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MEMORANDUM

TO: The Honorable Members of the Senate Judiciary Committee

FROM: John W. Whitehead, President

DATE: March 24, 2006

SUBJECT: H.R. 4437 "The Border Protection, Antiterrorism, and Illegal Immigration Control Act"

Representative James Sensenbrenner (R-WI) has proposed legislation H.R. 4437 "The Border Protection, Antiterrorism, and Illegal Immigration Control Act" (hereinafter referred to as the Bill). This Bill seeks to expand the class of individuals who could be prosecuted for illegal "alien smuggling" to include anyone who "knowing[ly] or in reckless disregard of the fact" helps an illegal alien enter or remain in the United States.

Although several lawmakers have insisted that the Bill is not aimed at criminalizing altruistic assistance given to illegal aliens, the language of this proposed legislation is so overtly vague as to put individuals, churches, charities and public-interest organizations at risk of violating federal law simply for performing acts of mercy commonly associated with charitable institutions and people of good will. As the *New York Times* noted in a recent editorial, this legislation "would expand the definition of 'alien smuggling' in a way that could theoretically include working in a soup kitchen, driving a friend to a bus stop or caring for a neighbor's baby." *The New York Times*, Editorial, "The Gospel vs. H.R. 4437," March 3, 2006.

For example, as currently written, the Bill could compel those operating soup kitchens and homeless shelters to restrict their services to individuals who are able to provide proof of legal residence. However, such a restriction would clearly impact legal immigrants and U.S. citizens who turn to such shelters for help, as well as illegal immigrants, if they were unable to provide the proper paperwork. The Bill could also be applied in such a way as to punish an innocent bystander for helping someone stranded by the side of the road if that person turned out to be an illegal alien.

By criminalizing the acts of Good Samaritans who may unknowingly offer aid to illegal aliens, the Bill would force religious individuals and institutions to either curtail their charitable activities, which are a central tenet of most faiths, and restrict them solely to individuals who can provide proof of legal residence or risk breaking the law. ("The concept of acts of charity as an essential part of religious worship is a central tenet of all major religions." *Western Presbyterian Church v. The Board of Zoning Adjustments of the District of Columbia*, 862 F. Supp. 538, 544 (D.C. 1994)).

Thus, as written, this Bill will interfere with the free exercise of religion, thereby violating the First Amendment to the U.S. Constitution, as well as the Religious Freedom Restoration Act.

To alleviate these pressing concerns, the U.S. Senate must recognize the serious legal flaws inherent in this proposed legislation as it is currently written and protect the constitutional rights of churches and charitable organizations.

Religious Freedom

This Bill unnecessarily and substantially interferes with the right to freely exercise religion.

When Congress passed the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb—1(b), it made a strong and resolute policy judgment that religious freedom is one of the most cherished and necessary constitutional freedoms protected by the United States Constitution. RFRA was a legislative response to *Employment Division v. Smith*, 494 U.S. 872 (1990), a United States Supreme Court opinion viewed as curtailing the rights of American citizens to freely exercise their religion. Under RFRA, any law that interferes with the sincere religious beliefs of citizens should be struck down unless it is the least restrictive means of furthering a compelling governmental interest.

The U.S. Supreme Court recently addressed the import of RFRA in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*. 546 U.S. ___, ___ (2006) (slip at 2-3). In rejecting the government's assertion that the "uniform application" of the Controlled Substance Act was a necessary component of America's war on drugs and as such was compelling enough to burden a minority religion's practice of drinking a sacramental tea that included substances banned under federal law, the Court ruled that "[u]nder RFRA, the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability.'"

Similar reasoning can be applied to this Bill. While Congress may have a legitimate interest in applying a criminal statute of general applicability in order to reduce illegal immigration in the United States, doing so by criminalizing charitable acts of mercy is clearly not the least restrictive means available.

Furthermore, imposing the threat of criminal prosecution on religious individuals who offer food, shelter or spiritual assistance to those in need, whether legal residents or

illegal aliens, places a heavy and unnecessary burden on those attempting to exercise their religious beliefs by requiring them to vet those whom they assist for legal eligibility. Such a burdensome requirement is unnecessary, unreasonable and, most importantly, in violation of federal law.

Moreover, while the language of this Bill makes no overt reference to religion, that does not prevent it from running afoul of RFRA. As the U.S. Supreme Court noted in *O Centro Espirita Beneficente Uniao Do Vegetal*, "Congress recognized that 'laws neutral toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.'" *Id* at 18. Thus, to the extent that some in Congress are satisfied that this law is neutral toward religion, it still remains flawed.

Likewise, if passed, this Bill would violate the Free Exercise Clause of the First Amendment. The Supreme Court in *Employment Division v. Smith*, 494 U.S. 872 (1990), ruled that criminal statutes of general applicability (i.e., statutes that do not target religious practices over non-religious practices) generally do not offend the Free Exercise Clause of the First Amendment. However, the Court was very clear that when such a statute interferes with a "hybrid" right, which includes free exercise of religion coupled with another free-standing constitutional right, the statute goes too far, thereby unconstitutionally infringing the rights secured under the Free Exercise Clause. This Bill is precisely what the Court had in mind when it defined a "hybrid" right that must be protected. This Bill unconstitutionally interferes with several free-standing constitutional rights including religious freedom, right of association and right to privacy. Consequently, this Bill would fail even under the Supreme Court's narrow framework analyzing the constitutionality of generally applicable criminal statutes under the Free Exercise Clause.

Right of Association

It has been well established that there is a constitutional right to associate with others to pursue goals independently protected by the First Amendment, such as political advocacy and religious worship. In *NAACP v. Alabama*, 357 U.S. 449, 461 (1958), the U.S. Supreme Court stated, "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the U.S. Constitution." The Court continued, "Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* As this case and others like it illustrate, legislative actions that interfere with the right of individuals to unite for a common cause—especially a religious or cultural cause—are presumptively unconstitutional. The Bill at hand would undoubtedly interfere with this associational right. Criminalizing the efforts of members of churches or charities to help people meet their most basic needs regardless of their immigration status obstructs their ability to help one another—more broadly, to associate with one another. The philanthropic mission of thousands of churches and charities extends to all people, including illegal aliens. In order for their religious or philanthropic mission to be met, they must be afforded their

constitutional right to meet with, communicate with and commune with those they service without having to condition that service on immigration status.

Additionally, even though the Bill does not expressly require churches and charitable organizations to disclose the names of those who are affiliated with their organizations, such disclosure would be necessary for enforcement of this statute. Such mandatory disclosure, however, is unconstitutional pursuant to *NAACP v. Alabama, supra.*

Right to Privacy

The right to privacy in our associations and our personal information is a fundamental right. In *NAACP v. Alabama*, the U.S. Supreme Court wrote, "This Court has recognized the vital relationship between freedom to associate and privacy in one's associations." *Id* at 462. As the Court recognized in *American Communications Assn. v. Douds*, 339 U.S. 382, 402 (1950), the privacy of association is particularly important in religious and political associations.

Privacy rights are found at the heart of the relationships dealing with religion and spirituality. The priest penitent privilege and clergy privilege, for instance, are supported by an inherent aspect of privacy. Pointing out the "value of privacy in instances where an individual speaks confidentially with a clergyman or other spiritual advisor," a federal court in *Griffin v. Coughlin*, 743 F. Supp. 1006, 1027 (N.D. N.Y. 1990) noted the U.S. Supreme Court's observation in *Trammel v. United States*, 445 U.S. 40, 51 (1980) that "the priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return." Thus, it is clear that a right to privacy has been recognized in relationships between church leaders and people seeking their help.

Conclusion

For the reasons listed above, we believe House Bill 4437 to be unconstitutional. As such, we call on the members of the United States Senate to reject House Bill 4437 as it currently stands. We further urge the Senate to consider attaching an exemption that would bar the prosecution of religious individuals and charitable organizations who offer basic needs such as food, shelter, counseling, child-care and spiritual assistance to illegal aliens.