

MEMORANDUM

TO: INTERESTED PARTIES

FROM: PUBLIC RIGHTS/PRIVATE CONSCIENCE PROJECT

RE: H.B. 757 & THE ESTABLISHMENT CLAUSE

DATE: MARCH 28, 2016

As legal scholars with expertise in matters of religious freedom, civil rights, and the interaction between those fields, we offer our opinion on the scope and meaning of Georgia House Bill 757, which Governor Nathan Deal recently announced that he would veto. Specifically, we wish to call attention to language in the bill that we believe may conflict with the Establishment Clause of the U.S. Constitution. We share the view of Justice Kennedy when he expressed that “[a]mong the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests.”¹ In light of established First Amendment doctrine, HB 757 presents a conflict with First Amendment religious freedom doctrine by granting religious accommodations that would meaningfully harm the rights of others. While the bill will be vetoed in Georgia, states around the country have introduced, and will continue to introduce, legislation that mirrors much of the H.B. 757’s overbroad, vague, and problematic language. We therefore believe this analysis remains necessary to clarify and explain the bill’s legal weaknesses. It also elucidates why, in the words of Governor Deal, we “do not think we have to discriminate against anyone to protect the faith-based community in Georgia” or elsewhere.

1. HB 757 Violates the Establishment Clause By Accommodating Religious Preferences In A Way That Causes Meaningful Harm to Other Private Citizens

The Establishment Clause of the First Amendment forbids the government from favoring or disfavoring any particular religion or religion in general.² Since the Supreme Court decided *Estate of Thornton v. Caldor*, it has been understood that the Establishment Clause restricts legislative accommodations for religious beliefs where such accommodations would cause a

¹ *Burwell v. Hobby Lobby Stores, Inc.* 134 S.Ct. 2751, 2786-7 (2014) (Kennedy, J., concurring)

² *See, e.g., Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 696 (1994) (“A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of ‘neutrality’ toward religion...favoring neither one religion over others nor religious adherents collectively over nonadherents) (internal quotation marks omitted).

meaningful harm to other private citizens.³ In *Caldor*, the Court struck down a Connecticut statute that gave workers the absolute right to a Sabbath day of rest. It held that the statute impermissibly advanced religion by “impos[ing] on employers and employees an absolute duty to conform their business practices to the particular religious practices of the [observing] employee.”⁴ Similarly, in *Texas Monthly, Inc. v. Bullock*, the Court found that a state tax exemption for religious periodicals violated the Establishment Clause by forcing non-religious publications to “become indirect and vicarious donors”⁵ to religious entities. In *Cutter v. Wilkinson*, the Court upheld a broad religious accommodation law while explaining that accommodations need not be granted where they “impose unjustified burdens” third parties or the State.⁶ Most recently, in *Burwell v. Hobby Lobby*, the Court granted a religious accommodation to an employer but repeatedly emphasized in the opinion the fact that employees would, according to the Court, not be harmed.⁷

Without question H.B. 757 disrupts the balance between religious and secular rights and oversteps the limitations on state action set out by the Establishment Clause.⁸ HB 757 poses an Establishment Clause problem by stripping Georgians of their legal rights to equality in order to satisfy the religious preferences of other people. Currently, two of Georgia’s three largest cities protect LGBT people from some forms of discrimination,⁹ and as acceptance for LGBT rights continues to grow, other municipalities are likely to follow suit. By exempting certain religious

³ See *Estate of Thornton v. Caldor*, 472 U.S. 703, 709 (1985) (holding a state law guarantying a chosen Sabbath day of rest to workers impermissibly advanced religion in violation of the Establishment Clause by “impos[ing] on employers and employees an absolute duty to conform their business practices to the particular religious practices of the [observing] employee.”); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989) (holding a state tax exemption for religious periodicals violated the Establishment Clause, as it had no secular purpose and forced non-religious publications to “become indirect and vicarious donors” to religious ones) (internal quotations omitted); *Cutter v. Wilkinson*, 544 U.S. 709, 726 (2005) (upholding a religious accommodations law for prisoners while emphasizing that particular accommodations need not be granted where they “impose unjustified burdens on other institutionalized persons” or on the prison itself); *Burwell v. Hobby Lobby Stores, Inc.* 134 S.Ct. 2751, 2759 (2014) (granting an accommodation to certain private companies while repeatedly noting that no employees would be harmed by the accommodation). See also, Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 357 (2014); *Board of Education of Kiryas Joel Village School District*, 512 U.S. at 725 (“There is a point, to be sure, at which an accommodation may impose a burden on nonadherents so great that it becomes an establishment”) (Kennedy, J., concurring).

⁴ *Estate of Thornton v. Caldor*, 472 U.S. 703, 709 (1985).

⁵ *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989) (internal quotations omitted).

⁶ *Cutter*, 544 U.S. at 726.

⁷ See *Burwell v. Hobby Lobby Stores, Inc.* 134 S.Ct. 2751, 2759 (2014) (“The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.”).

⁸ We note that not all provisions of the bill pose clear Constitutional problems. For example, section 2(b) and (c) of the bill prohibit any civil claims or government action against a minister or cleric who refuses to solemnize a marriage, perform a rite, or administer a sacrament for any reason. While this section would not violate the Establishment Clause, it is an unnecessary protection. Clerics already have this right under the Free Exercise Clause of the First Amendment, which provides extremely robust protections to houses of worship and religious leaders. See, *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (*cert. denied*, 409 U.S. 896 (1972)); *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S. Ct. 694 (2012).

⁹ Atlanta, Georgia Code of Ordinances §§ 94-68, 94-97, 94- 94 (banning discrimination in, inter alia, private employment by employers of ten or more employees, housing, and public accommodations); Savannah, Georgia Ordinance of 12-10-2015 (banning discrimination in city employment, permitting, and licensing).

entities from a legal obligation to treat all Georgians equally regardless of their membership in a class protected by law, H.B. 757 effectively sacrifices the equality rights of many in order to accommodate the religious preferences of a few. Religious liberty doctrine clearly disfavors state action, such as HB 757, that is overly solicitous of religious liberty claims by asking third parties to bear the costs of accommodating religious objectors.

Two articles in the proposed law raise serious Establishment Clause problems. First, article 35, § 10-1-1001 of the bill gives faith-based organizations—defined to include schools, universities, and certain non-profits—the right to refuse to rent or lease property for events that they find objectionable. It also allows them to refuse to provide “social, educational, or charitable services that violate [their] sincerely held religious belief.” This language establishes an enormous religion-based carve out essentially granting faith-based organizations a license to discriminate in a wide range of settings. While other parts of the bill target wedding-related services, § 10-1-1001 is much broader in its reach and could result in LGBT Georgians being denied services ranging from adoption to higher education to hospice care. In fact, the bill is not limited to anti-LGBT discrimination and could also be used to justify, for example, a religious adoption agency’s refusal to place children with interracial couples, a religious nonprofit’s refusal to serve people with HIV/AIDS, or a religious university’s refusal to admit pregnant women as students. Moreover, under the provision, faith-based organizations could refuse to provide nearly any service otherwise required by Georgia laws and administrative rules including, for example, the regulations governing requirements for care at day care facilities, drug treatment centers, or nursing homes.

Second, other provisions of the bill represent a solution in search of a problem, and enable, if not create, conflicts with the Establishment Clause. For instance, section 2(d) of the bill states, “[a]ll individuals shall be free to attend or not attend” marriages and other rites at their discretion. This provision merely restates existing law, as nothing in Georgia statutory, constitutional or administrative law compels anyone to *attend* a marriage if they are disinclined to do so, and it’s difficult to imagine any circumstance in which one would be required to attend a wedding in the first place. However, if the word “attend” is read broadly, the bill would seemingly give court clerks, officials, and even judges the state-sanctioned right to discriminate against Georgians exercising their Constitutional right to marry. It could also allow businesses that sell wedding-related services—such as musicians, florists, or caterers—to discriminate against customers based on religious beliefs. Like the provision above, this section of the bill does not contain a ban against invidious discrimination otherwise prohibited by state or federal law.¹⁰ Thus, beyond same-sex marriage, under this section of the bill government officials and wedding-related service providers may be empowered to refuse to attend interfaith or interracial weddings, if doing so would violate their religious beliefs. This could be a back-end way of allowing providers of public accommodations to refuse services: If a wedding photographer can choose not to attend the wedding, any legal requirement that she provide her open-to-the-public services to LGBT couples would be useless. Thus, the fact that the bill contains no exceptions for

¹⁰ Like the language on government employees, the bill’s clause that bans discrimination on the basis of race and other federally- or state-protected grounds appears not to apply to this section of the bill.

government employees¹¹ or public accommodations, would allow for opportunities for violations of the Establishment Clause.

In addition to shifting a burden from religious to secular parties, this provision runs the risk of violating the Establishment Clause by improperly endorsing, or seeming to endorse, a particular religious belief.¹² It lends the color of law to a government official's religion-based acts of discrimination.¹³ Allowing State employees to refuse to perform any duties related to, for example, same-sex, interracial, or interfaith weddings, while requiring that they perform every other aspect of their job, would cause a reasonable person to believe that the government has endorsed the religious grounds for such opposition. As the bill appears to permit State employees to discriminate against couples based on their race, nationality, or religion, it also conflicts with federal civil right law and equal protection guarantees.

2. HB 757 Grants to Faith-Based Organizations a General Warrant to Violate the Equality Rights of Georgia Citizens

An additional provision of the bill offends fundamental equality principles by leaving ample room for discriminatory treatment of LGBT Georgians and others. Section 5(b) of the bill states that no faith-based organization “shall be required to hire or retain as an employee any person whose religious beliefs or practices or lack of either are not in accord with the faith based organization's sincerely held religious belief,” except as required by the Georgia or Federal Constitutions or by federal law.¹⁴ This exemption is not limited to the hiring and firing of ministers, but appears to apply to *all* employees of religious organizations.¹⁵ The lack of protections for LGBT citizens under federal Civil Right law would allow faith-based organizations to fire employees expressly for their sexual orientation or gender identity. It could also lead to discrimination against single parents, especially single mothers, and pregnant women, and the enforcement of rigid, invasive, and discriminatory codes of conduct. This conduct may not create an Establishment Clause problem under current Supreme Court doctrine, but is nevertheless troubling for the manner in which it grants to faith-based organizations a general warrant to violate the equality rights of Georgia citizens.

¹¹ Government employees *are* exempted from other parts of the bill. Section 6, 50-15A-5(b) of the bill states that “Nothing in this chapter shall be construed to...Afford any protection or relief to a public officer or employee who fails or refuses to perform his or her official duties.” Since the attendance exemption is contained in a separate chapter, however, it appears to apply to public employees.

¹² *See, e.g., Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989) (holding that the government violates the Establishment Clause when it “conveys or attempts to convey a message that religion or a particular religious belief is favored or preferred”) (internal citations and quotation marks omitted).

¹³ *See generally*, Memorandum from the Public Rights/Private Conscience Project to Interested Parties, Proposed Conscience or Religion-Based Exemption for Public Officials Authorized to Solemnize Marriages (June 30, 2015) available at http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/marriage_exemptions_memo_june_30.pdf.

¹⁴ We acknowledge that in *Corporation of the Presiding Bishop v. Amos*, the Court upheld an exemption to Title VII of the Civil Rights Act, allowing certain religious non-profits to practice coreligionist hiring, against an Establishment Clause challenge. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

¹⁵ The hiring and firing of clergy members is already exempted from employment discrimination law under “ministerial exception” of the Free Exercise Clause. *See McClure*, 460 F.2d 553; *Hosanna-Tabor*, 132 S. Ct. 694.

Finally, the savings clause contained in § 50-15A-5¹⁶ of the bill, “Nothing in this chapter shall be construed to . . . [p]ermit invidious discrimination on any grounds prohibited by federal or state law,” does nothing to ameliorate the ways in which § 50-15A-2 of the bill enables discrimination against LGBT individuals. By limiting this savings language to federal or state law, but not local law, the bill explicitly subverts local anti-discrimination laws that may provide greater protections than do state or federal law. For example, Atlanta’s non-discrimination laws prohibit discrimination in employment, housing, public accommodations, public contracting, and hate crimes, among other things, based upon sexual orientation and gender identity, as well as race, color, creed, religion, sex, marital status, parental status, familial status, national origin, age and disability.¹⁷ H.B. 757 thus invites individuals and businesses to assert religion-based justifications for avoiding compliance with local anti-discrimination laws.

We also note that the issues we raise above with respect to Georgia H.B. 757 apply with equal force to legislation pending in other states, such as H.B. 1523 in Mississippi and S.J.R. 39 in Missouri. This year, dozens of bills have been introduced across the country that aim to provide religious objectors a broad right to violate municipal, state, and even federal law as they see fit. Too often, the bills rely on vague or misleading language to exempt a much greater range of discriminatory action than may be obvious from their face. For example, Mississippi’s H.B. 1523 would allow corporations, individuals, and even government employees to discriminate based on their religious beliefs about sex and marriage—and to still receive government funding if they do so. Thus a government-funded shelter for homeless teens could turn away a pregnant minor because of its opposition to premarital sex. Missouri’s S.J.R. 39 could actually enshrine discrimination in that state’s constitution, and would significantly weaken municipal protections against LGBT discrimination. While H.B. 757 has been vetoed, many other bills that pose similar constitutional problems may still be passed this legislative session, and threaten to promote discrimination in the name of religious freedom.

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¹⁶ This Chapter of the bill essentially builds “Religious Freedom Restoration Act” or RFRA-like language into Georgia law. We do not agree among ourselves on whether religious freedom legislation, which may vary in its terms, is generally good. But we do agree that the savings clause, as described *infra*, poses significant problems with respect to the enforceability of local efforts to include sexual orientation and gender identity protections into anti-discrimination law.

¹⁷ See City of Atlanta Code of Ordinances, Sec. 2-1381 (Public Contracts); Sec. 114-51 (Equal Public Employment Opportunity); Sec. 94-66 (Public Accommodations); Sec. 94-110 (Fair Private Employment); Sec. 94-92 (Fair Housing); Sec. 98-39 (Crimes manifesting evidence of prejudice); Sec. 10-224 (Discrimination in admission fees or membership fees; notice of admission charges or membership fees).

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