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Public Officers and Employees HB 766

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PUBLIC OFFICERS AND EMPLOYEES

Division of Archives and History: Amend Article 3 of Chapter 13 of Title 45 of the Official Code of Georgia Annotated, Relating to the Division of Archives and History, so as to Revise the Provisions of Law Regarding Foundations of American Law and Government Displays; Extend the Locations in Which Such Displays May Appear; Provide for Related Matters; Repeal Conflicting Laws; and for Other Purposes

CODE SECTIONS:	O.C.G.A. § 45-13-51 (amended)
BILL NUMBER:	HB 766
ACT NUMBER:	666
GEORGIA LAWS:	2012 Ga. Laws 699
SUMMARY:	This Act extends the locations in which the Foundations of American Law and Government Displays (Displays) may be published. When the law was originally enacted, local municipalities and political subdivisions could place the Displays in courthouses and judicial facilities. As revised, the Act allows both the State and all municipalities and political subdivisions to post the Displays in any public building.
EFFECTIVE DATE:	July 1, 2012

History

In 2012, Georgia joined Missouri, Indiana, Kentucky, South Dakota, and Oklahoma by passing House Bill (HB) 766, permitting the display of the Ten Commandments in public buildings.¹ The bill's passage did not represent the Georgia General Assembly's first effort to establish a constitutionally appropriate way to display the

1. *Georgia Bill Calls for Ten Commandments in Gov't Buildings*, ATLANTA J.-CONST., Feb. 28, 2012, available at <http://www.ajc.com/news/georgia-bill-calls-for-1366416.html>.

Ten Commandments. An existing Georgia law had provided for the display of the Ten Commandments, along with eight other foundational documents, in “judicial facilities.”² HB 766 was designed to expand upon existing law by redefining *where* these documents could be displayed; in its final form, the bill permitted display of the documents, not only in “judicial facilities,” but also in any “public building.”³

In 2006, the Georgia General Assembly passed legislation that authorized “Foundations of American Law and Government Displays” in judicial buildings.⁴ Under this law, the Ten Commandments could be displayed if eight other documents were also exhibited, including: (1) the Mayflower Compact; (2) the Declaration of Independence; (3) the Magna Carta; (4) “The Star-Spangled Banner” by Francis Scott Key; (5) the national motto: “In God We Trust”; (6) the Preamble to the Georgia Constitution; (7) the Bill of Rights of the United States Constitution; and (8) the description on the image of Lady Justice.⁵ The law further specified that the documents must be in the same sized frames, and one may not “be displayed more prominently than another.”⁶

Insurance Commissioner Ralph Hudgens, who supported the 2006 legislation when he was a member of the Georgia General Assembly, had purchased a set of the nine documents for display in the Georgia

2. O.C.G.A. § 45-13-51 (2011).

3. Compare O.C.G.A. § 45-13-51 (Supp. 2012), with O.C.G.A. § 45-13-51 (2011). Interestingly, Code section 45-13-51 did not define “public building.” O.C.G.A. § 45-13-51 (2011). The only definition of “public building” in the Code was found in Code section 8-7-1. O.C.G.A. § 8-7-1 (Supp. 2012). There, “public building” was defined as:

[A] building owned or leased by an agency, which is open to the public, including but not limited to the following: (A) Any building which provides facilities or shelter for public use or assembly or which is used for educational, office, or institutional purposes; and (B) Any library, museum, school, hospital, auditorium, dormitory, or university building.

Id.

4. O.C.G.A. § 45-13-51 (2011); see also Erica Boughner, *Public Officials*, 23 GA. ST. U. L. REV. 273 (2006) (discussing the implications of the 2006 legislation, which was substantially similar to the 2012 legislation).

5. O.C.G.A. § 45-13-51 (2011).

6. *Id.* Section (e) stated in pertinent part that “[a]ll documents which are included in the Foundations of American Law and Government displays shall be posted on paper not less than 11 x 14 inches in dimension and shall be framed in identically styled frames. No one document shall be displayed more prominently than another.” O.C.G.A. § 45-13-51(e) (2011). Section (f) also provided that: “In no event shall any state funding be used for a display of the Foundations of American Law and Government.” O.C.G.A. § 45-13-51(f) (2011).

capitol.⁷ Commissioner Hudgens met with the Capitol Art Standards Commission, whose members decide what may be displayed in the capitol.⁸ Because the 2006 legislation specified that the documents should be displayed in judicial facilities, the Commission determined that under the current law, the Displays could only hang in the Attorney General's office, not in the state capitol.⁹ Commissioner Hudgens stated: "[T]here's not a whole lot of people visiting the Attorney General's office, and I wanted them to see the foundational documents that this country was founded upon . . . so I talked to the Attorney General."¹⁰ Attorney General Sam Olens suggested modifying the language of the existing law to "take out the reference to the judicial center and say in public buildings."¹¹ Commissioner Hudgens approached Representative Tommy Benton (R-31st), the sponsor of the original 2006 legislation, about sponsoring new legislation to modify the law.¹²

Bill Tracking of HB 766

Consideration and Passage by the House

Representatives Tommy Benton (R-31st), Terry England (R-108th), Jon Burns (R-157th), John Meadows (R-5th), Matt Ramsey (R-72nd), and Tom McCall (R-30th) sponsored HB 766 during the 2012 Georgia General Assembly session.¹³ When Representative Benton¹⁴ introduced HB 766 to the Georgia House of

7. Interview with Rep. Tommy Benton (R-31st) (Mar. 20, 2012) [hereinafter Benton Interview]; Telephone Interview with Ralph Hudgens, Insurance Commissioner, State of Georgia (Apr. 3, 2012) [hereinafter Hudgens Interview].

8. Hudgens Interview, *supra* note 7. Among its duties, the Commission must:
[D]evelop standards and procedures for determining whether to acquire new artwork which shall include criteria for judging the relevance of the subject, the historical significance to the State of Georgia, and the quality of the artwork produced and an approval process for such acquisitions. No artwork shall be acquired or installed without final approval of the commission.

O.C.G.A. § 45-13-71 (2011).

9. See Hudgens Interview, *supra* note 7.

10. *Id.*

11. *Id.*

12. *Id.*

13. HB 766, as introduced, 2012 Ga. Gen. Assem.

14. HB 766, as introduced, 2012 Ga. Gen. Assem. Representative Benton's support of the Ten Commandments legislation in 2006 was significant because he represented part of Barrow County.

Representatives, he noted that the purpose of the bill was to “tweak a legislation that was passed six years ago.”¹⁵ Acknowledging that the 2006 legislation limited the Displays to *judicial* facilities, he stated that legislators “could not even display those items in our own state capitol” because the state capitol did not qualify as a “judicial facility” under the 2006 legislation.¹⁶ Thus, Representative Benton introduced HB 766 to redefine where the Displays could be placed. In so doing, the language from the 2006 legislation was expanded by replacing the phrase “judicial buildings” with “public buildings,” thereby greatly increasing the number of locations where the Displays could be placed.¹⁷

On January 24, 2012, the House first read HB 766.¹⁸ The bill was read a second time on January 25, 2012.¹⁹ Speaker of the House David Ralston (R-7th) assigned it to the House Government Affairs Committee, which made no changes and favorably reported HB 766 on February 24, 2012.²⁰ Only two questions were raised during the House floor debate.²¹ In response, Representative Benton clarified that, to his knowledge, displaying the documents electronically would be permitted, and placing the Displays in the state capitol would have little to no effect on other pictures or artifacts presently on display.²² After the two brief questions, the House passed the bill on February 28, 2012, by a vote of 161 to 0, with nineteen members excused or not voting.²³

Boughner, *supra* note 4, at 275. In 2003, the ACLU filed suit against Barrow County after they hung a Ten Commandments display in the Winder, Georgia courthouse. *Id.* “On July 18, 2005, the court signed a consent order providing for the removal of the Ten Commandments display, preventing the placement of substantially similar future displays, protecting the plaintiff’s anonymous status after the resolution, and awarding the ACLU \$150,000 in fees and expenses.” *Id.* at 275–76.

15. Video Recording of House Proceedings, Feb. 28, 2012 at 1 hr., 13 min., 52 sec. (remarks by Rep. Tommy Benton (R-31st)), <http://www.gpb.org/lawmakers/2012/day-27> [hereinafter House Video].

16. *Id.*

17. *Id.*

18. HB 766, as introduced, 2012 Ga. Gen. Assem.; State of Georgia Final Composite Status Sheet, HB 766, May 10, 2012.

19. State of Georgia Final Composite Status Sheet, HB 766, May 10, 2012.

20. *Id.*

21. House Video, *supra* note 15, at 1 hr., 13 min., 52 sec. (remarks by Rep. Tommy Benton (R-31st)). Representative Mike Cheokas (R-134th) asked whether the Displays could be shown as digital images on an electronic frame. *Id.* at 1 hr., 16 min., 40 sec. Representative “Coach” Williams (D-89th) inquired whether any existing pictures or artifacts in the state capitol would be moved to post the Display. *Id.* at 1 hr., 17 min., 15 sec.

22. *Id.* at 13 min., 15 sec. (remarks by Rep. Tommy Benton (R-31st)).

23. Georgia House of Representatives Voting Record, HB 766 (Feb. 28, 2012).

Consideration and Passage by the Senate

Senator Bill Heath (R-31st) sponsored HB 766 in the Senate, where it was first read on February 29, 2012.²⁴ The bill was assigned to the Senate Government Oversight Committee, which made no changes and favorably reported HB 766 on March 22, 2012.²⁵ The bill was read a second time in the Senate on the same day, and the Senate read the bill a third time on March 29, 2012.²⁶ During the Senate floor debate, several Senators posed questions regarding the role of religion in the State of Georgia and in American society.²⁷ Senator Barry Loudermilk (R-52nd) referenced the engraving of the Ten Commandments in the Georgia Supreme Court chambers.²⁸ Senator Loudermilk also confirmed with Senator Heath that the Declaration of Independence “has several references throughout, through the powers of the earth, the laws of nature and nature’s God in references to a Creator.”²⁹ Senator Jack Murphy (R-27th) emphasized the role of religion in American government when he pointed out that United States currency contains the phrase, “In God We Trust”; he then asked whether God created the Ten Commandments.³⁰ The sponsor, Senator Heath, responded: “Absolutely.”³¹ HB 766 passed the Georgia Senate by a vote of 41 to 9 on March 29, 2012.³²

On April 3, 2012, the House sent HB 766 to Governor Nathan Deal, and on May 1, 2012, the Governor signed the bill into law.³³

The Act

The Act amends Code section 45-13-51, allowing the Displays to be exhibited in all public buildings in the State of Georgia.³⁴

24. State of Georgia Final Composite Status Sheet, HB 766, May 10, 2012.

25. *Id.*

26. *Id.*

27. Video Recording of Senate Proceedings PM2, Mar. 29, 2012 at 3 min., 35 sec., <http://www.gpb.org/lawmakers/2012/day-40> [hereinafter Senate Video].

28. *Id.* at 5 min., 30 sec. (remarks by Sen. Barry Loudermilk (R-52nd)).

29. *Id.* at 6 min., 15 sec.

30. *Id.* at 7 min., 17 sec. (remarks by Sen. Jack Murphy (R-27th)).

31. *Id.* at 7 min., 34 sec. (remarks by Sen. Bill Heath (R-31st)).

32. Georgia Senate Voting Record, HB 766 (Mar. 29, 2012) (noting four senators did not vote).

33. State of Georgia Final Composite Status Sheet, HB 766, May 10, 2012.

Specifically, section 1 of the Act amends Code section 14-13-51 by replacing the language “courthouses and judicial buildings” with “public buildings.”³⁵ Section 1 also adds the State to the list of entities authorized to post the Displays.³⁶

Analysis

The 2006 legislation was not challenged during its six-year existence despite strong suggestions of likely constitutional challenges when it was originally enacted.³⁷ However, the absence of prior challenges does not ensure that the new Act will go uncontested. The Act may face opposition as an unconstitutional establishment of religion. The Establishment Clause of the United States Constitution states that “Congress shall make no law respecting an establishment of religion”³⁸ The Establishment Clause may be implicated when government either favors or targets a religion or religious entity; it was used against the states in *Everson v. Board of Education*.³⁹ The Supreme Court has applied three different tests in its Establishment Clause jurisprudence: the *Lemon v. Kurtzman* test,⁴⁰ the Endorsement test,⁴¹ and the Coercion test.⁴²

Lemon v. Kurtzman held that a government action implicating the Establishment Clause will be upheld if it: (1) has a secular legislative purpose; (2) does not have the principal or primary effect of advancing or inhibiting religion; and (3) does not create an “excessive government entanglement with religion.”⁴³ In *Lemon*, the Court invalidated state laws in Pennsylvania and Rhode Island that subsidized private religiously affiliated schools and teachers’ salaries at those schools.⁴⁴

34. O.C.G.A. § 45-13-51 (Supp. 2012).

35. Compare O.C.G.A. § 45-13-51 (2011), with O.C.G.A. § 45-13-51 (Supp. 2012).

36. Compare O.C.G.A. § 45-13-51 (2011), with O.C.G.A. § 45-13-51 (Supp. 2012).

37. Boughner, *supra* note 4, at 279 (noting that the 2006 legislation would “almost certainly . . . face a constitutional challenge”).

38. U.S. CONST. amend. I.

39. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

40. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

41. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984).

42. *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

43. *Lemon*, 403 U.S. at 612–13.

44. *Id.* at 625.

Dissatisfied with the application of the *Lemon* test, Justice Sandra Day O'Connor posited in her concurring opinion in *Lynch v. Donnelly* what has come to be known as the Endorsement test.⁴⁵ Under O'Connor's Endorsement test, government action implicating the Establishment Clause is unconstitutional if it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."⁴⁶ In *Lynch*, the Court found that the inclusion of a nativity scene in a city Christmas display in Pawtucket, Rhode Island, did not violate the Establishment Clause.⁴⁷

The third test that the Supreme Court has used in its Establishment Clause jurisprudence is Justice Anthony Kennedy's Coercion test as set out in *Lee v. Weisman*.⁴⁸ In his majority opinion, Justice Kennedy argued that the Establishment Clause is violated when a government entity coerces members of a minority faith to speak or act in accordance with the majority faith.⁴⁹ The Court held that the Establishment Clause was violated when a public school invited religious leaders to pray at a school graduation ceremony.⁵⁰

The Supreme Court has analyzed the constitutionality of Ten Commandments displays in various contexts—finding some constitutional and invalidating others.⁵¹ In *Stone v. Graham*, the Court found that a Kentucky law requiring schools to post the Ten Commandments was unconstitutional.⁵² The Court looked past the state's "'avowed' secular purpose"⁵³ and found an actual religious

45. *Lynch*, 465 U.S. at 688.

46. *Id.*

47. *Id.* at 687.

48. *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

49. *Id.* at 593.

50. *Id.* Several factors were relevant to the Court's analysis. The Court noted the heightened, sensitive nature of the school environment; in this environment, the Court has routinely required heightened scrutiny of state action because of an increased likelihood of coercion by minor students. *Id.* at 592. The Court also stressed the importance of a student's graduation ceremony and the fact that they would be required to forego an important part of their high school experience if they skipped the ceremony due to the inclusion of the prayer. *Id.* at 593–96.

51. Compare *Stone v. Graham*, 449 U.S. 39 (1980), and *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005) (both unconstitutional), with *Van Orden v. Perry*, 545 U.S. 677 (2005) (upheld).

52. *Stone*, 449 U.S. at 43.

53. *Id.* at 41. Each display had the disclaimer, "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law

purpose for the displays, thereby constituting a violation of the first prong of the *Lemon* test.⁵⁴ Twenty-five years later, the Court decided two Ten Commandments cases on the same day and came to different results regarding their constitutionality.⁵⁵ In *McCreary County v. American Civil Liberties Union of Kentucky*, the Court found the county's display of the Ten Commandments unconstitutional.⁵⁶ After the displays in three courthouses were challenged, the county added eight other documents purporting to establish a secular purpose, but the Court found the addition of the documents to be pretextual and found the posting was religiously motivated.⁵⁷ *McCreary* made it clear that the Court will conduct a more searching inquiry into the government's motivation for displaying the Ten Commandments and is willing to look past a stated purpose if the Court believes it to be a sham. On the same day *McCreary* was decided, the Court held in *Van Orden v. Perry* that the Ten Commandments display on the grounds of the Texas State Capitol was valid.⁵⁸ The Court found the *Lemon* test unhelpful in assessing the constitutionality of a passive monument and instead focused their analysis on the nature and history of the display.⁵⁹ In finding the display constitutional, the Court noted that the display was present for forty years before being challenged and that the display was only one of seventeen located on the twenty-two acre property.⁶⁰ Following the *McCreary* and *Van Orden* decisions in 2005, Georgia enacted Code section 45-13-51 permitting local governments to post the Display.⁶¹

Neither the bill's sponsor, Representative Tommy Benton (R-31st), nor the man behind the change in the law, State Insurance Commissioner Ralph Hudgens, expressed any concern about the law's unconstitutionality.⁶² The two likely based their beliefs on the *Van Orden* decision upholding the display at the Texas State Capitol,

of the United States" in small font at the bottom. *Id.* at 41.

54. *Id.* at 43.

55. *McCreary Cnty.*, 545 U.S. 844 (unconstitutional); *Van Orden*, 545 U.S. 677 (upheld).

56. *McCreary Cnty.*, 545 U.S. at 881.

57. *Id.* at 870–72.

58. *Van Orden*, 545 U.S. at 692.

59. *Id.* at 686.

60. *Id.* at 681.

61. O.C.G.A. § 45-13-51 (2011).

62. Benton Interview, *supra* note 7; Hudgens Interview, *supra* note 7.

the lack of constitutional challenges since the 2006 legislation was passed, and the support from the Attorney General's office in drafting the Act.⁶³ However, any future challenge will likely be an as-applied challenge when the State or a local government places the display and a citizen with standing brings suit. Georgia State University Professor Gerry Weber stressed the importance of context in Establishment Clause display cases.⁶⁴ Important factors in the analysis include the history of the display, the rationale and timing of its adoption, the centrality of its location, and the likely audience.⁶⁵ For example, a display in the state capitol may face greater scrutiny because of its location in the central seat of state government, but a display may go unchallenged in a smaller local government building. Similarly, a display posted in a school may face heightened scrutiny. Professor Weber acknowledged this concern and pointed out the Court's position that "kids are especially susceptible to the feeling of a coercive environment."⁶⁶ Professor Weber continued, "what is sometimes allowed in an adult environment under the Establishment Clause is not necessarily what is allowed in a primarily student environment."⁶⁷ Consequently, if the law is ever challenged, not only will courts have to decide which constitutional framework to apply—the *Lemon* test, the Endorsement test, or the Coercion test—they will also need to examine the context and history of that display. As in *McCreary*, a court may also look past an avowed neutral and sectarian purpose to determine the true intent and purpose of the display.⁶⁸

Some commentators have already questioned the purpose for the Displays. Reverend Barry W. Lynn, the Executive Director of Americans United for Separation of Church and State, wrote in the *Atlanta Journal-Constitution*: "The purpose of such displays is not to educate. It's to make a political statement that religion and government should be joined at the hip. . . . By elevating the Ten Commandments as the font of all law, we ignore the rich sources that

63. See Benton Interview, *supra* note 7; Hudgens Interview, *supra* note 7.

64. Interview with Gerry Weber, Adjunct Professor of Law, Georgia State University College of Law (Mar. 26, 2012).

65. *Id.*

66. *Id.*

67. *Id.*

68. *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 881 (2005).

have contributed to the nation's legal foundation."⁶⁹ In assessing the constitutionality of such displays, a greater question arises—what are the foundational documents of American law? In a case involving a standalone Ten Commandments' display in Cobb County, Georgia, a federal judge found a violation of the Establishment Clause but gave the county four months to include non-religious, historical items that would make the overall display constitutional.⁷⁰ At trial, University of Georgia professor Leif Carter testified that the Ten Commandments were only one of many influences on American law and the United States Constitution.⁷¹ Others included “the Code of Hammurabi, the Justinian Code, and the philosophies of Plato, St. Augustine, and St. Thomas Aquinas,”⁷² and “passages from early English cases.”⁷³ According to Lynn, expanding the possible locations of the Displays “raises a gigantic red flag, and on that flag are the words, ‘Sue us.’”⁷⁴

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69. Barry W. Lynn, *Religious Code Not the Basis of Our Laws*, ATLANTA J.-CONST., Mar. 7, 2012, at 18A.

70. *Harvey v. Cobb Cnty.*, 811 F. Supp. 669, 671 (N.D. Ga. 1993).

71. *Id.* at 672.

72. *Id.*

73. *Id.* at 678.

74. *Georgia Bill Calls for Ten Commandments in Gov't Buildings*, *supra* note 1.