# Recommendations for U.S. Attorneys Guidelines

Craig L. Parshall – Sr. V.P. & General Counsel
National Religious Broadcasters

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**Suggested Guidelines for U.S. Attorneys Regarding The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 – 18 U.S.C. § 249**

To: Thomas E. Perez, Assistant Attorney General for the Civil Rights Division, D.O.J.
Matt Nosanchuk, Senior Counselor, D.O.J.
Robert Moossy, Acting Criminal Section Chief, D.O.J.

Sirs:

## Introduction

During the debate in Congress regarding The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 ("the Act") I had the privilege, on behalf of my association, National Religious Broadcasters, of working with the office of Senator Sam Brownback regarding the need for protections for people of faith, to help insure that persons would not be wrongly prosecuted under the Act for exercising their religious expression, or rights of free speech or association. Being part of the drafting process of Senator Brownback's amendment which was included in the Act as Section 4710 – Rule of Construction – subsection (3), I believe I have a unique perspective regarding the intent behind that subsection and its legal framework.

Subsection (3) of Section 4710 of the Act was patterned after the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(a), as further amended by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) 42 U.S.C. § 2000bb-2(4), 2000cc-5(7)(A) (collectively referred to herein as "RFRA"). That paradigm was selected essentially because a RFRA approach offers a superior protection for religious expression and religious exercise rather than mere relying on the Free Exercise of Religion jurisprudence of the Supreme Court. RFRA was passed by Congress in response to *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), where the Supreme Court "held that the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws." *Gonzales v. O Centro Espirata Beneficente Uniao Vegetal et al.*, 546 U.S. 418, 424 (2006). RFRA "adopts a statutory rule comparable to the constitutional rule rejected in Smith." *Gonzales*, 546 U.S. at 424.

Thus, the suggested guidelines below, which we urge the D.O.J. to incorporate into their guidelines to U.S. Attorneys regarding enforcement of the Act, will explain the RFRA-type analysis that must be made in any case where a potential "hate crime" is being federally investigated or prosecuted and where a suspect or defendant appears to be implicated because he or she, at least in part, may be culpable because of an act or acts of religious practice, belief, or expression.

**Suggested Guidelines**

These guidelines will explain the analysis that must be made under subsection (3) of Section 4710 of the Act, whenever a potential "hate crime" is being federally investigated or prosecuted and where the culpability of a suspect or a defendant arises, at least in part, because of an act or acts of religious practice, belief, or expression

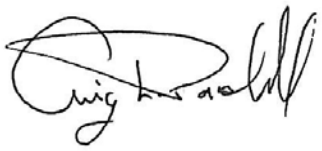
As a preliminary matter, enforcement of the Act is prohibited if it will "**substantially burden**[] a person's exercise of religion …" In order to be a "substantial" burden, as applicable to criminal prosecutions, a person must be "coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Navajo Nation v. U.S. Forest Service*, 535 F. 3d 1058 (9th Cir. 2007) (en banc). Stated another way, a "substantial burden" exists when a suspect or defendant is faced with prosecution because of conduct involving a "sincere exercise of religion," *Gonzales, supra* at 546 U.S. 426 (2006) (application of Controlled Substances Act to sacramental hallucinogens used by religious sect, thus criminalizing it, violated RFRA; U.S. government "conceded" that application of the Act would "substantially burden a sincere exercise of religion" by members of the sect).

An "**exercise of religion**" is protected from criminal prosecution under the Act "regardless of whether compelled by, or central to, a system of religious belief" (a provision similar to RFRA). This avoids prosecutors or judges having to intrusively weigh the relative importance of the questioned religious act or expression within the overall theology of the suspect (a pre-RFRA issue created by the decision in *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) where the Free Exercise clause had been held only to apply to "the observation of a *central* religious belief or practice.")(emphasis added). Under RFRA (and therefore under the Brownback amendment language to this Act) if the religious expression, practice, or act is "sincere," that is enough. *Gonzales, supra*.

However, under subsection (3), The government can avoid this RFRA-like defense only if: (a) first, it can "demonstrate[] that application of the burden to the person [charged or suspected] is in **furtherance of a compelling governmental interest** …" But such an interest cannot be proven by the government merely asserting "a general interest in uniformity" of law enforcement. *Gonzales, supra* at 435. Instead, the government prosecutor must "scrutinize[] the asserted [religious need] and explain[] why the denied exemptions could not be accommodated," and by "offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program" of law enforcement under the Act. *Id*. (2) and second, as in RFRA, "that its [prosecutorial] action involves **the least restrictive means** to achieve its purpose …"

*Navajo Nation, supra* at 1069. These two requirements of compelling interest and least restrictive means are demanding and daunting, because they forge a legal test that "is the most demanding test known to constitutional law." *City of Boerne*, 521 U.S. 534.

Respectfully submitted,



Craig L. Parshall
Senior Vice-President and General Counsel
National Religious Broadcasters