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HB 757 - Public Lawsuits: Protect Religious Freedoms

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COMMERCE AND TRADE

Public Lawsuits: Protect Religious Freedoms; Provide for Defenses and Relief Related Thereto; Amend Chapter 3 of Title 19 of the Official Code of Georgia Annotated, Relating to Marriage Generally, so as to Provide That Religious Officials Shall Not Be Required to Perform Marriage Ceremonies, Perform Rites, or Administer Sacraments in Violation of Their Legal Right to Free Exercise of Religion; Provide That No Individual Shall Be Required to Attend the Solemnization of a Marriage, Performance of Rites, or Administration of Sacraments in Violation of Their Legal Right to Free Exercise of Religion; Amend Chapter 1 of Title 10 of the Official Code of Georgia Annotated, Relating to Selling and Other Trade Practices, so as to Change Certain Provisions Relating to Days of Rest for Employees of Business and Industry; Protect Property Owners Which Are Faith Based Organizations Against Infringement of Religious Freedom; Protect Certain Providers of Services Against Infringement of Religious Freedom; Amend Chapter 1 of Title 34 of the Official Code of Georgia Annotated, Relating to Labor and Industrial Relations Generally, so as to Provide That Faith Based Organizations Shall Not Be Required to Hire or Retain Certain Persons as Employees; Amend Title 50 of the Official Code of Georgia Annotated, Relating to State Government, so as to Provide for the Preservation of Religious Freedom; Provide for the Granting of Relief; Provide for Waiver of Sovereign Immunity under Certain Circumstances; Provide for Definitions; Provide for Ante Litem Notices; Provide a Short Title; Provide for Related Matters; Provide for an Effective Date; Repeal Conflicting Laws; and for Other Purposes

CODE SECTIONS: O.C.G.A. §§ 10-1-573 (amended);
 10-1-1000, -1001, -1002 (new);
 19-3-11 (new); 34-1-9 (new);
 50-15A-1, -2, -3, -4, -5 (new);
 50-21-38 (new)

BILL NUMBER: HB 757

ACT NUMBER: N/A

VETO NUMBER:	1
GEORGIA LAWS:	N/A
SUMMARY:	The Act purported to protect the free exercise of religion for religious officials and institutions. Religious officials would not be required to perform marriage ceremonies in violation of their legal right to free exercise of religion. Moreover, faith based organizations would have been permitted to deny employment to individuals whose religious beliefs, or lack thereof, are not in accord with the organization. The Act would have further provided that no business may be required, by legislation, to operate on Saturday or Sunday and that sovereign immunity is waived under certain circumstances.
EFFECTIVE DATE:	N/A

History

In *Obergefell v. Hodges*, the Supreme Court of the United States finally settled years of debate between the states regarding same-sex marriage.¹ The majority opinion issued on June 26, 2015, authored by Associate Justice Anthony Kennedy, held that “same-sex couples may exercise the fundamental right to marry in all States.”² The majority also “emphasized that religions, and those who adhere to religious doctrines, may continue to advocate . . . that . . . same-sex marriage should not be condoned.”³

In his dissent, Chief Justice John Roberts expressed concern about the repercussions for First Amendment protections, stating:

1. Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), <http://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html> (noting that the decision was “the culmination of decades of litigation and activism”).

2. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

3. *Id.*

“[t]oday’s decision . . . creates serious questions about religious liberty.”⁴ The dissent continued: “[t]he majority graciously suggests that religious believers may continue to ‘advocate’ and ‘teach’ their views of marriage. The First Amendment guarantees, however, the freedom to ‘exercise’ religion. Ominously, that is not a word the majority uses.”⁵ The dissent predicted that the Court would soon face “[h]ard questions . . . when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage”⁶ After *Obergefell*, opponents of same-sex marriage have found new ways to voice their dissent to the decision. In Oregon, a bakery owner cited her religious beliefs when refusing to bake a wedding cake for a lesbian couple.⁷ In a very well-publicized controversy, a Kentucky court clerk refused to issue marriage licenses to same-sex couples and was briefly jailed for contempt for her recalcitrance.⁸

Many state legislatures have also found ways to demonstrate opposition to same-sex marriage in general, and to the *Obergefell* decision specifically. Since at least the 2014 legislative session, faith-based organizations have urged Georgia lawmakers to pass legislation to protect religious viewpoints and prevent discrimination against religious groups.⁹ Following *Obergefell*, these organizations explicitly linked same-sex marriage to their efforts to secure religious protection.¹⁰ Representative Kevin Tanner (R-9th), the original sponsor of House Bill (HB) 757, specifically cited the *Obergefell* decision as the primary motivator for introducing the bill.¹¹

4. *Id.* at 2625.

5. *Id.* (citations omitted).

6. *Id.*

7. Shelby Sebens, *Oregon Bakery Pays Damages in Lesbian Wedding Cake Case*, REUTERS (Dec. 29, 2015, 2:38 PM), <http://www.reuters.com/article/us-oregon-gaymarriage-idUSKBN0UC1JV20151229>. Although the case is currently on appeal, the Oregon court ordered the bakery to pay substantial damages to the lesbian couple for sexual orientation discrimination. *Id.*

8. Corky Siemaszko, *Kentucky Clerk Kim Davis, Who Refused to Issue Marriage Licenses to Gays, Seeks to End Case*, NBC NEWS (June 21, 2016, 2:28 PM), <http://www.nbcnews.com/news/us-news/kentucky-clerk-kim-davis-who-refused-issue-marriage-licenses-gays-n596476>.

9. Aaron Gould Sheinin and Kristina Torres, *‘Religious Liberty’ Bill Passes Georgia Legislature*, ATLANTA J.-CONST. (Mar. 16, 2016, 9:36 PM), <http://www.ajc.com/news/news/state-regional-govt-politics/religious-liberty-bill-could-get-surprise-vote-wed/nqmkF/>.

10. *Id.*

11. Telephone Interview with Rep. Kevin Tanner (R-9th) (Apr. 10, 2016) [hereinafter Tanner Interview].

In addition to HB 757, other lawmakers introduced a flurry of bills to address the concerns expressed by Chief Justice Roberts. Senator Greg Kirk (R-13th) sponsored Senate Bill (SB) 284, dubbed the “First Amendment Defense Act of Georgia.”¹² His bill prohibited the state from taking action against an individual for believing, speaking, or acting on sincerely held religious beliefs or moral convictions.¹³ Senator Joshua McKoon (R-29th) sponsored SB 129, which came to be known as the “Georgia Religious Freedom Restoration Act.”¹⁴ His bill, modeled after the federal Religious Freedom Restoration Act,¹⁵ also protected individuals from state action but did so using United States Supreme Court precedent.¹⁶

Unlike the Senate bills, HB 757 focused on “pastor protection,” instead of general protection of individuals.¹⁷ Although the original House version of HB 757 only implicated pastors’ rights, the final version ultimately would have extended religious protections to faith based organizations and individuals in terms of both service and employment.¹⁸

During the first five months of 2016, Georgia was one of thirty-two states that introduced legislation to address religious freedom in a variety of contexts, including marriage, adoption and foster care, higher education, and healthcare.¹⁹ With regards to the more controversial topic of marriage, some state legislatures, like Georgia’s, introduced blanket religious exemptions from otherwise generally applicable laws for individuals, government employees, business, and pastors.²⁰ Other states chose to focus on exempting

12. Georgia General Assembly, SB 284, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20152016/SB/284>. Senator Kirk’s bill was incorporated into a version of HB 757 passed by the Senate. Jim Denery, *Two Georgia Bills Join in Union to Counter Same-Sex Marriage Ruling*, ATLANTA J.-CONST. (Feb. 20, 2016, 12:00 AM), <http://www.ajc.com/news/news/state-regional-govt-politics/two-georgia-bills-join-in-union-to-counter-same-se/nqS7W/>.

13. HB 284, § 2, p. 2, ll. 4749, 2016 Ga. Gen. Assemb.

14. Georgia General Assembly, SB 129, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20152016/SB/129>.

15. 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

16. HB 129, § 2, p. 2, l. 43, 2016 Ga. Gen. Assemb.

17. See HB 757, as introduced, 2016 Ga. Gen. Assemb.

18. Compare HB 757, as introduced, 2016 Ga. Gen. Assemb., with HB 757, as passed, 2016 Ga. Gen. Assemb.

19. *Anti-LGBT Religious Exemption Legislation Across the Country*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/anti-lgbt-religious-exemption-legislation-across-country> (last visited May 22, 2016).

20. *Id.*

specific groups such as government employees or businesses.²¹ As of July 14, 2016, out of all the bills considered across the nation, only Florida's pastor protection bill has been signed into law.²²

Bill Tracking of HB 757

Consideration and Passage by the House

Representatives Kevin Tanner (R-9th), Randy Nix (R-69th), Paul Battles (R-15th), Jay Powell (R-171st), Matt Hatchett (R-150th), and Beth Beskin (R-54th) sponsored HB 757.²³ The House read the bill for the first time on January 14, 2016,²⁴ and a second time on January 15, 2016.²⁵ Speaker David Ralston (R-7th) assigned the bill to the House Judiciary Committee, which amended the entire bill and favorably reported the bill by substitute on February 10, 2016.²⁶

The House Committee substitute included the entire text of the introduced bill,²⁷ but inserted additional text in Code section 19-3-11(a),²⁸ and added the Code subsections 19-3-11(b)²⁹ and 10-1-1000(c).³⁰ The House Committee substitute changed Code section 19-3-11(a) from “[n]o minister . . . authorized to solemnize marriages according to the usages of the denomination” to “[n]o minister . . . authorized to solemnize marriage, perform rites, or administer sacraments according to the usages of the denomination.”³¹ In the same Code section, the House Committee substitute also changed “shall be required to solemnize any marriage in violation” to “shall be required to solemnize any marriage,

21. *Id.*

22. *Id.* The remaining bills were defeated in the legislature, vetoed by the governor, or remain active legislation in their respective states.

23. Georgia General Assembly, HB 757, Bill Tracking, <http://www.legis.ga.gov/Legislation/en-US/display/20152016/HB/757>.

24. State of Georgia Final Composite Status Sheet, HB 757, May 5, 2016.

25. *Id.*

26. *Id.*

27. *Compare* HB 757, as introduced, 2016 Ga. Gen. Assemb., *with* HB 757 (HCS), 2016 Ga. Gen. Assemb.

28. HB 757 (HCS), § 1, p. 1, ll. 16, 17, 2016 Ga. Gen. Assemb.

29. *Id.* at § 1, p. 1, ll. 21–24.

30. *Id.* at § 1, p. 2, l. 5053.

31. *Compare* HB 757, as introduced, § 1, p. 1, ll. 15–17, Ga. Gen. Assemb., *with* HB 757 (HCS), § 1, p. 1, ll. 15–18 2016 Ga. Gen. Assemb.

perform any rite, or administer any sacrament in violation”³² The additional subsections provided that refusal of religious practitioners and religious organizations would not give rise to a civil claim or cause of action.³³

The House read the bill for the third time on February 11, 2016,³⁴ and passed the Judiciary Committee substitute without amendment on the same day by a vote of 161 to 0.³⁵

Consideration and Passage by the Senate

Senator Kirk sponsored HB 757 in the Senate.³⁶ The Senate first read HB 757 on February 16, 2016.³⁷ HB 757 was assigned to the Senate Rules Committee,³⁸ which made a number of amendments to the bill.³⁹

First, the Senate Committee consolidated Sections 1 through 3 of the House version into Part I, changing none of the substantive text.⁴⁰ Next, the Senate Committee substitute created Part II, consisting of entirely new provisions.⁴¹ Finally, Part III contained the effective date and conflicts clauses.⁴²

The Senate Committee named Part II the “First Amendment Defense Act of Georgia,”⁴³ adding Code sections 50-15A-1, -2, -3, and -4,⁴⁴ and 50-21-38.⁴⁵ These sections provided, respectively, definitions;⁴⁶ protection for faith based organizations against adverse

32. *Id.*

33. HB 757 (HCS), §§ 1,3, pp. 1–2, ll. 21–24, 50–53, 2016 Ga. Gen. Assemb.

34. Georgia General Assembly, HB 757, Bill Tracking, <http://www.legis.ga.gov/Legislation/en-US/display/20152016/HB/757>.

35. Georgia House of Representatives Voting Record, HB 757 (Feb. 11, 2016). There were nine “Not Voting” and ten “Excused” members. *Id.*

36. Georgia General Assembly, HB 757, Bill Tracking, <http://www.legis.ga.gov/Legislation/en-US/display/20152016/HB/757>.

37. *Id.*

38. State of Georgia Final Composite Status Sheet, HB 757, May 5, 2016.

39. Compare HB 757 (HCS), 2016 Ga. Gen. Assemb., with HB 757 (SCS), 2016 Ga. Gen. Assemb.

40. HB 757 (SCS), §§ 1-1-1-3, pp. 1–3, ll. 17–60, 2016 Ga. Gen. Assemb.

41. *Id.* at §§ 2-1-2-3, pp. 3–5, ll. 61–151.

42. *Id.* at §§ 3-1-3-2, pp. 5–6, ll. 152–57.

43. *Id.* at § 2-1, p. 3, ll. 63–64.

44. *Id.* at § 2-2, pp. 3–5, ll. 68–141.

45. *Id.* at § 2-3, p. 5, ll. 145–51.

46. HB 757 (SCS), § 2-2, pp. 3–4, ll. 69–99, 2016 Ga. Gen. Assemb.

action of the government;⁴⁷ accreditation to any person or faith based organization of sincerely held religious belief related to marriage and sexual relations;⁴⁸ for broad construction of the Code chapter;⁴⁹ and waiver of sovereign immunity in certain circumstances.⁵⁰

The Senate Rules Committee favorably reported the bill by substitute on February 17, 2016.⁵¹ The Senate read the bill for the second time on February 18, 2016, and for a third time on February 19, 2016.⁵² After the Senate voted to engross,⁵³ the Senate Committee substitute was passed on February 19, 2016, by a vote of 38 to 14.⁵⁴

Re-Consideration by the House

Representative Kevin Tanner (R-9th) offered an amendment to the Senate Committee substitute, making several changes.⁵⁵ Tanner's floor amendment eliminated the parts created by the Senate Committee substitute and established nine sections.⁵⁶ In Section 1, the bill established that the Act might be cited as the "Free Exercise Protection Act."⁵⁷

Section 2 of Tanner's floor amendment included Part I, Section 1-1 of the Senate Committee substitute relating to Code section 19-3-11.⁵⁸ The amendment changed Code subsection 19-3-11(a) to define the term "government,"⁵⁹ and moved subsections (a) and (b) to

47. *Id.* at § 2-2, p. 4, ll. 100–23.

48. *Id.* at § 2-2, p. 5, ll. 123–32.

49. *Id.* at § 2-2, p. 5, ll. 133–41.

50. *Id.* at § 2-3, p. 5, ll. 145–51.

51. State of Georgia Final Composite Status Sheet, HB 757, May 5, 2016.

52. *Id.*

53. Georgia Senate Voting Record, HB 757, Vote #469 (Feb. 19, 2016). The Senate voted 36 to 19 for engrossment, with one "Excused" member. *Id.*

54. Georgia Senate Voting Record, HB 757, Vote #471 (Feb. 19, 2016). The record reflected one "Not Voting" and three "Excused" members. *Id.*

55. *Compare* HB 757 (SCS), 2016 Ga. Gen. Assemb., with HB 757, as passed, 2016 Ga. Gen. Assemb.

56. *Compare* HB 757 (SCS), 2016 Ga. Gen. Assemb., with HB 757, as passed, 2016 Ga. Gen. Assemb.

57. HB 757, as passed, § 1, p. 1, l. 24, 2016 Ga. Gen. Assemb.

58. *Compare* HB 757 (SCS), § 1-1, pp. 1–2, ll. 21–31, 2016 Ga. Gen. Assemb., with HB 757, as passed, § 2, p. 2, ll. 28–63, 2016 Ga. Gen. Assemb.

59. HB 757, as passed, § 2, p. 2, ll. 29–31, 2016 Ga. Gen. Assemb.

(b) and (c)(1), respectively.⁶⁰ The amendment further changed subsection (b) from “[n]o minister” to read “[a]ll individuals who are ministers,” and changed “usages of the denomination, when acting in his or her official religious capacity shall be required to solemnize any marriage, perform any rite, or administer any sacrament in violation of his or her free exercise” to “usages of the denomination shall be free to solemnize any marriage, perform any rite, or administer any sacrament or to decline to do the same, in their discretion, in the exercise of their rights to free exercise”⁶¹ Subsection (c)(1) changed the reference of “subsection (a)” to “subsection (b),” and changed “person,” to “individual.”⁶²

In addition to these alterations, Section 2 of Tanner’s floor amendment added subsections 19-3-11(c)(2), -11(d), -11(e), -11(f), and -11(g).⁶³ These subsections, respectively, provided for tax-related protections to individuals who exercise their right to refusal;⁶⁴ for freedom to attend or not attend ceremonies;⁶⁵ for the ability to assert violation of the Code section;⁶⁶ for the ability to receive attorney’s fees and court costs;⁶⁷ and for the requirement to give notice of a claim before filing action.⁶⁸

Section 3 of Tanner’s floor amendment incorporated Part I, Section 1-2 of the Senate Committee substitute with no change.⁶⁹ Section 4 incorporated Part I, Section 1-3 of the Senate Committee substitute relating to Code section 10-1-1000.⁷⁰ The amendment added introductory language to the beginning of the section;⁷¹ renumbered subsection 1000(a) as 1000(1), and changed “religious

60. Compare HB 757 (SCS), § 1-1, pp. 1–2, ll. 22–31, 2016 Ga. Gen. Assemb., with HB 757, as passed, § 2, p. 2, ll. 32–41, 2016 Ga. Gen. Assemb.

61. Compare HB 757 (SCS), § 1-1, pp. 1–2, ll. 23–26, 2016 Ga. Gen. Assemb., with HB 757, as passed, § 2, p. 2, ll. 34–36, 2016 Ga. Gen. Assemb.

62. Compare HB 757 (SCS), § 1-1, p. 2, ll. 28–29, 2016 Ga. Gen. Assemb., with HB 757, as passed, § 2, p. 2, ll. 38–39, 2016 Ga. Gen. Assemb.

63. HB 757, as passed, § 2, p. 2, ll. 42–63, 2016 Ga. Gen. Assemb.

64. *Id.* at § 2, p. 2, ll. 42–49.

65. *Id.* at § 2, p. 2, ll. 50–53.

66. *Id.* at § 2, p. 2, ll. 54–56.

67. *Id.* at § 2, p. 2, ll. 57–58.

68. *Id.* at § 2, p. 2, ll. 59–63.

69. Compare HB 757 (SCS), § 1-2, p. 2, ll. 32–44, 2016 Ga. Gen. Assemb., with HB 757, as passed, § 3, p. 3, ll. 64–76, 2016 Ga. Gen. Assemb.

70. Compare HB 757 (SCS), § 1-3, pp. 2–3, ll. 45–60, 2016 Ga. Gen. Assemb., with HB 757, as passed, § 4, pp. 3–4, ll. 77–102, 2016 Ga. Gen. Assemb.

71. HB 757, as passed, § 4, p. 3, l. 81, 2016 Ga. Gen. Assemb.

organization” to “faith based organization.”⁷² The amendment then added subsection 1000(2), which defined “government.”⁷³

Next, Section 4 of Tanner’s floor amendment created Code section 10-1-1001(a), which incorporated subsection 1000(b) of the Senate substitute,⁷⁴ and changed “religious organization” to “faith based organization,” throughout.⁷⁵ The amendment further added subsection 1001(b), which made it so no faith based organization would be required to provide service against sincerely held beliefs.⁷⁶

Finally, Section 4 of Tanner’s floor amendment incorporated Part I, Section 1-3 of the Senate Committee substitute relating to Code section 10-2-1000(c).⁷⁷ Section 4 changed “religious organization pursuant to subsection (b) of this Code section,” to “faith based organization pursuant to Code section 10-1-1001” and changed “religious organization” to “faith based organization,” throughout.⁷⁸ Additionally, Section 4 created Code sections 10-1-1002(a)(2), -1002(b), -1002(c), and -1002(d).⁷⁹ These sections respectively provided: tax protections to faith based organizations that refuse service;⁸⁰ ability of a faith based organization to affirmatively assert violations of the Code;⁸¹ rights to attorney’s fees in an action;⁸² and required notice to the government before such action is brought.⁸³

Section 5 of Tanner’s floor amendment introduced entirely new substantive material by creating Code section 34-1-9⁸⁴ The new section provided that “no faith based organization shall be required to

72. Compare HB 757 (SCS), § 1-3, p. 2, ll. 48–49, 2016 Ga. Gen. Assemb., with HB 757, as passed, § 4, p. 3, ll. 80–82, 2016 Ga. Gen. Assemb.

73. HB 757, as passed, § 4, p. 3, ll. 87–88, 2016 Ga. Gen. Assemb.

74. Compare HB 757 (SCS), § 1-3, p. 2, ll. 54–56, 2016 Ga. Gen. Assemb., with HB 757, as passed, § 4, p. 3, ll. 89–92, 2016 Ga. Gen. Assemb.

75. Compare HB 757 (SCS), § 1-3, p. 2, ll. 54, 56, 2016 Ga. Gen. Assemb., with HB 757, as passed, § 4, p. 3, ll. 90, 92, 2016 Ga. Gen. Assemb.

76. HB 757, as passed, § 4, pp. 3–4, ll. 92–97, 2016 Ga. Gen. Assemb.

77. Compare HB 757 (SCS), § 1-3, pp. 2–3, ll. 57–60, 2016 Ga. Gen. Assemb., with HB 757, as passed, § 4, p. 4, ll. 99–102, 2016 Ga. Gen. Assemb.

78. Compare HB 757 (SCS), § 1-3, pp. 2–3, ll. 57–60, 2016 Ga. Gen. Assemb., with HB 757, as passed, § 4, p. 4, ll. 99–102, 2016 Ga. Gen. Assemb.

79. HB 757, as passed, § 4, p. 4, ll. 103–21, 2016 Ga. Gen. Assemb.

80. *Id.* at § 4, p. 4, ll. 103–11.

81. *Id.* at § 4, p. 4, ll. 112–14.

82. *Id.* at § 4, p. 4, ll. 115–16.

83. *Id.* at § 4, p. 4, ll. 117–21.

84. *Id.* at § 5, pp. 4–5, ll. 122–62.

hire or retain” employees that hold religious beliefs contrary to the beliefs of the organization.⁸⁵ Moreover, the section provided protection from civil claims for exercising the refusal of employment;⁸⁶ tax protections to faith based organizations that refuse service;⁸⁷ the ability of a faith based organization to affirmatively assert violations of the Code upon written notice to the government;⁸⁸ and the right to attorney’s fees in an action.⁸⁹

Section 6 of Tanner’s floor amendment incorporated the structure of the Senate Committee substitute Part II, Section 2-2 relating to Chapter 15A, but much of the substantive law was changed.⁹⁰ Both versions were aimed at prohibiting government action from limiting the free exercise of religion; but the Senate Committee substitute limited “adverse action” by the government, whereas Tanner’s floor amendment prohibited the government from imposing a “substantial burden” on persons or faith based organization.⁹¹ As such, the definitions used throughout Chapter 15A were necessarily altered in Code section 50-15A-1.⁹² Moreover, Code section 50-15A-3 incorporated the award of attorney’s fees.⁹³ Code section 50-15A-4 incorporated the requirement to provide notice to the government when raising such a claim.⁹⁴ Furthermore, the new Code section 50-15A-5 provided construction for Chapter 15A, which prohibits invidious discrimination, certain applications to the penal system, creation of rights of an employee against a non-government employer, or protection of government officials and employees from performing their official duties.⁹⁵

85. HB 757, as passed, § 5, p. 5, l. 135, 2016 Ga. Gen. Assemb.

86. *Id.* at § 5, p. 5, ll. 139–43.

87. *Id.* at § 5, p. 5, ll. 144–52.

88. *Id.* at § 5, p. 5, ll. 153–55, 58–62.

89. *Id.* at § 5, p. 5, ll. 156–57.

90. *Compare* HB 757 (SCS), § 2-2, p. 4, l. 101, 2016 Ga. Gen. Assemb., *with* HB 757, as passed, § 6, p. 6, l. 186, 2016 Ga. Gen. Assemb.

91. *Compare* HB 757 (SCS), § 2-2, p. 4, l. 101, 2016 Ga. Gen. Assemb., *with* HB 757, as passed, § 6, p. 6, l. 186, 2016 Ga. Gen. Assemb.

92. *Compare* HB 757 (SCS), § 2-2, pp. 3–4, ll. 69–99, 2016 Ga. Gen. Assemb., *with* HB 757, as passed, § 6, p. 6, ll. 167–184, 2016 Ga. Gen. Assemb.

93. *Compare* HB 757 (SCS), § 2-2, p. 4, ll. 115–17, 2016 Ga. Gen. Assemb., *with* HB 757, as passed, § 6, p. 6, ll. 196–99, 2016 Ga. Gen. Assemb.

94. *Compare* HB 757 (SCS), § 2-2, p. 4, ll. 118–23, 2016 Ga. Gen. Assemb., *with* HB 757, as passed, § 6, p. 7, ll. 200–05, 2016 Ga. Gen. Assemb.

95. HB 757, as passed, § 6, p. 7, ll. 206–22, 2016 Ga. Gen. Assemb.

Section 7 of Tanner’s floor amendment incorporated Part II, Section 2-3 of the Senate Committee substitute related to Code section 50-21-38.⁹⁶ The changes included: “expenses of litigation” to “court costs”;⁹⁷ “as provided for in Chapter 15A of this title” to “as provided for in Code Section 19-3-11, Article 35 of Chapter 1 of Title 10, Code Section 34-1-9, or Chapter 15A of this title”;⁹⁸ and “Chapter 15A of this title” to “said Code sections, article, or chapter”⁹⁹ Finally, “or any political subdivision thereof” was deleted.¹⁰⁰ Section 8 and 9 of Tanner’s floor amendment incorporated Part III, Sections 3-1 and 3-2 of the Senate Committee substitute, relating to when the bill becomes effective and repealing conflicting laws.¹⁰¹

The Bill

Section 1 of the bill would have made the Act known and cited as the “Free Exercise Protection Act.”¹⁰²

Section 2 of the bill would have amended Chapter 3 of Title 19 of the Official Code of Georgia Annotated by adding a new chapter, Chapter 11, regarding the free exercise of religion for religious officials and individuals.¹⁰³ Religious officials would not have been required to perform marriage ceremonies, perform rites, or administer sacraments in violation of their legal right to free exercise of religion.¹⁰⁴ All individuals would have been free to attend, or not attend, the solemnization of a marriage, performance of rites, or

96. Compare HB 757 (SCS), § 2-3, p. 5, ll. 142–51, 2016 Ga. Gen. Assemb., with HB 757, as passed, § 7, p. 7, ll. 223–32, 2016 Ga. Gen. Assemb.

97. Compare HB 757 (SCS), § 2-3, p. 5, l. 149, 2016 Ga. Gen. Assemb., with HB 757, as passed, § 7, p. 7, l. 229, 2016 Ga. Gen. Assemb.

98. Compare HB 757 (SCS), § 2-3, p. 5, ll. 149–50, 2016 Ga. Gen. Assemb., with HB 757, as passed, § 7, p. 7, ll. 229–30, 2016 Ga. Gen. Assemb.

99. Compare HB 757 (SCS), § 2-3, p. 5, ll. 150–51, 2016 Ga. Gen. Assemb., with HB 757, as passed, § 7, p. 7, l. 231, 2016 Ga. Gen. Assemb.

100. Compare HB 757 (SCS), § 2-3, p. 5, l. 149, 2016 Ga. Gen. Assemb., with HB 757, as passed, § 7, p. 7, l. 229, 2016 Ga. Gen. Assemb.

101. Compare HB 757 (SCS), §§ 3-1 and 3-2, pp. 5–6, ll. 152–57, 2016 Ga. Gen. Assemb., with HB 757, as passed, §§ 8,9, p. 8, ll. 233–37, 2016 Ga. Gen. Assemb.

102. HB 757, as passed, § 1, 2016 Ga. Gen. Assemb.

103. *Id.*

104. *Id.*

administration of sacraments in the exercise of their right to free exercise of religion.¹⁰⁵

Section 3 of the bill would have amended Chapter 1 of Title 10 of the Official Code of Georgia Annotated by revising Code Section 573 regarding trade practices relating to days of rest for employees of business and industry.¹⁰⁶ The bill would have added a new subsection to Section 573 declaring that no business or industry can be required to operate on either of the two rest days, Saturday or Sunday.¹⁰⁷

Section 4 of the bill would have amended Chapter 1 Title 10 of the Official Code of Georgia Annotated by adding a new article, proposed Article 35, regarding faith based organizations that are property owners.¹⁰⁸ A “faith based organization” would have been defined as a church, a religious school, an association or convention of churches, a convention mission agency, or an integrated auxiliary thereof, when such entity is qualified as an exempt religious organization under Section 501(c)(3) of the Internal Revenue Code.¹⁰⁹ Identical to Section 2, the bill would have defined “government” as the state or any political subdivision of the state or public instrumentality or public corporate body created by or under authority of state law.¹¹⁰

No faith based organization would have been required to rent, lease, or grant permission for property to be used by another person for an event objectionable to that organization’s beliefs.¹¹¹ Additionally, faith based organizations would have been allowed to refuse to provide social, educational, or charitable services that violate that religion’s sincerely held religious belief, as long as that belief is demonstrated by the organization’s practice, expression, or clearly articulated tenet of faith.¹¹² However, faith based organizations would have been subject to any terms of a grant,

105. HB 757, as passed, § 2, 2016 Ga. Gen. Assemb.

106. HB 757, as passed, § 3, 2016 Ga. Gen. Assemb.

107. *Id.*

108. HB 757, as passed, § 4, 2016 Ga. Gen. Assemb.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

contract, or other agreement voluntarily entered into with the state government entity.¹¹³

Section 5 of the bill would have amended Chapter 1 of Title 34 of the Official Code of Georgia Annotated by adding a new Code section, section 9, relating to a faith based organizations' labor requirements.¹¹⁴ The section starts by defining a "faith based organization" and "government" the same as it did in previous sections.¹¹⁵ This section would have allowed faith based organizations to refuse to hire or retain employees whose religious beliefs or practices, or lack thereof, are not in accord with the organization's sincerely held religious beliefs demonstrated by practice, expression, or clearly articulated tenet of faith, except as provided by the Georgia Constitution, or United States or federal law.¹¹⁶

Section 6 of the bill would have amended Title 50 of the Official Code of Georgia Annotated by adding a new chapter, Chapter 15A, addressing the state government entity's limits on burdening a person's exercise of religion.¹¹⁷ The "government"—as defined in previous sections of the bill—would not have been allowed to substantially burden a person's exercise of religion afforded by Paragraphs III and IV of Section I, Article I of the Georgia Constitution or the Free Exercise Clause of the First Amendment to the Constitution of the United States, even if the burden resulted from a law, rule, regulation, ordinance, or resolution.¹¹⁸ However, the state government entity would have been able to burden a person's exercise of religion if it demonstrated that the burden to the person was in furtherance of a compelling governmental interest, and the least restrictive means of furthering that interest.¹¹⁹ If the state government entity burdened an individual's exercise of religion, that person would have been able to assert that violation as a claim or defense against that entity. Similar to other sections of the bill, the prevailing party, other than the state government entity, could have

113. *Id.*

114. HB 757, as passed, § 5, 2016 Ga. Gen. Assemb.

115. *Id.*

116. *Id.*

117. HB 757, as passed, § 6, 2016 Ga. Gen. Assemb.

118. *Id.*

119. *Id.*

been awarded attorney's fees and court costs, but no claim could have been brought unless 30 days notice was first given.¹²⁰

The Georgia Legislature intended this chapter to be construed with Article I, Section I, Paragraphs III and IV of the Georgia Constitution and consistent with decisions of the Georgia Supreme Court, with respect to interactions that would have affected the rights or interests of third persons had this bill become law.¹²¹ Conversely, the legislature did not intend this chapter to be construed to permit invidious discrimination on any grounds prohibited by federal or state law, to apply to penal rules, regulations, conditions, policies, or maintenance of good order and discipline of a penal institution.¹²² Additionally, this proposed chapter was not intended to create any rights by an employee against an employer, if the employer is not a government entity, or to afford any protection or relief to a public officer or employee who fails or refuses to perform his or her official duties.¹²³ However, it would not have prohibited any person from holding public office or trust because of religious opinions.¹²⁴

Section 7 of the bill would have added a new Code section in Title 50, waiving the defense of sovereign immunity to any claim, counterclaim, cross-claim, or third-party claim brought against a state government entity for violations of any of the provisions provided for in the bill.¹²⁵

Section 8 would have made the proposed Act effective upon its approval by Governor Deal or upon its becoming law without such approval.¹²⁶

Pursuant to Section 2, 4, and 5, a religious official's refusal to perform a marriage, rite, or sacraments, a faith based organization's refusal to rent, lease, or grant permission for property to be used, and faith based organization's refusal to hire or retain individuals whose religious beliefs or practices are not in accord with an organization's sincerely held religious beliefs, would not give rise to a civil claim, cause of action, or state action to penalize, withhold benefits from, or

120. *Id.*

121. *Id.*

122. *Id.*

123. HB 757, as passed, § 6, 2016 Ga. Gen. Assemb.

124. *Id.*

125. HB 757, as passed, § 7, 2016 Ga. Gen. Assemb.

126. HB 757, as passed, § 8, 2016 Ga. Gen. Assemb.

discriminate against that them.¹²⁷ In addition, an organization's refusal would not alter any state tax treatment exemptions, cause any tax, penalty, or payment to be assessed, or disallow a deduction for state tax purposes of any charitable contributions that the official or organization made.¹²⁸ If a "government"—defined in this section as the state or any political subdivision, public instrumentality, or public corporate body created by or under the authority of the state—violated this proposed Code section, an individual would have been able to assert a violation as a claim or defense in any court of competent jurisdiction.¹²⁹ If an individual prevailed in his or her action pursuant to this proposed Code section, the court would have been able to award reasonable attorney's fees and court costs.¹³⁰ However, the individual would have only been able to bring a claim against a state government entity if the individual had first given notice of the specific prohibited action that the government entity allegedly undertook at least thirty days prior to filing the action.¹³¹

Analysis

Since *Obergefell*, twenty-one states have passed religious freedom bills similar to HB 757.¹³² For some legislators, the question going into this legislative session was whether the State of Georgia would be intolerant of those who hold a sincere belief that marriage is between a man and a woman, and whether expression of that belief could lead to sanctions by local or state government.¹³³ Though the original version of HB 757, relating to "pastor protection," passed through the House with unanimous support, the version of the bill revised by the Senate was a major point of public controversy during the 2016 legislative session. However, despite the challenges it faced from many voices on the left, many of whom characterized the

127. HB 757, as passed, §§ 2, 4, 5, 2016 Ga. Gen. Assemb.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *State Religious Freedom Restoration Acts*, NAT'L CONFERENCE OF STATE LEGS. (Oct. 15 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> [hereinafter NCSL State Religious Freedom Acts].

133. GeorgiaStateSenate, *Sen. Greg Kirk: Free Exercise Protection Act*, YOUTUBE (Mar. 22, 2016), <https://www.youtube.com/watch?v=OnGCH4KPDX4>.

legislation as “a license to discriminate,”¹³⁴ the amended bill passed both the House and Senate and was sent to Governor Deal to sign.¹³⁵

The drafters of the Bill believed that they had taken care to avoid creating discriminatory privileges.¹³⁶ In fact, in a press conference, Senator Kirk stated that its language cited the Georgia Constitution and Federal laws, thereby incorporating non-discriminatory language into the bill by reference.¹³⁷ Senator Kirk supported his argument for enactment of the bill by citing a poll taken of 720 Georgians, the majority of whom were either neutral or in support of the bill.¹³⁸ Interestingly, at this same press conference, Senator Kirk said that the term “individual” as used within the bill was only meant to describe pastors and other religious officers, not other individuals.¹³⁹

Before the legislature passed the bill, Governor Deal warned he would veto any measure allowing “discrimination in our state in order to protect people of faith.”¹⁴⁰ In turn, many businesses and organizations warned Governor Deal that the bill could have jeopardized economic opportunities in Georgia.¹⁴¹ After the bill passed, Governor Deal publicly vetoed the bill, citing the need to “heed the ‘hands-off’ admonition of the First Amendment” rather than allow a measure permitting discrimination.¹⁴²

Before HB 757 came to the Senate, Senator Kirk had proposed a “First Amendment Defense Act of Georgia” that said, according to Senator Kirk, if you hold that marriage is between a man and a woman, you could express that without being punished by your

134. Brandon Lorenz, *In Shocking Vote, Georgia House Adds New Indiana-Style Anti-LGBT Discrimination Provisions to HB 757*, HUM. RTS. CAMPAIGN (Mar. 16, 2016), <http://www.hrc.org/blog/in-shocking-vote-georgia-house-adds-new-indiana-style-provisions>.

135. Shannon Wiggins, *GA Lawmakers Wrap Up General Assembly*, WALB (Mar. 25, 2016), <http://www.walb.com/story/31569955/ga-lawmakers-wrap-up-general-assembly>.

136. Tanner Interview, *supra* note 11.

137. GeorgiaStateSenate, *supra* note 133.

138. *Id.*

139. *Id.*

140. Greg Bluestein, *Nathan Deal makes a forceful, biblical case against Georgia’s ‘religious liberty’ bill*, ATLANTA J. -CONST.: POLITICAL INSIDER BLOG (Mar. 3, 2016), <http://politics.blog.ajc.com/2016/03/03/nathan-deals-remarkably-forceful-opposition-to-georgia-religious-liberty-legislation/>.

141. Alan Blinder & Richard Pérez-Peña, *Georgia Governor Rejects Bill Shielding Critics of Gay Marriage*, N.Y. TIMES (Mar. 28, 2016), <http://www.nytimes.com/2016/03/29/us/georgia-governor-rejects-bill-shielding-critics-of-gay-marriage.html>.

142. Governor Nathan Deal Office of the Governor, *Transcript: Deal HB 757 remarks* (Mar. 28, 2016), <https://gov.georgia.gov/press-releases/2016-03-28/transcript-deal-hb-757-remarks-0>.

government.¹⁴³ According to Representative Tanner, the First Amendment Defense Act was the most controversial part of the bill when it was sent back from the Senate to the House.¹⁴⁴ Representative Tanner noted that both parties unanimously supported Pastor Protection, which is the idea that ministers should not be forced to marry two people of the same sex against their wills.¹⁴⁵ The controversial aspects of the proposed “First Amendment Defense Act of Georgia” were those provisions that reflected the federal Religious Freedom and Restoration Act.¹⁴⁶ Though there were concerns of discrimination, the parties attempted to draw a fine line between overt discrimination and avoiding compelling business owners to provide business that conflicted with their religious beliefs.¹⁴⁷

Even though the original HB 757 cruised through the House of Representatives only to come to an abrupt halt in the Senate, Senator Kirk still claimed the final bill was the result of compromise from both sides.¹⁴⁸ In describing the negotiations that took place in creating the final bill, Senator Kirk said there was a lot of give and take and that the overarching theme of the negotiations was “live and let live” regarding whether one believes marriage can occur between two people of the same sex.¹⁴⁹ Concerned with opening the door for overt discrimination, Representative Tanner stated that throughout the process, he attempted to balance the individual rights of business owners, gay couples, and ministers.¹⁵⁰ When asked why he added the First Amendment Defense Act into the Pastor Protection Act, Senator Kirk responded he believes and stands by the fact that it is the right thing to do.¹⁵¹

Opponents to the bill have vocally fought against the addition of the First Amendment Defense Act into the Pastor Protection Act. In response to Senator Kirk’s belief that the First Amendment Defense Act is the right thing to do, Senator Emanuel Jones (D-10) asked, if it

143. See Interview with Sen. Greg Kirk (R-13th) (June 15, 2016) [hereinafter Kirk Interview].

144. See Tanner Interview, *supra* note 11.

145. *Id.*

146. *Id.*

147. *Id.*

148. See Kirk Interview, *supra* note 143.

149. *Id.*

150. See Tanner Interview, *supra* note 11.

151. See *Lawmakers 2016* (GPTV broadcast, Mar. 2, 2016) (remarks by Sen. Emanuel Jones (D-10th) and Sen. Greg Kirk (R-13th)) (on file with the Georgia State University Law Review).

is the right thing to do, why so many people and businesses in Georgia believe that this is the wrong bill.¹⁵² Senator Jones went on to say that if you look at this bill, it does nothing more than ostracize a segment of our population and promote discrimination against the LGBT community.¹⁵³ When asked if this issue would be easier to handle if Georgia had a specific Civil Rights Statute that protected gays and lesbians, Senator Jones responded in the affirmative.¹⁵⁴ Senator Jones went on to say that this bill “needed to die a certain death in the House.”¹⁵⁵

On the other hand, Senator Kirk does not believe that his First Amendment Defense Act, as incorporated into the Pastor Protection Act, allowed for discrimination.¹⁵⁶ Instead he believes that the bill was “equal” and that he was trying to balance the agendas of both sides with this bill.¹⁵⁷ Rather than allowing businesses to discriminating against the gay community, Senator Kirk says that the bill protected faith based organizations.¹⁵⁸ He also said that commerce would drive business,¹⁵⁹ possibly alluding to the fact that the market will respond to certain faith based organizations decisions to not serve the gay community accordingly. He further noted that the bill only dealt with the government having adverse reactions to a business as a result of their definition of marriage and that much of the language within the bill came from the business community, despite the negative reaction of companies such as Coca-Cola, Disney, and Marvel.¹⁶⁰ When asked whether he would be happy with just “pastor protection” but not any of the language in his First Amendment Defense Act, Senator Kirk said that he would not be satisfied and that we need to do more.¹⁶¹

Some Republican leaders believe that the reason the bill failed to get signed by the Governor was that it was too much of an omnibus

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *See Lawmakers 2016, supra* note 151.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

bill.¹⁶² Though both political parties readily agreed to the “pastor protection” part of the bill, many opponents to the bill have criticized the portions similar to the federal Religious Freedom and Restoration Act, saying that it could lead to legalized discrimination.¹⁶³ Legislators and other proponents of the bill also cite media uproar and the influence of a few businesses as a large reason that Governor Deal vetoed this bill.¹⁶⁴ Republican legislators are still analyzing where they went wrong and how to improve their chances in the future.¹⁶⁵

In the aftermath of Governor Deal’s veto, Republican leaders have once again begun to make calls for some form of a Religious Freedom Restoration Act to become law after the next legislative session.¹⁶⁶ Senator Josh McKoon (R-29th) said, “I think in 2017 the stage is kind of set. I believe at least one is going to pass next year.”¹⁶⁷

Governor Deal’s veto of HB 757 and the subsequent reaction from commentators and policy makers on both sides of the debate shows that the same-sex marriage issue is far from settled in Georgia.¹⁶⁸ Twenty-one other state legislatures have passed similar laws.¹⁶⁹ A large part of Governor Deal’s reasoning for vetoing HB 757 may have been avoiding the economic and public relations damage that befell many of those states, especially those states that took more robust and public measures.¹⁷⁰ The 2016 legislative session is likely not the last session where this sort of legislation will take center stage.

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162. Spencer Lahr, *McKoon: '17 Is Year for New Law*, NW. GA. NEWS (June 24, 2016), http://www.northwestgeorgianews.com/mckoon-is-year-for-new-law/article_ebca9baf-df7f-584c-920a-e4d9825162db.html.

163. *Id.*

164. GeorgiaStateSenate, *supra* note 133.

165. Lahr, *supra* note 162.

166. *Id.*

167. *Id.*

168. Blinder & Pérez-Peña, *supra* note 141.

169. NCSL State Religious Freedom Acts, *supra* note 132.

170. Blinder & Pérez-Peña, *supra* note 141.