that I submit at this time a Section-by-Section sent. Because it is not accompanied by any Committee Report. S. 2869, on the other Committee hearings, two markups, and the filing of with an overwhelming vote after several com-
ments about this important new law.

The Religious Land Use and Institutionalized Persons Act, S. 2869, is patterned after an earlier, more expansive bill, H.R. 1691, which passed the House of Representatives with an overwhelming vote after several committee hearings, two markups, and the filing of a Committee Report. S. 2869, on the other hand, passed the Senate and the House without committee action and by unanimous consent. Because it is not accompanied by any recorded legislative history, it is appropriate that I submit at this time a Section-by-Section Analysis of the S. 2869:

The Religious Land Use and Institutionalized Persons Act

Section 1. This section provides that the title of the Act is the Religious Land Use and Institutionalized Persons Act of 2000. Section 2(a). The ‘‘General Rule’’ in §2(a)(1) tracks the substantive language of the Religious Freedom Restoration Act (‘‘RFRA’’), providing that land use regulation which would apply to the free exercise of religion by religious persons residing in or confined to institutionalized persons. This provision is substantially the same as §2(a) and 2(b) of H.R. 1691, except that its scope has been restricted to institutionalized persons. Section 2(a)(2) confines the General Rule to cases within Congress’ constitutional authority under the Commerce Clause and the Spending Clause. The RFRA standard, the Commerce Clause standard, and the Spending Clause standard in §3 are identical to the parallel provisions in §2, and the same explanatory comments apply. These provisions are substantially the same as §2(a) and 2(b) of H.R. 1691, except that their scope has been restricted to institutionalized persons.

Section 2. Section 2(a) tracks RFRA, creating a private cause of action for damages, injunction, and declaratory judgment, and a motion is controlled by the government. These claims and defenses lie against a government, but the Act does not abrogate the Eleventh Amendment immunity of states. In the case of violation by state, the Act must be enforced by suits against state officials or employees. This section is identical to §4(a) of H.R. 1691.

Section 4(b) simplifies enforcement of the Free Exercise Clause as interpreted by the Supreme Court. Smith v. Employment Division of Oregon, 494 U.S. 872 (1990), held that governmental burdens on religious exercise, without more, receive only rational-basis review. But this rule is an important departure. The Act applies the compelling interest test to laws that are not neutral and generally applicable, to laws that provide for individualized adjudication of regulation, to conduct motivated by hostility to religion, to cases involving hybrid claims that implicate both the Free Exercise Clause and some other constitutional or other exceptional cases. These exceptions present issues in which the facts are uncertain and difficult to prove, or in which essential information is not available. This section is addressed principally to these issues about whether one of these exceptions applies. It provides generally that if a complaint of prima facie evidence of a free exercise violation, the government then bears the burden of persuasion on all issues except burden on religion. This section provides substantially the same as §3(a) of H.R. 1691.

Section 4(c) requires a full and fair opportunity to litigate land use claims arising under section 2. This is based on existing law; no judgment is entitled to full faith and credit if there was not a full and fair opportunity to litigate. Kremer v. Chemical Construction Corp., 456 U.S. 461, 480–81 (1982), interpreting 28 U.S.C. §1738 (1984). The rule has special application in this context, where a zoning board may refuse to entertain a federal claim because of limits on its jurisdiction, or may confine its inquiry to the individual parcel and exclude evidence of how places of secular assembly were treated. If a state court then confines itself to the record before the zoning board, it has been given no opportunity to litigate essential elements of the federal claim, and the resulting judgment is not entitled to full faith and credit in a federal suit under Supremacy Clause. This section is based on §3(b)(2) of H.R. 1691.

Section 4(d) tracks RFRA and provides that a successful plaintiff may recover attorney’s fees. This section is substantially the same as §4(d) of H.R. 1691.
Section 4(e) makes explicit that the bill does not "amend or repeal the Prison Litigation Reform Act." The PLRA is therefore still fully available to deal with frivolous prisoner claims. This section is based on §4(c) of H.R. 1691.

Section 4(f) expressly authorizes the United States to sue for injunctive or declaratory relief under the Act. The President, or his agent, has similar authority to enforce other civil rights acts. This section is based on §§2(c) and (d) of H.R. 1691.

Section 4(g). If a claimant proves an effect on commerce in a particular case, the courts assume or infer that all similar effects will, in the aggregate, substantially affect commerce. This section gives government an opportunity to rebut that inference. Government may show that even in the aggregate, there is no effect on commerce. Such an opportunity to rebut the usual inference is not constitutionally required, but is provided to create an extra margin of constitutionality in potentially difficult cases. This section had no equivalent in H.R. 1691.

Section 5. This section states several rules of construction designed to clarify the meaning or effect of the provisions. Section 5(a) provides that nothing in the Act authorizes government to burden religious belief, this tracks RFRA. Section 5(b) provides that nothing in the Act authorizes government to burden or restrict religious exercise or for claims against a religious organization or for claims against a government entity. These two subsections closely track §5(e) of H.R. 1691 and §1004(g). This section gives government an opportunity to rebut an inference of an effect on commerce. Such an opportunity to rebut the usual inference is not constitutionally required, but is provided to create an extra margin of constitutionality in potentially difficult cases. This section had no equivalent in H.R. 1691.

Section 5(c) and 5(d) have been carefully negotiated to keep this Act neutral on all disputed issues of law not directly or tangentially related to religious exercise. Section 5(c) states neutrality on whether such assistance can be provided at all; §§5(d) states neutrality on the scope of existing authority to regulate private organizations that accept such aid. Litigation about such aid will be conducted under other theories and will not be affected by this bill. They are identical to §5(c) and 5(d) of H.R. 1691.

Section 5(e) emphasizes what would be true in any event: This bill does not authorize governments to pursue any particular public policy or to abandon any policy, and that each government is free to choose its own means of accommodating religion under the exercise of the First Amendment. This section is substantially the same as §1004(h) of H.R. 1691.

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Section 5(f) provides that proof of an effect on commerce under §2(a)(2)(B) does not include the United States and its agencies, because the United States remains subject to RFRA. But a further definition in §(4)(B) includes the United States and its agencies for the purposes of §§4(b) and (5), because the burden-shifting provision in §(4), and some of the rules of construction in §(5) of H.R. 1691 do not extend to the government.

Section 5(g) provides that the Act should be broadly construed to protect religious exercise to the maximum extent permitted by its terms and the Constitution. Section 5(h) provides that each provision of the Act is severable from every other provision. These sections are substantially the same as §§5(g) and 5(h) of H.R. 1691.

Section 6. This section is taken from RFRA. It was carefully negotiated to ensure that the Act's new and expanded definition of "commerce" under the Establishment Clause. It is more general than §§5(c) and 5(d), which were not

other uses or portions of the same property. Thus, if a commercial enterprise builds a chapel in one wing of the building, the chapel is protected if the owner is sincere about providing a place of worship. But if the commercial enterprise is not protected. Similarly if religious services are conducted once a week in a building otherwise devoted to secular commerce, the religious services are not protected but the secular commerce is not. Both parts of this definition are based on §8(i) of H.R. 1691.

THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000

HON. JEREMY J. HYDE
OF ILLINOIS
IN THE HOUSE OF REPRESENTATIVES
Thursday, September 21, 2000

Mr. HYDE. Mr. Speaker, tomorrow the President of the United States will sign into law the Religious Land Use and Institutionalized Persons Act. S. 2689. I would like to submit for the RECORD a document prepared by the Christian Legal Society describing zoning conflicts between churches and cities which have come to light since subcommittee hearings on the subject.

Recent Land-Use Cases

"In the last 10 years, zoning conflicts between churches and cities have become a leading church-state issue. Disputes have arisen over church soup kitchens or homeless shelters, the use of public facilities, parking squeezes on Sunday, breaches of noise ordinances or disagreements on what kind of meetings the zoning boards will permit. Growing churches that seek new land to relocate often cannot win zoning approvals in the face of public protest over traffic." Joyce Howard Price, Portland church ordered to limit attendance, Washington Times, February 18, 2000.

A couple in Montgomery County, Maryland, challenged in federal court a zoning ordinance that allowed a Roman Catholic girls' school to build on one lot obtaining a special permit. In August 1999, a U.S. District Judge ruled that the ordinance violated the Establishment Clause, but on two three-week suspensions of the 4th U.S. Circuit Court of Appeals reversed the district court by a 2-1 vote, concluding in August 2000, that "[t]he authorized, and sometimes mandatory, accommodation of religion [by the government] is a necessary aspect of the Establishment Clause jurisprudence because, without it, the government would find itself effectively and unconstitutionally promoting the absence of religion over its practice." The dissenting Judge differentiated between regulations that influence or alter programming and regulations that affect physical facilities.


On June 30, 2000, Chicago Public Radio's Jason DeRosa reported that the Al Salam Mosque Foundation encountered opposition from the city council of Palos Heights, Illinois, when Muslims tried to buy a building from a Reformed Church and turn it into a Muslim mosque. Although the city council attempted to block the $2.1 million sale by arguing that the city needed the building for