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STATE REPRESENTATIVE

Senate Committee on Judiciary and Labor
Public Hearing, August 20, 2013
Senate Joint Resolution 38 Testimony
Representative David Craig, 83rd Assembly District

Thank you, Chairman Grothman, for scheduling a hearing on Senate Joint Resolution 38. I appreciate the opportunity to speak before you and the members of the committee today regarding SJR 38. This amendment would incorporate existing case law into the Wisconsin Constitution, Article I, Section 18, which is our state version of the freedom of religion amendment in the U.S. Constitution. Wisconsin has a constitutional, religious liberty provision that the Wisconsin State Supreme Court has recognized may actually be stronger than the First Amendment of the U.S. Constitution.ⁱ

However, in recent decades court rulings at the national level have eroded and confused the interpretation of the breadth of our religious liberties, leading to a ruling by the Wisconsin State Supreme Court establishing a high level of scrutiny for religious liberty in Wisconsin. In *State v. Miller* in 1996, the State Supreme Court established the “compelling interest/least restrictive alternative test,” whereby an individual could establish that a state law burdens that individual’s sincerely held religious belief. The state would then have to show that the law in question was based on a compelling state interest and the state was using the least restrictive alternative to achieve that compelling interest.

Religious liberty is a bedrock principle of our republic and of individual liberty. The right of conscience and public expression of one’s faith are some of the most basic, most important rights we have as individuals and it is absolutely imperative that government protect those rights. Court rulings on the national and state level have sometimes muddied the waters on the interpretation of this most basic liberty and recent incidents in our state reflect the confusion and misinformation that exist and lead to violations of this right by state government, particularly on the local level in public education and municipal government.

Here are a few examples of freedom of religion violations recently in Wisconsin:

- A public high school student in Tomah had his artwork censored in an art class due to classroom policies prohibiting religious expression in artwork, because the student’s artwork depicted a cross and a Bible verse.ⁱⁱ
- After legal action, the Sun Prairie Area School District changed an existing policy allowing the district to charge fees to religious groups for the use of district facilities while allowing non-religious groups to use their facilities without a fee.ⁱⁱⁱ
- A Shawano high school student was threatened with suspension for allegedly violating the district bullying policy by writing a school newspaper column outlining his opposition to same-sex adoption.^{iv}

- Officials at the University of Wisconsin-Eau Claire had adopted a discriminatory policy that prohibited resident assistants in college dorms from holding Bible studies in their dorms.^v
- A police officer in Janesville was prohibited from posting an announcement for an off-site prayer group on a public bulletin board in the department. He had been posting such announcements routinely until someone complained that one posting which cited a scripture reference was offensive. Others frequently used the bulletin board to post announcements for various off-site events and groups.^{vi}

These and other examples illustrate why we need a constitutional amendment which would establish a compelling state interest protection in our state constitution. The language of our amendment would protect the right of individuals to engage in activities or refrain from activities that would violate their sincerely held religious beliefs from being burdened by the state unless the state proves it has a compelling state interest to infringe on that right and is using the least restrictive means to do so. This amendment codifies the “compelling interest/least restrictive alternative test” in our Constitution, lifting it from the purview of judges and applying it across the board to every citizen in Wisconsin in every religious liberty violation involving a burden of the state on a sincerely held religious belief.

Since *State v. Miller*, Wisconsin courts have applied the “compelling interest/least restrictive alternative test” in variety of situations, giving us a body of case law to establish the effectiveness of this test in upholding religious liberty while protecting state interests to enforce necessary laws. As you know, this resolution would go to the people for a vote once it was passed by two consecutive legislatures, giving the people of Wisconsin a chance to strengthen their religious liberty in our state constitution.

I believe this is a necessary and appropriate amendment that will strengthen this basic human right in our state and also clarify that right for citizens, state government employees and judges. I welcome any questions you may have and thank you, again, for the opportunity to testify on this amendment and ask that you move this amendment forward.

ⁱ *Coulee Catholic Schools v. LIRC*, 2009 WI 88, ¶60.

ⁱⁱ <http://www.adfmedia.org/News/PRDetail/2244?search=1>

ⁱⁱⁱ <http://www.alliancealert.org/2008/10/30/adf-wis-school-district-agrees-to-stop-discriminatory-fees-against-christian-club/>

^{iv} <http://www.jsonline.com/blogs/news/138336534.html>

^v <http://www.nbc15.com/home/headlines/2072896.html>

^{vi} <http://www.alliancedefendingfreedom.org/News/PRDetail/778>



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Testimony in Support of Senate Joint Resolution 38
Senate Committee on Judiciary and Labor
Julaine K. Appling, WFA President
August 20, 2013

Thank you, Chairman Grothman and committee members, for the opportunity to testify today in support of Senate Joint Resolution 38. I am Julaine Appling, president of Wisconsin Family Action, an organization dedicated to strengthening, preserving and promoting marriage, family, life and liberty in The Badger state. Our mission affords us the privilege of working extensively with churches and religiously-affiliated or faith-based organizations and ministries statewide.

We are grateful to Sen. Leibham and Rep. Craig for introducing SJR 38, the Religious Freedom Amendment. Wisconsin Family Action strongly supports this preemptive, proactive amendment that is designed to ensure that Wisconsin citizens have their constitutionally provided religious freedom and conscience rights protected for years to come.

SJR 38 adds language to Article I, Section 18 of the Wisconsin Constitution. It does not delete or change any existing language. Rather, the additional language clarifies and delineates the approach a court must take when deciding a case dealing with a citizen's religious and conscience beliefs. By adding this language, we lessen the likelihood that the state through a court or even legislative action can compel a person to act—or, as important, not act, in a way or in ways that violate his religious beliefs or conscience.

Wisconsin Family Action has closely studied the language of this amendment for some time. We have talked with religious freedom legal experts extensively. We have hashed over various scenarios that might come before courts in our state under this amendment. Each time, we have come away more convinced that we need this amendment in Wisconsin, that the wording is strong and is the very best wording available to ensure our citizens' religious freedom is appropriately regarded and safeguarded.

Prior to 1990, in this nation, we had a clear "compelling interest" precedent that required the state to unequivocally prove its "compelling interest" in abrogating a person's or organization's religious freedom or conscience rights. However, with *Employment Division v. Smith*, the US Supreme Court dramatically lowered the test and standard of protection for citizens. In response, Congress passed the Religious Freedom Restoration Act. In an ensuing legal challenge this new law, the US Supreme Court eventually struck down the portion of the law that extended the reach of the RFRA to states and local governments. However, the Court left the door open for states to take their own action to ensure that they do not have to have the same low standard for religious freedom as is now in place federally. States such as Wisconsin have been fortunate that our courts have over the past twenty-plus years essentially retained a pre-*Smith* approach. However, again, nothing, absolutely nothing in Wisconsin's current statutes or constitution require the use of the "balance test." That is the entire purpose of this amendment.

Some will ask for specific examples of where religious freedom has been threatened in Wisconsin. We can provide those, but more important to us is what we might face in the future. While Wisconsin courts have actually been pretty good on cases regarding religious freedom over the last 20 years, we know that a single election or even a vacancy appointment could change that in any given court. The protection of a freedom as important as our religious freedom should not be dependent upon either the good will or the whim of any particular judge or court. This amendment gives judges and courts clear language and directives by which to determine a case involving religious freedom.

Some have inquired about whether or not this amendment creates any new or additional rights for any religious activity or potential litigant. Religious freedom experts assure us that the amendment does not do this. It merely restores the former, heightened standard of review of religious liberty claims that served our country and our people well for so many years. That standard requires courts to always weigh legitimate free exercise claims against compelling state interests.

In addition, no problems have been created or abuses noted since the passage of the federal Religious Freedom Restoration Act, nor in any of the numerous states where the "compelling interest test" has already been restored by statute or amendment over the last decade or so. Prior to the passage of many of those laws, detractors warned the legislation would spark waves of subversive litigation. Those abuses simply never materialized.

Quite honestly, we see no way that Wisconsin is exempt from more and more challenges involving citizens' religious freedom, just as other states are experiencing. Now is the time to ensure that the very best and most responsible legal protection is in place for our citizens, people who believe in strong religious freedom protection. Waiting or taking no action is a risk that we are not willing to take. Giving our citizens the opportunity to vote on this important matter is altogether appropriate.

Thank you for your time. Wisconsin Family Action urges you to vote in support of SJR 38.