Testimony of

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TESTIMONY OF THE AMERICAN JEWISH CONGRESS
BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS
OF THE SENATE COMMITTEE ON THE JUDICIARY
CONCERNING

S. 3696
THE VETERANS' MEMORIALS, BOY SCOUTS, PUBLIC SEALS AND OTHER PUBLIC EXPRESSIONS OF RELIGION ACT OF 2005
JULY 26, 2006

On behalf of the American Jewish Congress, I want to thank you for providing it with an opportunity to submit its views on S. 3696, The Veterans' Memorials, Boy Scouts Public Seals and Other Public Expressions of Religion Act of 2006. ("PERA") We believe this bill to be exceedingly bad public policy. It is arguably unconstitutional as well, but this Committee need not reach that issue to determine that the bill should not pass. We urge you to give it the decent burial it deserves.

The bill has two sub-sections. The first bans all but injunctive and declaratory relief in cases arising under the Establishment Clause of the First Amendment. The second carves out an exception from the general rule of 42 U.S.C. § 1988 and the Equal Access to Justice Act 28 U.S.C. 2412 (d) (1) (A). providing for an award of attorney's fees in cases in which plaintiffs bring successful actions to vindicate Establishment Clause. Under the EAJA, if the position of the United States is "substantially justified" ("EAJA") no fees are awarded. Thus, PERA bars attorneys' fees against the federal government only even in the unusual case in which the federal government's position is not "substantially justified".

Section 3 of the Act is, moreover, so broadly drafted ("Notwithstanding any provisions of law...") as to bar an award of attorneys' fees even if a government entity's defense is frivolous within the meaning of F.R. Civ. P.R. 11, Wallace v. Jaffee, 472 U.S. 38 (1985) (defendant challenged incorporation of Establishment Clause and correctness of various Supreme Court decisions), or if party incurs fees in prosecuting a contempt motion to enforce an injunction already issued. In this regard, S. 3696 is far broader than its House counterpart which did not bar fees under Rule 11 or in contempt situations. (The authority to award attorney's fees in contempt cases has been well settled since Parker v. U.S., 153 F.2d 66 (1st Cir. 1946). See also Vuitton et Fils, S.A., v. Carousel Handbags, 592 F.2d 126, 131 (2nd Cir.1979); Borough of Slatington v. Ziegler, 890 A. 2d 8 (Pa. Commonwealth 2006) (collecting cases))

I. The Limits On Relief Remedies

With regard to remedies, S. 3696 casts a broad net, albeit one narrower than its House counterpart H.R. 3679. As it currently stands, S. 3696 simply bars any but injunctive and declaratory relief in cases brought under the Establishment Clause. Thus, even if a state or locality were to formally establish a state church, prefer one religion over another, Larson v. Valente, 456 U.S. 1 (1982), or coerce participation in religious exercises, Lee v. Weissman 505 U.S. 587, 636-39 (1992) (Scalia, J., dissenting) all of which are well settled, core violations of the Establishment Clause, a plaintiff would be entitled to nothing but injunctive and declaratory relief, not actual or nominal damages, and not punitive damages.
When the Prison Litigation Reform Act, 42 U.S.C. § 1997 (PLRA), was enacted, there was a substantial debate whether Congress had the power to limit the remedies available to the federal courts to cure constitutional violations. We need not enter that thicket. For present purposes, we acknowledge that Congress has substantial but not unlimited authority over remedies. Nevertheless, H.R. 2689 is indefensible both as policy and constitutional law.

Because H.R. 3696 does not address the universe of constitutional claims against local governments, it cannot be claimed that the bill addresses some generally applicable problem with regard to remedies arising in conjunction with constitutional claims. The doctrines of qualified immunity, the 11th Amendment and sovereign immunity are already substantial bars to monetary relief. PERA, if it is to have any additional effect, would bar relief only in cases where plaintiffs prevailed and qualified immunity was unavailable, that is, in cases where officials violate a "clearly established" right. If S. 3696 is to be sustained, it must be because something unique to Establishment Clause claims justifies treating such claims less well than all other constitutional claims.

Just how draconian these restrictions are may be judged by comparing the proposed Public Expression of Religion Act with the Prison Litigation Reform Act, 42 U.S.C. § 1997e(e), which denies monetary damages to inmates in any civil action in which they allege a violation of rights, but suffer no physical injury. On its face, this language would seem to deny the possibility of relief in any prisoner case seeking to vindicate rights under either the Free Exercise or Establishment Clauses.

The courts have generally read this ban not to deny courts the power to issue declaratory judgments. See e.g., Thompson v. Carter, 284 F.3d 411 (2d Cir. 2002). Cf. Boxer v. Harris, 437 F. 3d 1107, 1111 (11th Cir. 2006) (collecting cases; noting issue is open in the Circuit). In the face of the statute's language, about half the circuits that have spoken on the subject award actual and punitive damages for violations of First Amendment rights, refusing to allow these fundamental constitutional rights to be rendered nugatory by PLRA, Allah v. al-Hafeez, 226 F.3d 247 (3rd Cir. 2000); Cannell v. Lightner, 143 F.3d 1210 (9 th Cir. 1998); Calhoun v. DeTella, 319 F.3d 936 (7th Cir. 2005). Contra Searles v. Van Bebber, 251 F.3d 869 (10th Cir. 2001). The Second and Eighth Circuits allow nominal and punitive damages as well as declaratory relief, but not compensatory (actual) damages, for First Amendment violations. Thompson v. Carter, supra; Royal v. Kavtzky, 375 F.3d 720 (8th Cir. 2004).

We are unable to conceive of any rationale, other than naked hostility toward the Establishment Clause as interpreted by the federal courts, that would justify denying to law-abiding citizens at

least the same access to the panoply of judicial relief afforded convicted felons in First Amendment cases.

Consider what S. 3696 would mean in the real world. A student is compelled by a teacher to participate in prayer of a faith different than her own. This is a one-time event. The teacher acts on her own. No school policy authorizes such action. Suit is brought by the student against the teacher. Without question, the teacher's actions violates the Constitution.

By the time a court case is brought and is resolved, the school year will have ended. The student will no longer been assigned to the offending teacher. The likelihood of a further violation by this teacher directed at this student is so slight that it is doubtful that the student has standing to seek an injunction against further violations. Cf. Los Angeles v. Lyons, 461 U.S. 95 (1983); see O'Connor v. Washburn University, 416 F.3d 1216 (10th Cir. 2005).

This is a case where the only practical remedy is damages. Yet by its terms, S. 3696 denies the courts the ability to give the student any damage remedy, even nominal damages. Declaratory relief may not be given where a violation is complete and not likely to be repeated. O'Shea v. Littleton, 414 U.S. 688 (1974). Indeed, there is a substantial likelihood that without the availability of a damage remedy, the entire matter is moot, Arizonans for Official English v. Arizona, 530 U.S. 43 (1997), and a court would be powerless to entertain the lawsuit and to provide even the psychic satisfaction of official vindication. (Of course, by denying a potential plaintiff attorney's fees, the PERA would make it highly unlikely that suit would be brought in these circumstances in the first place.

What possible justification can there be for denying damages in cases such as the one I posit? It is not to protect public officials in doubtful cases, because public officials are immune from damages except where the law was clearly settled at the time they violated it. Harlow v. Fitzgerald, 457 U.S. 800 (1982). The bar on damage awards in this bill is only about violations of clearly settled law. The law is now pellucidly clear that officially coerced prayers are unconstitutional. Lee v. Weisman, 505 U.S. 587, 636-39 (1992) (Scalia, J., dissenting). Violation of every clearly settled constitutional right ordinarily generates a right to nominal damages, Carey v. Piphus, 435 U.S. 247 (1978), at least where there is no possible claim of qualified immunity. See, e.g., Brousseau v. Haugen, 543 U.S. 194 (2004); Saucier v. Katz, 533 U.S. 194 (2001); Anderson v Creighton 483 U.S. 635 (1987).

We assume that the legislation is not intended to strip the courts of the power to remedy contempts of court with monetary damages. The language, however, is not so limited. The language of Section 2(b) is broad enough to such monetary relief, even though "make-whole" relief is of ten appropriate in civil contempt proceedings. See, in addition to cases cited at p 3, supra, U.S. v. U.M.W., 330 U.S. 258, 303-04 (1947). If we are correct, courts would find themselves hampered in enforcing their orders.

Consider Roy Moore, who erected a huge Ten Commandments monument in the Alabama Supreme Court courthouse. The Eleventh Circuit easily found the display unconstitutional, and the U.S. Supreme Court refused to consider the case. Judge Moore flatly refused to comply with the injunction requiring the display's removal, virtually inviting a confrontation with federal marshals and the federal judge. If enacted, S. 3696 would well have left that district judge with no choice but to either 'martyr' Judge Moore, then Chief Judge of the Alabama Supreme Court by

jailing him or order federal marshals to create a spectacle by forcibly removing the display. One suspects Roy Moore, and others like him, would be far less willing to defy federal court orders if they knew their assets were at risk.

Coerced prayer cases do not exhaust the possibilities for damages in Establishment Clause cases. In Larson, supra, officially disfavored churches were subjected to onerous regulatory requirements with attendant expenses, while more favored churches were exempted. S. 3696 would bar recovery for the added, but illegally imposed, costs or the loss of solicitation opportunities.

It is worth emphasizing how difficult it is to recover damages in Establishment Clause cases. First, of course, one must win, by no means easy. Where the law is not clearly established -- a purported concern of the House sponsors - the qualified immunity doctrine is a substantial barrier to recovery. Harlow, supra. Municipal bodies, including school boards, are only liable in damages for the acts of their line employees when they act pursuant to an official policy set by high ranking public officials, again a high hurdle. Jett v. Dallas I.S.D., 491 U.S. 701 (1989). Actual damages must be shown and not presumed, Carey v. Piphus, supra.

This is not to say there are no cases in which damages are not won in Establishment Clause cases. Although reported opinions often do not discuss damages, there is evidence in the case reports of such awards. See Bell v. Little Axe I.D.S., 766 F.2d 1391 (10th Cir. 1985) (school prayer); Kitzmiller v. Dover Area School Dist, __ F.Supp.2d__ (M.D. Pa. 2005) (teaching intelligent design; nominal damages); Hansen v. Ann Arbor Public Schools, 293 F.Supp.2d 780 (E.D. Mich. 2003) (nominal damages) (exclusion of ministers who taught homosexuality sinful from public school forum). Gospel Mission of America v. Los Angeles, 951 F. Supp, 1429 (C.D. Cal. 1997) (invalidating charitable solicitation ordinance on Establishment Clause grounds); Warnock v. Archer, 380 F. 3d 1076 (8th Cir. 2004) (compelled attendance at prayer meetings); Warnock v. Archer, 443 F. 3d 954 (8th Cir. 2006) (monetary relief in the form of, inter alia, damages on contempt motion).
Some cases founder on qualified immunity grounds, but were the facts to be repeated involving others, monetary damages (actual or nominal) would be appropriate. Kaufman v. McCaughty __ F.Supp.2d __ (W.D. Wisc. 2006) (discrimination against atheist); C.E.F. v. Montgomery County Public Schools, __ F. Supp 2d __ (D.Md. 2005)
th
(discrimination against religious speaker) (11 amendment immunity).
Other damage claims are pending. Chaplaincy of Full Gospel Churches v. England, __ F.3d__ (D.C.Cir.2006) (official favoritism toward chaplains of liturgical churches); Summum v. Duchesne City, __F.Supp.2d__ (D. Utah 2005) (Establishment and Free Speech Clauses; discrimination against small faith in display of symbols; setting demand for damages for trial); C.E.F. v. Anderson School Dist., __F.Supp.___ (D.S.C.
2006) (discriminatory denial of fee waiver: claim denied on the merits, appeal appending): Henderson v. Brush, __F.Supp.2d __ (W. D. Wisc.2006) (denial of Taoist texts to inmate).

In addition, there are cases pending in which parties seek a remedy of an order (injunction?) demanding recoupment of tax funds spent in violation of the Establishment Clause. Those claims probably, but not certainly, would be barred by PERA. Americans United v. Prison Fellowship,

__F.Supp.2d__ (S.D. Iowa 2006) (appeal pending); Lakowski
v. Spellings, 443 F.3d 930 (7th Cir. 2006); Moeller v. Bradford County, __F.Supp.2d__ (M.D. Pa. 2006). Those recoupment claims are governed by a pair of Supreme Court decisions, laying out equitable rules for resolving such claims. N.Y. v. Cathedral Academy, 434 U.S. 125 (1977); Lemon v. Kurtzman (II), 411 U.S. 192 (1973).

In one additional unreported case, which settled quietly, the reaction to plaintiffs' having objected to traditional religious practices in the public schools was so severe they had to leave the community. They settled for substantial damages.

Again, other than raw hostility to the non-establishment of religion as mandated by the Constitution, there is no justification for the wholesale denial of monetary damages or declaratory relief across the entire range of Establishment Clause cases. It is simply not true, as is the case with regard to prison inmate litigation addressed by the Prison Litigation Reform Act, that in Establishment Clause cases public officials operate under the especially difficult circumstances that prison officials do day-by-day.

Nor is it in any event true that the Establishment Clause is uniquely difficult to understand amongst constitutional rights. It is no more confusing than, say, when a regulation becomes a taking, where beginning with Pennsylvania Coal v. Mahon, 260 U.S. 393 1922) (Holmes, J.), and continuing through Palazzolo v. Rhode Island, 533 U.S. 606 (2001), confusion reigns supreme; the free speech rights of public employees, Garcetti v. Cebalos, __U.S. __ (2006); the Fourth Amendment or the public forum doctrine. In those cases where the law is not clear, the immunity doctrine is a bar to recovery against public officials.

That the interest advanced by the bill is hostility to existing Establishment Clause jurisprudence, not the preservation of the public fisc, is indicated by a comparison of two sets of cases, each presenting the same legal issues for consideration by the courts. In one, the full panoply of judicial remedies is available, as are attorney fees. In the other, only declaratory and injunctive relief is possible.

Example 1. A private party seeks to erect a Latin cross on public property, invoking his free speech rights. The city responds that it is barred from granting the request by the Establishment Clause. The private party sues.

Example 2. A private party seeks to erect a Latin cross on public property on Good Friday, and the town acquiesces, believing it is obligated to do so by the Free Speech Clause. The town, in turn, is sued by other citizens claiming that the display violates their rights under the Establishment Clause.

Example 3. A teacher, invoking academic freedom, prays with her class. She is disciplined by the school district, on the ground that the teacher's actions violated the Establishment Clause. The teacher sues her employer, alleging the discipline violated her Free Speech and Free Exercise rights.

Example 4. A student sues a teacher because the teacher led a class in prayer and refused to excuse students unwilling to participate in violation of the Establishment Clause. The defendant

teacher invokes the Free Speech Clause in his own defense.

Leaving aside the merits of these cases for the moment, it is apparent that the plaintiffs in cases 1 and 3 have available to them a full range of judicial remedies, including declaratory judgments and monetary damages and are eligible for an award of attorney fees. By contrast, plaintiffs in cases 2 and 4 are entitled only to declaratory and injunctive relief, if they can overcome barriers of mootness and meet the other requirements for injunctive relief.

Each of these four cases is of a type now routine. Each presents exactly the same legal issues, albeit only sometimes the Establishment Clause is injected into the case at the behest of the plaintiffs, and sometimes at the behest of the defendants. Each of these litigations makes the same demands on the government, the courts and the public fisc. Each raises exactly the same Establishment Clause issues. Plaintiffs in cases 2 and 4 have no greater incentive than plaintiffs in cases 1 and 3 to bring legally frivolous or marginal claims. But only in 2 and 4 does S. 3696 have any effect.

In upholding the restriction on damages (and attorney's fees) in the Prison Litigation Reform Act ("PLRA"), the courts insisted on a rational basis for distinguishing between prison claims and all other constitutional claims. See, e.g., Johnson v. Daley, 339 F.3d 582 (7th Cir. 2003) (en banc); Zehner v. Trigg, 133 F.3d 459, 463 (7th Cir. 1997). In the PRLA context, the courts have found that prisoners had a unique set of incentives to engage in frivolous litigation and harass their keepers since they were largely immune from any penalties and costs imposed on other litigants, and that hence, such litigation posed a special risk to the public fisc and prison governance. Zehner, supra.

That is not the case with the Establishment Clause. Whatever disputes there may be at the margins of that Clause, no one can doubt the importance of the principle embodied in that clause for the religious peace Americans have enjoyed, nor that the overwhelming majority of cases present issues of profound importance. Such cases are not brought, in my experience, promiscuously or lightly.

None of the factors involved in inmate litigation--or any other ones we can conceive--justify the exception created by S. 3696. No one has an incentive to engage in frivolous Establishment Clause litigation, especially given the notoriety attaching to such plaintiffs. See Santa Fe I.S.D. v. Doe, 530 U.S. 290 (2000) (noting efforts by school officials to expose and harass Establishment Clause plaintiffs). I am unaware of any Establishment Clause challenge, let alone one brought by the "separationist" groups which bring a majority of these cases (ACLU, AJCongress, Americans United, Freedom from Religion Foundation), ever having incurred Federal Rule of Civ. Procedure Rule 11 sanctions for filing a frivolous action. *]

Establishment Clause litigants are not inmates with unlimited time on their hands for whom litigation is a form of recreation, not hard work. They have no incentive to lie or retaliate, Johnson v. Perry, supra. They, or the organizations representing them, typically have to initially bear by themselves the not inconsiderable costs of litigation. The number of Establishment Clause cases (that is, for purposes of S. 3696, cases in which plaintiffs invoke the Establishment Clause), brought in the federal courts is a miniscule portion of the docket, unlike prisoner civil

rights cases. The proposed statute cannot possibly be defended as necessary to spare the federal courts from a deluge of lawsuits.

It is true that some have contended that the Establishment Clause creates no individual rights, but is merely a federalism provision. Elk Grove I.S.D. v. Newdow, 547
* But see Peloza v. Capistrano U.S.D., 37 F.3d 517 (9th Cir. 1994) (Establishment Clause challenges to ban on teaching evolution; parts of claim frivolous; no Rule 11 fees).
U.S. 1, 49-50 (2004) (Thomas, J., dissenting). That is not, however, the law, because it is an argument that has failed to persuade anyone but Justice Thomas. And if it were the law, private parties would lack standing to seek injunctive relief. Congress may not make it law de facto by majority vote.

We know authoritatively that Congress may not invoke powers it undoubtedly possesses, such as the power to regulate remedies, to enlarge or contract the judiciary's interpretation of the Constitution. City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating Religious Freedom Restoration Act because it expand and the meaning of Constitution as interpreted by the Court): If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, ... alterable when the legislature shall please to alter it. Marbury v. Madison, 1 Cranch, at 177. Under this approach, it is difficult to conceive of a principle that would limit congressional power. ... Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V. 521 U.S. at 529 (some citations omitted).

If this is true of congressional efforts to expand constitutional rights, it is a fortiori true of congressional efforts to contract them.

In too many places in this country, public officials routinely ignore Establishment Clause decisions of the Supreme Court and other federal courts. The political dynamic is simple enough. Popular politics or tradition supports some evident and blatant violations of the Establishment Clause, say school prayer or permanent religious displays. Public officials make a deliberate decision to ignore the law, and to appease public opinion, betting (often correctly) that dissenters would not risk community displeasure to file a court challenge. See N. Banerjee, Families Challenging Religious Influence in Delaware Schools, N.Y. Times (July 29, 2006). Often, like Roy Moore mimicking George Wallace in the schoolhouse door, their own popularity is enhanced by their defiance.

In the fall of 1989, I represented a Jewish high school football player who objected to school-sponsored prayers at every football game. We sought interim injunctive relief for my client to remedy that blatant Establishment Clause violation. It was denied. (The school board contended, inter alia, that if the court granted the injunction there would be riot at the next game.)

We had made one important tactical error. We filed the lawsuit (Berlin v. Okaloosa County) while the school superintendent was running for reelection. He promptly drew a line in the sand, announcing that a vote for him was a vote to resist to the end all efforts to ban prayer at football games. The end to the litigation came only after he was safely reelected (and the local

newspapers began to speculate on what the attorney's fees would be if the lawsuit was successful.)

II. Attorney's Fees The bill recites that it is intended to prevent 'extortion' from local governments, which I take it refers to attorney's fees. In the House hearing, the sponsor pointed out, as an example of such 'extortion', a 1993 letter from the Indiana Civil Liberties Union to Indiana school districts demanding compliance with Lee v. Weisman, supra, on pain of litigation in which, inter alia, attorney's fee would be sought. The sponsor did not --and cannot - explain how a demand that a school district comply with the law could be extortion, especially when the remedies supposedly being extorted are provided for by Congress precisely to discourage government from ignoring constitutional rules. The ICLU would have been happy with compliance, rather than attorney's fee in cases whose sole point was to insist on compliance with settled law.

It is a good thing that the fee statute exists. It provides a tangible disincentive for the manipulation of the Constitution for the short-term advantage of unprincipled public officials. Moreover, it forces governments to take the Constitution seriously into account in decision-making, not just local and transient interests. Eliminate those as incentives--as S. 3696 would do--and the inevitable, perhaps the desired result, will be more open defiance of well-settled constitutional principle.

It is true that in some marginal cases, a governmental unit changes its conduct because it does not want to run the risk of incurring attorney's fees to those challenging its conduct. That problem is general. It applies as much to cases in which potential plaintiffs seek more religion, rather than less and government defends on Establishment Clause grounds as when Plaintiffs invoke the Clause. [Given the not "substantially justified" standard under EAJA, this problem is not likely to arise in federal cases].

In a related vein, in its testimony to these House Judiciary Committee's Subcommittee on Constitution, the American Legion objected that the possibility that it would be jointly liable for attorney's fees has kept it from intervening in defense of so-called war memorials.
The American Legion could enter its defense of those memorials through the filing of briefs amicus curiae. I do most of my Establishment Clause practice that way. If it wants the privileges of being a party -discovery, the right to advance claims other than those raised by the original parties, and, if successful, the right to recover costs -- it is only reasonable to ask it to bear the risks of litigation, including attorney's fees.
The presence of intervenors adds to plaintiff's burden of litigation: There is no reason why intervenors like the American Legion should be able to impose those burdens on plaintiffs risk free. cf. 28 U.S.C. Section 2403 (requiring official intervenors to pay court costs).

To repeat, the only justification for the line drawn by S. 3696 is unvarnished hostility toward one set of constitutional claims, and a desire of its sponsors to encourage local government to defy existing restraints on endorsing and encouraging religion, particularly in cases not readily subject to injunctive relief such as one-time ceremonies or other temporary events. That is not a legitimate purpose; it may indeed be constitutionally impermissible sectarian purpose. See, e.g., Edwards v. Aguillard, 482 U.S. 578 (1987). More to the point, Congress should not be in the business of encouraging violations of the Nation's fundamental charter.

Here, as in the remedy section, S. 3696 treats citizens' Establishment Clause claims less advantageously than it treats the constitutional claims of inmates. A successful inmate litigant is entitled to attorney's fees, like all other successful litigants under § 1983, except that fees for prisoners are capped by reference to the Criminal Justice Act, 18 U.S.C. § 3006A. (Presumably, if S. 3696 passes, inmates raising Establishment Clause claims will also be denied attorney's fees, unlike all other inmate litigants.) In upholding the constitutionality of the fee cap against claims that the cap interferes with access to courts, courts have emphasized that the statute does not deny all fees, Johnson, supra. S. 3696 does not even make a capped fee available to Establishment Clause litigants.

What possible reason could there be for treating citizen litigants substantially less well than prison litigants? Again, it must be nothing less than naked hostility toward Establishment Clause claims itself. No rational reason justifies the crude line the bill draws. It therefore is doubtful that S. 3696 would withstand a constitutional challenge such as those brought unsuccessfully to challenge PLRA.

We recognize, of course, that the Constitution does not of its own force compel an award of attorney's fees. Congress could, if it thought it wise, repeal the attorney's fees statutes in their entirety and revert to the usual American rule on attorney's fees. It could create some sort of good faith defense; it could cap fees. Whether these are good or bad ideas, they are at least neutral across the run of constitutional cases. What Congress should not do is pick and choose among favored constitutional rights.

In passing the Attorney Fees Act, Congress recognized the importance of private litigation to enforce constitutional rights. In the ensuing decades attorney's fees have become an integral part of the mechanism for making real the rights guaranteed citizens by the Constitution. Our political institutions have adapted to that mechanism, both by considering it in setting their budgets, and more importantly, in taking constitutional law more seriously.
Local government now treats constitutional law as law that is relevant to local governments and the way they do business, and not just something, as a Montana state judge once memorably told a lawyer, only for the Supreme Court, Sandstrom v. Montana, 442 U.S. 510, 513 (1979) ("you can give those [citations] to the Supreme Court"). The judge's reaction is, unfortunately, still common, although not nearly as common as it was before fees were mandated.
The attorney's fees statute embodies the view that the public weal is best served by ensuring official compliance with the Constitution. Given the imbalance of power and resources between the government and the citizen, and the costs of contemporary litigation, the Attorney Fees Act represents an important effort to recalibrate that balance. Its selective gutting would be a mistake of the first order.

If Congress is to begin to deny attorney's fees to unpopular cases, there will be no end to the loopholes it will be pressed to create. The attorney fee statute will soon be pock¬marked with carve outs for controversial cases. One does not need a particularly long memory to recall that desegregating the nation's schools was once a controversial subject. Indeed, as the Supreme Court's recent decision to review two school desegregation cases reveals, Parents Involved v Seattle School Dist., 426 F. 3d 1162 (9th Cir. 2005) (en banc) cert. granted, 547 U.S. __ (2006); McFarland v. Jefferson County, 416 F. 3d 513 (6th Cir. 2005), cert. granted, 547 U.S. ___ (2006),

it remains a controversial subject.

Any number of other civil liberties issues remain contentious. Should Congress deny attorney's fees to those seeking to integrate schools; challenge reverse discrimination; anti-terrorism legislation; ensure free access to the ballot; invalidate English-only rules; exclude illegal aliens from government benefits; rectify abuse of the power of eminent domain; protect or suppress speech of violent extremist groups; advance gay rights claims; resist ordinances protecting rights of gays and lesbians in cases affecting religious institutions?

Depending on the political winds of the moment, one or the other of these classes of claims will be politically controversial. To take but one set of current controversies: At some times and for some people, decisions expanding the rights of gay and lesbian Americans, such as Lawrence v. Texas, 539 U.S. 558 (2003), will be controversial. At other times, and in other places in this country, decisions denying religious institutions the right to be excused from compliance with anti-discrimination laws will be controversial.
M. Stern, Two Way Street, New York Sun (June 14, 2006). The only practical way to make sure that all these claims can be heard is to ensure that access to the courts is on an equal footing.

III.

Conservatives may think that they do their causes no harm by restricting the access to the courts of "liberal" claims. I deny that separating church and state, a cause dear to the Founders, is particularly a liberal cause. Many of the damages cases cited were brought by religious conservatives challenging liberal or bureaucratic establishments. But the major premise is mistaken. Once the Congress establishes exceptions to the Attorney Fees Act and the remedial powers of the federal courts in pursuit of one vision of church-state relations, it will set a precedent that will be invoked by others with very different visions.

At the moment, political power temporarily rests with those who reject a sharp line dividing church and state. That dominance will not last forever. And when advocates of a sharp division between the two are politically ascendant, supporters of S. 3696 will be fighting to defeat exceptions of the sort they created but favoring their opponents' causes.

Cases challenging traditional civic religious practices are deeply unpopular among many Americans. Some of the most controversial decisions have been exploited by demagogues of all stripes to support their claim that there is a judicial war against religion and Christianity or an imminent threat of theocracy. If the subject today were the value of the separation of church and state as such, I would be pleased to defend most but not all of these challenges to official religion. But I need not enter those lists today.

The bill you are considering today is a reflection of the mistaken view that Establishment Clause litigation is brought only by those who detest religion, and who seek a named public square. That is a gross over-simplification. In some cases, it is a simple lie. In recent years, conservatives have also successfully invoked the Establishment Clause to stop efforts to grant preferred status to "progressive" religious views on sexuality in the public schools. Citizens for a Responsible Curriculum v. Montgomery County, __F. Supp.2d __ (D.Md. 2005); Hansen v. Ann Arbor Public Schools, 293 F.Supp.2d, 7780, 804-05 (E.D. Mich 2003). (In Hansen, plaintiffs won nominal

damages and attorney's fees.) Those were solid and welcome decisions. They were hailed by all those who view the Establishment Clause as a guarantor of religious liberty, and not as a means of suppressing faiths with which one disagrees.

If S. 3696 were law, neither the Hansen or Montgomery County plaintiffs would have been entitled to damages or attorney's fees, collateral victims of legislation creating disincentive to litigation on the part of 'liberal' groups. The Michigan lawsuit involved a one-time event, long since complete by the time that case was adjudicated. Claims for injunctive relief were moot. S. 3696 would have denied all of us, including public school officials across the Nation, the sound guidance that decision provides.

As I have said, one should not think that the current balance of forces in religion and politics will prevail forever. One need not be much of a prophet to predict that sometime in the coming years there will be a resurgence of political power to those holding "liberal" religious views, to say nothing of those hostile to public faith claims altogether. Some of those persons are likely to attempt to use governmental authority to lord over their religious opponents. It is a sad fact of human nature that some of those who today protest official efforts to impose religion will, when they hold the reins of power, not hesitate to impose their secular views on others. When that happens, as it inevitably will, the sponsors of S. 3696 will rue the day that they supported this legislation. *

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*] Although the bill's title suggests a preoccupation with a subset of Establishment Clause claims--those involving the names issues such as municipal seals, so-called war memorials, and other "public religious expression"--the actual text of the bill is not so limited, but applies to all Establishment Clause claims. Section 3 of the Bill, relating to attorneys' fees lists for kinds of lawsuits subject to this section (veterans' memorials, religious displays or imagery, religious words on the official U.S. seal or currency (but, not, for some reason municipal seals) and the support of Boy Scouts by public entities. The list by its terms does not apply to the limitations on remedies in Section 2.

However, since this listing is merely illustrative, but not limiting, the difference between Sections 2 and 3 is academic. It is simply an exploitation of current celebrity litigation, not any sensible listing of cases or types of cases where there is rational reason for different remedial treatment.