Testimony of

Ms. Melissa Rogers

Professor
Wake Forest University Divinity School
August 2, 2006

TESTIMONY OFMELISSA ROGERS,VISITING PROFESSOR OF RELIGION AND PUBLIC POLICYWAKE FOREST UNIVERSITY DIVINITY SCHOOLBEFORE THESUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTYRIGHTSOF THE COMMITTEE ON THE JUDICIARYUNITED STATES SENATEREGARDING"PAYING YOUR OWN WAY: CREATING A FAIR STANDARD FORATTORNEY'S FEES AWARDS IN ESTABLISHMENT CLAUSE CASES"WEDNESDAY, AUGUST 2, 20061 2

I. Introduction Thank you, Mr. Chairman, Senator Feingold, and Members of the Subcommittee, for this opportunity to speak with you about the ??Veterans?? Memorials, Boy Scouts, Public Seals, and other Public Expressions of Religion Protection Act of 2006?? (S. 3696)(referred to hereinafter as ??PERA??).1 I am Melissa Rogers, and I currently serve as a visiting professor of religion and public policy at Wake Forest University Divinity School. 2 I formerly served as the executive director of the Pew Forum on Religion and Public Life, an organization supported by The Pew Charitable Trusts that is dedicated to exploring the way in which religion shapes American institutions and ideas. As that former title would suggest, I wholeheartedly support the right of religious individuals, organizations, and ideas to play an active role in the public square. 3 The U.S. Supreme Court wisely has recognized that ??[t]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.??4 Of course, this reference to ??private speech?? is not to speech ??in private.?? Instead, it 1 I understand that the Subcommittee allows witnesses to supplement their testimony after the hearing. I would like to reserve my right to take advantage of that opportunity. 2 My faculty biography is posted at http://www.wfu.edu/divinity/faculty-rogers.html. 3 See generally Melissa Rogers, Testimony before the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Property Rights regarding religious expression and the public square (June 8, 2004). 4 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000).3 describes religious expression attributable to individuals and organizations rather than to the government. Previous to my time with the Pew Forum, I served as general counsel to the Baptist Joint Committee on Religious Liberty. In that capacity, I had the privilege of helping lead a remarkable coalition that included Methodists, Mormons, and Muslims, as well as organizations ranging from the ACLU and Americans United for Separation of Church and State to the National Association of Evangelicals and Prison Fellowship. This coalition urged Congress to pass the Religious Land Use and Institutionalized Persons Act (RLUIPA), which was enacted in 2000.5 RLUIPA provides heightened protection for the fundamental right of religious exercise in land use matters and situations in which persons are residing in or confined to governmental institutions. Apropos of this hearing, one of RLUIPA??s provisions amended 42 U.S.C. Section 1988 to allow the court to award reasonable attorney??s fees to prevailing parties in these matters.6 During my service at

the Baptist Joint Committee, I also contributed to amicus curiae briefs on behalf of the prevailing parties in Santa Fe Indep. Sch. Dist. v. Doe 7 and Good News Club v. Milford Central Sch. Dist., 8 among other cases heard by the U.S. Supreme Court. 5 42 U.S.C. Section 2000cc et seq. 6 Id. 7 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000). 8 Good News Club v. Milford Central Sch. Dist., 533 U.S. 98 (2001).4 I speak today not for any of the institutions with which I have been or am now affiliated, but as an attorney, a religious person who supports a vital role for faith in the public square, and someone who has been deeply involved in issues at the intersection of religion and public affairs for many years. II. PERA Singles Out Establishment Clause Claims for Disfavored Treatment The defining characteristic of PERA is that it would single out claims made under the Establishment Clause of the First Amendment for disfavored treatment. This bill does not address all constitutional claims or even all constitutional claims related to church-state issues. Instead, it selectively targets the Establishment Clause for poor treatment. PERA would carve out an exception from the general rule of 42 U.S.C. Section 1988 which provides for an award of attorney??s fees to the prevailing parties who have sued to protect their constitutional rights. Under PERA, courts would be prohibited from awarding attorney??s fees to parties who prevail on their Establishment Clause claims. PERA also would amend 42 U.S.C. Section 1983 to limit relief to injunctive and declaratory relief in cases arising under the Establishment Clause. 9 9 See 42 U.S.C. Section 1983.5 As a general matter, this legislation would set a dangerous precedent, whereby Congress picks and chooses among constitutional provisions, singling some out for disfavor. Today, it is the Establishment Clause. Tomorrow, it could be the right to bear arms10 or the right to just compensation when private property is taken for public use.11 More specifically, this legislation is troubling because it would discourage compliance with parts of the Constitution and undermine religious freedom. As Congress recognized in the 1976 Civil Rights Attorney??s Fees Award Act, the ability of prevailing parties to receive an award of attorney??s fees helps ensure that private attorneys will be willing to take these cases.12 By barring attorney fees and damages to prevailing parties in Establishment Clause claims, PERA would discourage these claims, and thus discourage compliance with parts of the Constitution. The following sections address these issues in greater detail. 10 Second Amendment to the U.S. Constitution. 11 Fifth Amendment to the U.S. Constitution. 12 See generally S. Rep. No. 94-1011 (1976) on the Civil Rights Attorney??s Fees Awards Act of 1976 reprinted in 1976 U.S.C.C.A.N 5908. The Senate report includes the following statement: There are very few provisions in our Federal laws which are self-executing. Enforcement of the laws depends on governmental action and, in some cases, on private action through the courts. If 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. Id. at 6.6 A. PERA Disfavors the Establishment Clause, the Primary Guardian Against Religious Discrimination and a Critical Source of Protection for Voluntarism and Religious Autonomy PERA disfavors the Establishment Clause, the primary guardian against religious discrimination by the government and a critical source of protection for voluntarism and religious autonomy, among other constitutional values. The following describes PERA??s impact on the specified constitutional values. 1. PERA Would Disfavor and Undermine the State??s Obligation to Treat All Faiths Equally PERA would disfavor and undermine the key constitutional obligation of the state to treat all faiths equally. As the U.S. Supreme Court has said, ??[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.??13 Simply put, the Establishment Clause is our primary guardian against religious

discrimination by the government. This bill would undermine that commitment. PERA would disfavor claims that challenge blatant governmental favoritism for one or more religion(s) over others, including a claim targeting a state??s proclamation that Christianity is the official religion of 13 Larson v. Valente, 456 U.S. 228, 244 (1982).7 the state or a claim challenging a city??s policy of awarding social service grants only to organizations of certain faiths. Case law reflects the fact that blatant governmental favoritism for one faith sometimes manifests itself in our public elementary and secondary schools, a setting which the Supreme Court has said calls for particular vigilance in the enforcement of the Establishment Clause.14 For example, in the case of Doe v. Santa Fe, which ultimately was heard by the U. S. Supreme Court,15 a lower court took note of a number of troubling incidents linked to that case. The following is the court??s description of one such incident: In April 1993, while plaintiff Jane Doe II was attending her seventh grade Texas History class, her teacher, David Wilson, handed out fliers advertising a Baptist religious revival. Jane Doe II asked if non-Baptists were invited to attend, prompting Wilson to inquire about her religious affiliation. On hearing that she was an adherent of the Church of Jesus Christ of Latter Day Saints (Mormon), Wilson launched into a diatribe about the non- Christian, cult-like nature of Mormonism, and its general evils. Wilson's comments inspired further discussion among Jane Doe II's classmates, some of whom reportedly noted that "he sure does make it sound evil," and "gee, . . . it's kind of like the KKK, isn't it?" Jane Doe II was understandably upset by this incident, and two days later, her mother, Jane Doe I, complained to [the school]. In this case, the school corrected this situation after hearing the complaint. But if future Establishment Clause claims are based on 14 Lee v. Weisman, 505 U.S. 577, 592 (1992) (recognizing ??heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.??) 15 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).8 blatant governmental discrimination against some faiths and PERA is the law of the land, such claims would be disfavored. Let me mention another public secondary school case. Elizabeth Hansen was a senior at Ann Arbor Pioneer High School and a member of the Pioneers for Christ student organization.16 Pioneer High School has a tradition of holding a ??Diversity Week?? that includes activities such as a general assembly program, panel discussions, and activities involving food and music. In 2002, the Pioneer High School Student Council decided to hold a panel discussion on homosexuality and religion as part of these activities. It invited various adult religious leaders from the Ann Arbor community to participate in this panel discussion. All of the clergy who were selected to appear on the panel took the view that religious beliefs and homosexual conduct are not inconsistent. Hansen sought to invite an adult member of the clergy of her choosing, or of the Pioneers for Christ??s choosing, to participate on this panel. She testified that ??she wanted her representative [on the panel] to convey the message that the Bible teaches that homosexuality is a sin.??17 To make a long story short, her attempts to include such a clergy leader on the panel were rejected. Hansen sued the school for declaratory and injunctive relief and damages, claiming its conduct in this and other matters violated the First Amendment??s Free Speech, Free Exercise, and 16 Hansen v. Ann Arbor Public Schools, 293 F. Supp. 2d 780 (E. D. Mich. 2003). 17 Id. at n.10.9 Establishment Clause and the Equal Protection Clause of the Fourteenth Amendment. With regard to Hansen??s Establishment Clause claim, the court found that the school was ??quite candid in admitting that the panel was created to convey only one religious view regarding the issue of homosexuality.?? According to the court, ??[a]ny contrary or differing religious view was deemed ??negative,?? and summarily excluded from the panel.?? Thus, the court found that it was clear that ??the principal effect of the panel was to suggest preference for a particular religious view?? in

violation of the Establishment Clause.18 The court also found violations of Free Speech and Equal Protection Clauses in this case. It noted, however, that the Establishment Clause aspects of the case made it especially troubling. The court wrote: This case presents the ironic, and unfortunate, paradox of a public high school celebrating ??diversity?? by refusing to permit the presentation to students of an ??unwelcomed?? viewpoint on the topic of homosexuality and religion, while actively promoting the competing view. This practice of ??one-way diversity,?? unsettling in itself, was rendered still more troubling ?? both constitutionally and ethically ?? by the fact that the approved viewpoint was, in one manifestation, presented to students as religious doctrine by six clerics (some in full garb) quoting from religious scripture.19 18 Id. at 805. 19 Id. at 780.10 In this case, the court ordered the school district to pay $100,000 in legal fees to the Thomas More Law Center, the firm that represented Hansen.20 None of these kinds of claims should be disfavored by the law. Each represents a case in which the government has overstepped it bounds into the religious realm and dishonored its obligation to treat all faiths equally. Particularly at a time when our country is striving to take a principled stand for religious freedom abroad, asking countries with majority Muslim populations to give equal dignity and respect to non- Muslim faiths, it does not serve our country well to back away from our commitment to equal religious liberty for all at home. 2. PERA Would Disfavor and Undermine Voluntarism and Religious Autonomy Some seem to support PERA because they believe that only the Free Exercise Clause protects religious autonomy and vitality. They are wrong. The Establishment Clause also is a source of protection for these values.For example, the Establishment Clause has been interpreted to protect the right of people to choose faith or reject it free from 20 Kim Kozlowski, ??Thomas More Cases Range from Defending Intelligent Design to Opposing Same-Sex Marriage, Detroit News, December 4, 2005.11 government pressure.21 In short, decisions in matters of faith should be the product of one??s volition, not state influence. At the founding of our country, my Baptists ancestors supported this principle in part because they recognized that governmental pressure on religious matters creates a stumbling block in the way of the formation of voluntary commitments to God. As Baptist preacher Isaac Backus recognized, ??religion is ever a matter between God and individuals . . . .??22 Moreover, it has been recognized by many people of faith that government support for a particular religion not only undermines other faiths, atheism, and agnosticism, it also harms the faith that is favored or funded by the state. As Baptist preacher John Leland said in 1804, ??[e]xperience, the best teacher, has informed us that the fondness of magistrates to foster Christianity, has done it more harm that all the persecutions ever did.??23 What sorts of harms worried these Baptists? Isaac Backus believed, for example, that state financial support for religion shifted religious people??s focus from God to government. Another group of Virginia Baptists worried about the rules and regulation that would 21 See, e.g., Abingdon Township v. Schempp, 374 U.S. 203 (1963); Lee v. Weisman, 505 U.S. 577 (1992). 22 Isaac Backus, A Door Opened for Christian Liberty (1783) in Isaac Backus on Church, State, and Calvinism, Pamphlets (1754-1789) at 432 (William G. McLoughlin ed., 1968). 23 John Leland, The Government of Christ A Christocracy (1804) reprinted in The Writings of the Late Elder John Leland (L.F. Greene, ed. 1845) at 278,12 follow government funds.24 John Leland deplored the way in which state establishment of religion sapped the established religion??s integrity and vitality.25 The times and circumstances have changed, but these risks endure. 24 A memorial drafted by an association of Baptist ministers and delegates and published in 1777 opposed the Virginia establishment and explained some of the ways in which state financial support of religion leads to state intrusion in religious matters: If, therefore, the State provides a Support for the Preachers of the Gospel, and they receive it in

Consideration for their Services, they must certainly when the Preach act as Officers of the State, and ought to be Accountable thereto for their Conduct. . . . The Consequence of this is, that those whom the State employs in its Service, it has the right to regulate and dictate to; it may judge and determine who shall preach; when and where they shall preach; and what they must preach. . . . Lyman H. Butterfield, Elder John Leland, Jeffersonian Itinerant, 62 Proc. of the Am. Antiquarian Soc??y 160, 175 (1952)(quoting from a memorial included in The Papers of Thomas Jefferson 660-61 (Julian P. Boyd ed. Princeton 1950). A similar petition was written by the Baptist General Committee of Virginia (BGAV) in 1785 in response to Patrick Henry??s proposal in the Virginia House of Delegates to provide assessments for the teaching of religion, the bill that occasioned James Madison??s famous work, A Memorial Against Religious Assessments. The BGAV declaration read in part: That it is believed to be repugnant to the spirit of the gospel for the legislature thus to proceed in matters of religion; that the holy author of our religion needs no such compulsive measures for the promotion of his cause; that the gospel wants not the feeble arm of man for its support; that it has made and will again through divine power make its way against all opposition; and that should the legislature assume the right of taxing the people for the support of the gospel it will be destructive to religious liberty. Catherine Cookson, Regulating Religion: The Courts and the Free Exercise Clause at 84 (Oxford Univ. Press 2001). 25 Leland charged that Virginia??s state-supported Anglican preachers ??not only plead for theatrical amusements, and what they call civil mirth, but their preaching is dry and barren, containing little else but morality.?? Leland explained: ??The great doctrines of universal depravity, redemption by the blood of Christ, regeneration, faith, repentance and self-denial, are but seldom preached by them, and, when they meddle with them, it is in such a superficial manner, as if they were nothing but things of course.?? Lyman H. Butterfield, Elder John Leland, Jeffersonian Itinerant, 62 Proc. of the Am. Antiquarian Soc??y 160, 171 (1952)(quoting from The Writings of John Leland, including Some Events in His Life, Written by Himself, edited by L.F. Greene at 108-09).13 Conversely, when the government refuses to fund religious activities due to Establishment Clause concerns, for example, it helps ensure that religion is essentially self-supporting and self-governing. This, in turn, assists in the avoidance of a corrosive dependence of religion on the government. This dependence would warp and weaken faith by tending to dry up tithes and gifts for religious ministries and make ministries less apt to criticize the governmental policies lest they lose state funds. The Establishment Clause also has been interpreted to provide various means of protection for religious bodies to control their internal affairs. The Supreme Court has noted, for example, that " ??pervasive [government] monitoring?? " for ??the subtle or overt presence of religious matter?? is a central danger against which we have held the Establishment Clause guards.??26 In the same vein, the Establishment Clause is understood to help undergird concepts such as the ministerial exception, which places the relationship between clergy and religious groups beyond the reach of civil authorities.27 In short, both the Free Exercise and the Establishment Clauses are sources of protection for religious autonomy and vitality. Congress should not weaken claims made under either clause. 26 Hernandez v. Comm??r of Internal Revenue, 490 U.S. 680, 694 (1989). 27 See, e.g., Rayburn v. General Conf. of Seventh-day Adventists, 772 F.2d 1164, 1169- 70 (4th Cir. 1985).14 3. PERA Would Tamper with the Family of Provisions that, Working Together, Create Religious Freedom PERA would tamper with the family of constitutional provisions and other laws that, working together, create the uniquely American concept of religious freedom. Disfavoring a particular member in that family of religious liberty, as this bill would do, would distort and weaken that freedom as a whole. On a number of occasions, the Supreme Court in general and

various justices in particular have recognized the inter-connectedness of the various constitutional provisions that protect religious freedom. It has been said, for example, that the Establishment Clause is ??a coguarantor, with the Free Exercise Clause, of religious liberty.??28 Or, as Justice Frankfurter wrote in 1947, the Establishment and Free Exercise Clauses are ?? correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom. ??29 More recently, the Court has said: The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference. James Madison, the principal author of 28 Abingdon Township v. Schempp, 374 U.S. 203, 256 (1963)(J. Brennan concurring). 29 Everson v. Board of Educ., 330 U.S. 1, 40 (1947)(J. Frankfurter, dissenting).15 the Bill of Rights, did not rest his opposition to a religious establishment on the sole ground of its effect on the minority. A principal ground for his view was: "Experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation."30 As these passages indicate, the Free Exercise, Establishment, and Free Exercise Clauses (among other constitutional and statutory provisions) construct a web of mutually supportive rights that essentially keeps the government out of religious matters. 31 This provides freedom for citizens and groups to advance their religion as they see fit, rather than as the government sees fit. As described above, disfavoring one strand of this freedom obviously would undermine the values that that particular strand protects. But it also would destabilize the concept of religious freedom as a whole. In other words, one cannot make a surgical strike at one strand of religious freedom. There will be collateral damage on related concepts and religious freedom overall. PERA would destabilize religious freedom in ways we cannot predict. 30 Lee v. Weisman, 505 U.S. 570, 589-90 (1992). 31 This web of religious freedom also is supported by other constitutional provisions such as the ??no religious test?? clause of Article VI and the Equal Protection Clause and by statutes such as the Religious Freedom Restoration Act, 42 U.S.C. Section 2000bb et seq., and RLUIPA. 16 B. Special Concerns Regarding Compliance with the Establishment Clause People often take great personal risks when they file certain types of Establishment Clause lawsuits. As scores of cases indicate, some Establishment Clause claimants risk ostracism. I mentioned earlier the case of Santa Fe Indep. Sch. Dist. v. Doe, in which plaintiffs sued a Texas school district for implementing a policy that encouraged school-sponsored prayer at public high school football games.32 The plaintiffs in this case were ??two sets of current and former students and their respective mothers.?? 33 As the Court noted, ??[o]ne family is Mormon and the other is Catholic.??34 They sued anonymously because they feared a backlash from their community. Their fears were realized. Indeed, the trial court judge in this case found that even ??many [school] officials apparently neither agreed with nor particularly respected?? the plaintiffs?? decision to sue anonymously. The conduct of the school officials was so menacing and unrepentant, the judge issued the following order: Attempts by [school] administrators, teachers, and other employees "overtly or covertly to ferret out the identities of the Plaintiffs . . . by means of bogus petitions, questionnaires, individual interrogation, or downright 'snooping'" eventually prompted the district court to threaten to visit upon them "THE HARSHEST POSSIBLE 32 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000). 33 Id. at 294. 34 Id.17 CONTEMPT

SANCTIONS" and/or "CRIMINAL LIABILITY" if [school officials did] not cease their investigations. Similarly, the newspapers this weekend carried an important story about the Dobrich family who used to live in the small town of Georgetown, Delaware.35 For years, the story reports, Mrs. Dobrich and her daughter, Samantha, ??listened to Christian prayers at public school potlucks, award dinners and parent-teacher group meetings. . . ?? But at her daughter??s high school graduation in June 2004, ??a minister??s prayer proclaiming Jesus as the only way to the truth nudged Mrs. Dobrich to act.?? The Supreme Court has ruled that public schools may not invite clergy to lead prayers at these ceremonies,36 yet the school apparently engaged in this practice without hesitation or apology. The article describes Mrs. Dobrich??s attempt to address the situation with the relevant school authorities: Mrs. Dobrich asked the Indian River district school to consider prayers that were more generic and, she said, less exclusionary. As news of her request spread, many local Christians saw it as an effort to limit their free exercise of religion, residents said. Anger spilled on to talk radio, in letters to the editor and at school board meetings attended by hundreds of people carrying signs praising Jesus. ??What people here are saying is, ??Stop interfering with our traditions, stop interfering with our faith and leave our country the way we knew it to be,?????? said Dan Gaffney, a host at WGMD, a talk 35 See Neela Banerjee, Families Challenging Religious Influence in Delaware Schools, The New York Times (July 29, 2006), which may be found at http://www.nytimes.com/2006/07/29/us/29delaware.html?_r=1&oref=slogin. 36Lee v. Weisman, 505 U.S. 570 (1992).18 radio station in Rehoboth, and a supporter of prayer in the school district. After receiving several threats, Mrs. Dobrich took her son, Alex, to Wilmington in the fall of 2004, planning to stay until the controversy blew over. It never has. The Dobriches eventually sued the Indian River School District, challenging what they asserted was the pervasiveness of religion in the schools and seeking financial damages. They have been joined by ??the Does,?? a family still in the school district who has remained anonymous because of the response against the Dobriches. Meanwhile, a Muslim family in another school district here in Sussex County has filed suit, alleging proselytizing in the schools and the harassment of their daughters. The move to Wilmington, the Dobriches said, wrecked them financially, leading them to sell their house and their daughter to drop out of Columbia University. When Mrs. Dobrich attended a school board meeting on these issues in August 2004, hundreds of people showed up, according to the story. She asked the board to draw up policies that would comply with the Constitution. Here is an excerpt from the story addressing some of the attendees?? reaction to her request: People booed and rattled signs that read ??Jesus Saves,?? she recalled. Her son had written a short statement, but he felt so intimidated that his sister read it for him. In his statement, Alex, who was 11 then, said: ??I feel bad when kids in my class call me ??Jew boy.?? I do not want to move away from the house I have lived in forever.?? Later, another speaker turned to Mrs. Dobrich and said, according to several witnesses, ??If you want people to stop calling him ??Jew boy,?? you tell him to give his heart to Jesus.?? Immediately afterward, the Dobriches got threatening phone calls. Samantha had enrolled in Columbia, and Mrs. Dobrich decided to go to Wilmington temporarily.19 But the controversy simmered, keeping Mrs. Dobrich and Alex away. The cost of renting an apartment in Wilmington led the Dobriches to sell their home here. Mrs. Dobrich??s husband, Marco, a school bus driver and transportation coordinator, makes about $30,000 a year and has stayed in town to care for Mrs. Dobrich??s ailing parents. Mr. Dobrich declined to comment. Samantha left Columbia because of the financial strain. According to the story, ??[t]he Dobrich and Doe legal complaint portrays a district in which children were given special privileges for being in Bible club, Bibles were distributed in 2003 at an elementary school,

Christian prayer was routine at school functions and teachers evangelized.?? The legal complaint seeks compensatory or nominal damages for ??past unconstitutional practices and policies?? and for pecuniary loss the Dobriches and Does have allegedly suffered. It also seeks declaratory and injunctive relief to prevent a range of ??school-sponsored religious exercises at public functions.?? In addition, plaintiffs seek their attorneys?? fees in the case under 42 U.S.C. Section 1988.37 If the allegations in the complaint are true, they represent a case of stubborn resistance to Establishment Clause principles, not to mention grossly un-Christian behavior. Let me pause here for a moment to emphasize that students in public schools have the right to practice their faiths, but the school must not promote or endorse religion.38 The legal 37 Plaintiff??s First Amended Complaint in Dobrich v. Indian River Sch. Dist., CA No. 05- 120 (JJF)(D. Del. June 2, 2006). A copy of the Dobrich complaint may be found at www.jewsonfirst.org/06b/ indianriver.pdf 38 See Religion in the Public Schools: A Joint Statement of Current Law, which may be found at http://archive.aclu.org/issues/religion/relig7.html. President Clinton noted that his administration borrowed from this statement to create a similar statement on this subject entitled, Religious Expression in Public Schools, which was released by The20 problem in situations such as this is not religion expression per se, but school-sponsorship of it. Again, if these allegations are true, then this and other Establishment Clause principles have been ignored with impunity in this case, at least until Mrs. Dobrich began her courageous attempt to try to bring the school??s conduct in line with the Constitution. In response, the Dobrich family apparently has been subject of ostracism. As these stories suggest, one can understand that it would only be the unusual person who would challenge the majority on these matters.39 If attorneys were not able to recover fees for their work on such cases, that would make enforcement of the law even more rare. Whether one agrees or disagrees with the law in this area, we all should be able to agree that the rule of law must prevail.40 In these White House on May 30, 1998, and sent to every school district in the nation. This statement on religious expression may be found at www.ed.gov/Speeches/08- 1995/religion.html. 39 As the U.S. Supreme Court has recognized, the Bill of Rights is a counter-majoritarian document: The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. West Virginia St. Bd. of Ed. v. Barnette, 319 U.S. 624, 638 (1943). 40 In a statement addressed to the Indian River School Board at a meeting in July 2004, Mrs. Dobrich spoke eloquently about this principle. She said: You as elected officials of this community have not only an opportunity, but an obligation to follow the law. It is your duty to develop standards for teachers, coaches, and administrators to follow. Put into place policies that will ensure21 cases, the ability of prevailing parties to receive an award of attorney fees serves an important role in increasing the odds that it will. If such fee awards were unavailable, the Establishment Clause would be violated much more often with impunity. In this way, PERA would frustrate the rule of law. C. There is No Evidence of a Principled Justification for Treating Establishment Clause Claims Differently as PERA Does Some have suggested that PERA??s different treatment of Establishment Clause claims is justified because Establishment Clause jurisprudence is uniquely unpredictable or confusing. That suggestion is incorrect. It first should be said that many aspects of Establishment Clause law are perfectly clear. For example, under the Establishment Clause, the state may not prefer one religious denomination or one religion over another;41 prescribe or sponsor prayers in public

elementary and [at] all school events, the law [will be] upheld. Make me proud to be a graduate of the Indian River School District. Plaintiff??s First Amended Complaint in Dobrich v. Indian River Sch. Dist., CA No. 05- 120 (JJF)(D. Del. June 2, 2006) at 19. 41 Larson v. Valente, 456 U.S. 228, 244 (1982)(??The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.??)22 secondary schools;42 refuse to teach certain materials in the public schools simply because they contradict particular religious teachings;43 or delegate governmental powers to religious groups.44 While Establishment Clause claims do sometimes present complex issues, that is hardly an unusual aspect of constitutional jurisprudence. For example, consider one of the most criticized tests in Establishment Clause jurisprudence, the endorsement test which requires ??judicial interpretation of social facts.??45 As Professor Alan Brownstein has noted, ??the endorsement standard is no different than a host of commonly utilized constitutional constructs that also involve ??judicial interpretation of social facts.??????46 A ??small set of possible examples?? of such constructs include: the reasonably prudent person in tort law; expectations of privacy in Fourth Amendment doctrine; justified investment-based expectations and economically viable uses in Taking Clauses cases; fighting words, clear and present dangers, offensive speech in free speech doctrine; stigmatic messages in equal protection cases; and important or compelling state interests in the standards of review that extend throughout the constitutional protection of fundamental rights. . . . These mixed fact and law conclusions in various degrees describe cultural understandings (or perceptions) derived from social behavior that are assigned specific and significant legal consequences in particular cases.47 42 Engel v. Vitale, 370 U.S. 421 (1962); Abingdon Township v. Schempp, 374 U.S. 203 (1963). 43 Epperson v. Arkansas, 393 U.S. 97 (1968). 44 Larkin v. Grendel??s Den, 459 U.S. 116 (1982). 45 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 315 (2000)(quoting Lynch v. Donnelly, 465 U.S. 668, 693-94 (1984)(J. O?? Connor, concurring)). 46 Alan Brownstein, A Decent Respect for Religious Liberty and Religious Equality: Justice ????Connor??s Interpretation of the Religion Clauses of the First Amendment, 32 McGeorge L. Rev. 837, 850 (2001). 47 Id.23 It simply isn??t the case that Establishment Clause jurisprudence generally or the endorsement test specifically is uniquely unpredictable or confusing. As Professor Brownstein says, ??[w]hat is disturbing about some of the criticisms of the endorsement test is the suggestion that there is something uniquely unfathomable about this principle.??48 Moreover, this argument in favor of PERA raises a question. How does Congress propose to determine when some area of the law becomes sufficiently complex to deny awards of attorneys?? fees to prevailing parties or to limit their relief? This would seem to be an invitation to mischief, with legislators being tempted to say that certain claims they disfavor touch on areas of the law that are distinctly confusing or unpredictable. We also need to remember that clarity and predictability are not always a virtue. To take an extreme example, the U.S. Supreme Court could hand down a unanimous opinion establishing Christianity as the official religion of our country, to be preferred and favored in law and policy. That would be quite clear, but it would do great violence to our constitutional values and our democracy. At bottom, PERA is an attempt to undermine the Establishment Clause by discouraging enforcement of it. There is something deeply disturbing about the notion that Congress would weaken certain 48 Id. Professor Brownstein notes that he doesn??t mean to suggest that there aren??t ??important questions to be raised about how the Court identifies an endorsement for constitutional purposes.?? But he emphasizes that ??many criticisms directed at the endorsement test are equally applicable to a host of constitutional standards.?? Id. constitutional provisions because it does not support some of the principles embedded in it or the

results those provisions have commanded in particular cases. That would be conduct unworthy of a body sworn to protect and defend the Constitution.

III. Conclusion

PERA would single out claims made under the Establishment Clause of the First Amendment for disfavored treatment. This would set a dangerous precedent, whereby Congress picks and chooses among constitutional rights, undermining some of them. It also would discourage compliance with parts of the Constitution and harm religious freedom. For these and other reasons, I respectfully urge the members of the Subcommittee to reject this bill.