RELIGIOUS FREEDOM AND THE LDS LAW COMMUNITY

by W. Cole Durham, Jr.

Elder Dallin H. Oaks' recent testimony supporting the Religious Liberty Protection Act of 1998 (RLPA) is part of the latest efforts to legislatively compensate for reduced judicial protection of religious liberty after *Employment Division v. Smith* (494 U.S. 872 [1990]). Then, the U.S. Supreme Court jettisoned its insistence that incursions on religious liberty be justified by a compelling state interest. Congress sought to remedy the resulting gap by passing the Religious Freedom Restoration Act (RFRA), but in June 1997 the Court struck that legislation down in *City of Boerne v. Flores* (117 S. Ct. 2157 [1997]) holding that Congress lacked power under Section 5 of the 14th Amendment to pass it.

Senators Orrin Hatch and Ted Kennedy jointly introduced RLPA in the Senate, and many LDS senators and representatives have signed on as cosponsors of the Senate and House versions (Senate Bill S. 2148; House Bill H.R. 4019). Elder Oaks' testimony is the most prominent LDS contribution to the broad-based effort for RLPA, but many other Church members have played a significant role.

A month after the *Boerne* decision, Elder Lance B. Wickman, general counsel for the Church, obtained First Presidency approval to convene an ad hoc Religious Freedom Advisory Committee. In addition to Elder Wickman, this group included Boyd J. Black ('78), associate general counsel for the Church; Marcus G. Faust ('77), and Von G. Keetch ('87), who have served as the Church's representatives to the Coalition for the Free Exercise of Religion; BYU Law School professors Frederick Mark Gedicks, Richard G. Wilkins ('79), and myself; and three other Church members with relevant constitutional expertise: Timothy Flanigan, Gene C. Schaerr, and Alexander Dushku ('93). With the benefit of advice from this group, recommendations for an LDS response were developed. The advisory committee considered how best to continue cooperating with the Coalition for the Free Exercise of Religion, a broad-based organization with representation across the entire political and religious spectrum that played a key role in RFRA's adoption and defense and then sprang into action again when *Boerne* was decided. (The LDS Church has been an active member of the coalition since its creation.) Over the next several months, Von Keetch and Marcus Faust worked with the coalition on formulating concrete legislative recommendations.

The coalition has chosen to pursue legislative remedies rather than a constitutional amendment because of the difficulty and delay involved. It has taken the position, yet to be tested before the Supreme Court, that *Boerne* only invalidated RFRA insofar as it relates to state actions infringing on religious freedom, and that RFRA remains valid in federal contexts. The *Boerne* decision makes it difficult to achieve an across-the-board remedy with the strength, simplicity, and elegance of RFRA. Instead, what has emerged is a more piecemeal approach that seeks to invoke acknowledged bases for Congressional power, such as the commerce and spending powers, to the extent possible.

The first initiative along these lines is the Religious Liberty and Charitable Donation Protection Act of 1998, signed into law on June 19, 1998 (Pub. L. No. 105-183, 112 Stat. 517 [1998]). Essentially, this legislation is aimed at preventing normal contributions to religious or charitable entities from being treated as fraudulent conveyances under bankruptcy law. Because this law deals with bankruptcy, a field in which Congress clearly has power to regulate, there can be no doubt about congressional authority in this area.

RLPA, the subject of Elder Oaks' testimony, is more general legislation providing that, in areas where Congress' spending or commerce power applies, state action can burden religious exercise only if it can meet the compelling state interest/least restrictive alternative test. In addition, RLPA contains special provisions that address the field of land-use regulation. These provisions are also based on spending and commerce power, to the extent those apply, but in addition, they are based on congressional power under Section 5 of the 14th Amendment. *Boerne* left open the possibility that Section 5 can be used as a basis for legislation aimed at remedying free-exercise-rights violations. If adopted, this provision will help ameliorate the recurrent problem faced by many smaller and less popular faiths when they attempt to acquire and develop sites for religious purposes. RLPA also amends RFRA to limit its applicability to federal settings and addresses other more technical issues, such as attorneys' fees.

LDS scholarship has been particularly significant in showing both the need and the justification for RLPA's land-use provisions. The amicus brief submitted on behalf of the LDS Church in *Boerne* (coauthored by myself, Fred Gedicks, Richard Wilkins, Von Keetch, Alexander Dushku, and several distinguished church-state lawyers at Mayer, Brown & Platt in Chicago) included an appendix that showed a substantial pattern of discrimination against smaller and less popular churches in the land-use context. This study has been cited by Von Keetch in his testimony in support of the House version of RLPA on March 26, 1998; it was expanded upon in my own testimony before Congress on June 16, 1998; and it was again referred to in Elder Oaks' testimony. The study has turned out to be particularly important because it provides crucial evidentiary support that there is a pervasive pattern of religious discrimination in land use. This finding, in turn, warrants congressional exercise of power under Section 5 of the 14th Amendment to remedy the violation of religious freedom principles, even after *Boerne.*