsement and funding of religion. H.R. 2679 creates an arbitrary congressional policy in favor of the enforcement of the Free Exercise Clause, while simultaneously impeding individuals wronged by the government under the Establishment Clause.

Through the denial of attorneys’ fee awards under H.R. 2679, plaintiffs will be unable to afford the expense of litigation only when they are seeking to protect certain constitutional rights but not others. This bad congressional policy serves to create a dangerous double standard by favoring cases brought under the Free Exercise Clause, but severely restricting cases under the Establishment clause.

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<sup>3</sup> S. REP. NO. 94-1011, at 5 (1976), *reprinted in* 1776 U.S.C.C.A.N. 5908, 5913.

<sup>4</sup> *Id.* at 6.

<sup>5</sup> The Free Exercise clause of the First Amendment guarantees the right to practice one's religion free of government interference. *See* U.S. CONST. amend. I, cl. 2.

### **H.R. 2679 Denies Just Compensation.**

Finally, despite proponents' assertions to the contrary, attorneys' fees are not awarded in Establishment Clause cases as a punitive measure. Rather, as in any case where the government violates its citizens' civil or constitutional rights, the award of attorneys' fees is reasonable compensation for the expenses of litigation awarded at the discretion of the court. After intensive fact-finding, Congress determined that these fees "are adequate to attract competent counsel, but . . . do not produce windfalls to attorneys."<sup>6</sup> HR. 2679 is contrary to good public policy -- it reduces enforcement of constitutional rights; it has a chilling effect on those who have been harmed by the government; and it prevents attorneys from acting in the public's good. The award of fees in Establishment Clause cases is not a means for attorneys to receive unjust windfalls -- it is designed to assist those whose government has failed them.

**Proponents of this bill have been spreading the urban myth that religious symbols on gravestones at military cemeteries will be threatened without passage of H.R. 2679.** The supposedly "threatened" religious markers on gravestones has become a red-herring – *indeed it is an urban myth* -- that has been invoked as a reason for the denial of attorneys' fees in Establishment Clause cases. It should be noted – in light of the wildly inaccurate statements that have repeatedly been made – that religious symbols on soldiers' grave markers in military cemeteries (including Arlington National Cemetery) are entirely constitutional.

Religious symbols on personal gravestones are vastly different from government-sponsored religious symbols or sectarian religious symbols on government- owned property. Gravestones and the symbols placed upon them are the choice of individual service members and their families. The ACLU would in fact vigorously defend the first amendment rights of all veteran Americans and service members to display the religious symbol of their choosing on their gravestone.

If the Constitution is to be meaningful, every American should have equal access to the federal courts to vindicate his or her fundamental constitutional rights. The ability to recover attorneys' fees in successful cases is an essential component of the enforcement of these rights, as Congress has long recognized. The bill is a direct attack on the religious freedoms of individuals, as it effectively shuts the door for redress for all suits involving the Establishment Clause. We urge members of Congress to oppose H.R. 2679.

If you have any questions, please contact Terri Schroeder, Senior Lobbyist at (202) 675-2324.

Sincerely,

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<sup>6</sup> S. REP. NO. 94-1011, at 6 (1976), *reprinted in* 1776 U.S.C.C.A.N. 5908, 5913.



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