HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 43 Churches or Religious Organizations
SPONSOR(S): Plakon; Cortes, B. and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 110

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	9 Y, 4 N	Malcolm	Bond
2) Judiciary Committee	12 Y, 5 N	Malcolm	Havlicak

SUMMARY ANALYSIS

Conscience protection laws prevent individuals and entities from being required to perform services that violate their religious beliefs or moral convictions. These laws have historically applied to abortion, sterilization, and contraception. The bill creates conscience protections for clergy, churches, and religious organizations and their employees who object to solemnizing any marriage or providing services, facilities, or goods related to a marriage if doing so violates the organization or individual's sincerely held religious beliefs.

The bill also protects the state tax exempt status, and the right to apply for grants, contracts, and participation in government programs, of covered organizations that refuse to solemnize a marriage or provide services, facilities, or goods related to a marriage.

The bill does not have a fiscal impact on state or local government.

The bill provides an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Conscience Clauses

Conscience clauses allow individuals and entities to refuse to provide a service or undertake an activity that violates his or her religious or moral beliefs. A number of states and the federal government have enacted conscience clauses on a wide array of issues, including abortion,[1] the draft,[2] birth control,[3] education,[4] and adoption.[5] Florida currently provides conscience clause protections for physicians and hospitals that refuse to perform abortions or dispense contraceptives, family planning devices, services or information for medical or religious reasons.[6] In June of 2015, Texas enacted conscience clause protections for clergy and religious organizations and their employees regarding marriage services identical to this bill.[7]

Free Exercise Clause

The First Amendment to the United States Constitution provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[8] Prior to 1990, the United States Supreme Court, in determining the constitutionality of laws that infringe upon the free exercise clause of First Amendment to the United State Constitution, "used a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest."[9] Using this test, the Court has held that an employee who was fired for refusing to work on her Sabbath could not be denied unemployment benefits,[10] and that Amish children could not be required to comply with a state law demanding that they remain in school until the age of 16 where their religion required them to focus on Amish values and beliefs during their adolescent years.[11]

However, in 1990, the Court in *Employment Div., Dept. of Human Resources of Ore. v. Smith* rejected the compelling interest test.[12] *Smith* concerned two members of the Native American Church who were fired for ingesting peyote for religious purposes. When they sought unemployment benefits, Oregon rejected their claims on the ground that consumption of peyote was a crime, but the Oregon Supreme Court, applying the compelling interest test, held that the denial of benefits violated the free exercise clause.[13] The United States Supreme Court reversed. It found that the "use of the [compelling interest] test whenever a person objected on religious grounds to the enforcement of a generally applicable law 'would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.'"[14] The Court abandoned the compelling interest test in favor of a bright-line test in which, under the First Amendment, "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest."[15]

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[1] 42 U.S.C. § 300a-7 (2000).
[2] 50 U.S.C. app. § 456(j) (2010).
[3] COLO. REV. STAT. 25-6-102(9) (2015).
[4] MO. CONST. art. I, § 5; N.H. REV. STAT. ANN. § 186:11 (2015).
[5] VA. CODE ANN. § 63.2-1709.3(A) (2012); N.D. CENT. CODE § 50-12-07.1.
[6] ss. 381.0051(5) and 390.0111(8), F.S.
[7] 2015 TEX. GEN. LAWS ch. 434.
[8] Article 1, section 3 of the Florida Constitution contains a nearly identical provision ("There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof . . . .").
[9] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760-61 (2014).
[10] *Sherbert v. Verner*, 374 U.S. 398, at 408–09 (1963).
[11] *Wisconsin v. Yoder*, 406 U.S. 205, at 210–11, 234–36 (1972).
[12] 494 U.S. 872, 875 (1990). The "compelling interest test" is also called the "balancing test." *See id.* at 875.
[13] *Id.* at 875.
[14] *Burwell*, 134 S. Ct. at 2760-61 (quoting *Smith*, 494 U.S. at 888).
[15] *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997).

Religious Freedom and Restoration Act

In response to *Smith*, Congress enacted the Religious Freedom Restoration Act (RFRA) to provide religious liberty protections broader than those in *Smith*.[16] The RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."[17] If the government substantially burdens a person's exercise of religion, that person is entitled to an exemption from the rule unless the government "demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest."[18] In its original form, the RFRA applied to both the federal government and the states; however, the Supreme Court in *City of Boerne v. Flores* ruled the RFRA's application to the states unconstitutional because "[t]he stringent test RFRA demands . . . far exceed[ed] any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*."[19]

In 1998, in response to *Flores*, the Florida legislature enacted a state version of the RFRA that is similar in substance to the federal RFRA.[20] The Florida RFRA (FRFRA), ch. 761, F.S., provides that the government[21] may not substantially burden a person's exercise of religion[22], even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.[23]

In interpreting the FRFRA, the Florida Supreme Court has held that "a substantial burden on the free exercise of religion is one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires."[24] According to the Court, laws that merely inconvenience the exercise of religion do not create a substantial burden.[25] Although the FRFRA prohibits a court from conducting a factual inquiry into the validity of a person's beliefs, the court will examine the relationship between the person's religious exercise and the level of government interference to determine whether the interference is a substantial burden or merely inconveniences the exercise of religion.[26]

Ministerial Exception

In 2012, the United States Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* unanimously rejected application of its free exercise clause analysis from *Smith*[27] instead recognizing a "'ministerial exception,' grounded in the First Amendment, that precludes application of [employment discrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers."[28] Observing that "members of a religious group put their faith in the hands of their ministers," the Court reasoned that applying employment discrimination in the context

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[16] *See* 42 U.S.C. § 2000bb(a)(2).
[17] 42 U.S.C. § 2000bb-1(a).
[18] 42 U.S.C. § 2000bb–1(b).
[19] 512 U.S. 507, 533-34 (1997).
[20] A number of states have also enacted state versions of the RFRA. *See* National Conference of State Legislatures, *State Religious Freedom Restoration Acts*, http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx (last visited Sept. 9, 2015).
[21] "Government" includes any branch, department, agency, instrumentality, or official or other person acting under color of law of the state, a county, special district, municipality, or any other subdivision of the state. s. 761.02(1), F.S.
[22] "Exercise of religion" means an act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief. s. 761.02(3), F.S.
[23] s. 761.03, F.S.
[24] *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1033 (Fla. 2004)
[25] *Id.* at 1035.
[26] *See id.* (finding that Boca Raton's grave marker regulations did not substantially burden the appellant's religious beliefs because they "merely inconvenience the plaintiffs' practices of marking graves and decorating them with religious symbols.") (quoting *Warner*, F. Supp. 2d 1272, 1287 (S.D. Fla. 1999)).
[27] 494 U.S. 872.
[28] 132 S. Ct. 694, 705 (2012). *See* 42 U.S.C. s. 2000e-1 (providing an exemption for religious organizations and institutions from religious discrimination from the Civil Rights Act of 1964 related to employment discrimination).

of religious institutions to require "a church to accept or retain an unwanted minister, or [punish] a church for failing to do so, intrudes upon more than a mere employment decision."[29] Such action, the Court concluded,

> interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.[30]

Right to Marriage and *Obergefell*

The United State Supreme Court has consistently held that marriage is a fundamental right under the due process clause of the Fourteenth Amendment.[31] In June 2015, the Supreme Court in *Obergefell v. Hodges* extended the right to marriage to same-sex couples finding that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty."[32]

Effect of Proposed Changes

The bill creates s. 761.061(1), F.S., to provide that a clergy member, minister, church, religious organization, or any organization supervised or controlled by or in connection with a church or religious organization may not be required to solemnize any marriage or provide services, facilities, or goods related to the marriage if such action would cause the clergy member, minister, church or organization to violate a sincerely held religious belief. These provisions extend to any individual employed by a church or religious organization while acting in the scope of his or her employment.

The bill also provides that a refusal to solemnize any marriage or provide services, facilities, or goods related to the marriage pursuant to s. 761.061(1), F.S., may not serve as the basis for any cause of action or any other action by this state or any political subdivision to penalize or withhold benefits or privileges, including tax exemptions, governmental contracts, grants, or licenses.

The bill provides an effective date of July 1, 2016.

B. SECTION DIRECTORY:

Section 1 creates s. 761.061, F.S., related to the rights of churches and religious organizations or individuals.

Section 2 provides for an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

[29] *Hosanna-Tabor*, 132 S. Ct. at 706.
[30] *Id.*
[31] *Obergefell v. Hodges,*135 S. Ct. 2584, 2598; *see, e.g., M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996); *Zablocki v. Redhail*, 434 U.S. 374, 383-87 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977); *Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632, 639–40, (1974); *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).
[32] 135 S. Ct. 2584, 2604 (2016).

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The bill appears to implicate separate constitutional provisions: the free exercise clause, and the due process and equal protection clauses.

Free Exercise Clause

The First Amendment to the United States Constitution provides, in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." Likewise, Article 1, Section 3 of the Florida Constitution provides that "There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof . . . ."

As discussed above, with respect to internal decisions of religious institutions, the Supreme Court has recognized a "ministerial exemption" under the First Amendment to the United States Constitution. However, that exemption has only been applied by the Supreme Court in employment discrimination cases.

In addition to these constitutional protections, as discussed above, Florida's Religious Freedom Restoration Act (FRFRA) guarantees that "The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability . . . ."[33]

It may be argued that the language of this bill does not create a new right for churches, religious organizations, and their employees but rather codifies an existing right guaranteed by both the United States and Florida Constitutions and the FRFRA—the right to be free from the government compelling them, as clergy and religious organizations, to engage in conduct their religion forbids.

[33] s. 761.03(1), F.S.

Due Process and Equal Protection

The due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution provide that "no state shall deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."[34] Similarly, Florida's equal protection clause states that "no person shall be deprived of any right because of race, religion, national origin, or physical disability,"[35] and the state's due process clause provides that "no person shall be deprived of life liberty or property without due process of law."[36]

A court's analysis of an equal protection or substantive due process claim depends on the nature of the right and the classification of people involved. A court will analyze government action that infringes a fundamental right or discriminates according to race, ethnicity, religion, and national origin with the strictest scrutiny.[37] To survive a constitutional challenge under strict scrutiny, the government must show that the regulation is the least restrictive means necessary to further a compelling state interest.[38] In addition to already recognized protected classes, federal and state courts also recognize quasi-suspect classes.[39] If a claim does not involve a fundamental right, a suspect class, or quasi-suspect class, then a court will uphold the law if it bears a reasonable relationship to the attainment of a legitimate government objective.[40]

Although the United State Supreme Court in *Obergefell* held that the due process and equal protection clauses of the Fourteenth Amendment provide the right to same-sex marriage, the Court did not indicate the standard of review it would apply in determining the constitutionality of state action that may infringe this right nor did it indicate whether an individual's sexual orientation is a protected class.

However, the United States Supreme Court has a history of disfavoring private-party discrimination and, instead, finding that state action may unconstitutionally facilitate private parties' discrimination against a protected class.[41] For example, in *Shelley v. Kraemer*, the Supreme Court found that judicial enforcement of racially restrictive covenants in private neighborhoods was sufficient to give rise to state action that promoted discrimination and thus was in violation of the Fourteenth Amendment.[42]

In recent years, some courts have begun recognizing homosexuals as a quasi-suspect class and applying intermediate scrutiny to find laws with discriminatory effects against homosexuals unconstitutional.[43] Further, some courts, including a Florida state court, have found that laws prohibiting qualified homosexuals from participating in state-sanctioned activity, like adoption, that qualified heterosexuals can participate in freely are not justifiable even under the deferential rational

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[34] U.S. CONST. amend. XIV, s. 1.
[35] FLA. CONST. art. I, s. 2.
[36] *Id.* at art. I. s. 9.
[37] *See, e.g., San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973); *Roe v. Wade*, 410 U.S. 113 (1973); *Bullock v. Carter*, 405 U.S. 134 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Skinner*, 316 U.S. 535 (1942).
[38] *See Roe*, 410 U.S. at 155.
[39] BLACK'S LAW DICTIONARY (10th ed. 2014) defines quasi-suspect classification as "[a] statutory classification based on gender or legitimacy, and therefore subject to intermediate scrutiny under equal protection analysis." BLACK'S defines intermediate scrutiny as "[a] standard lying between the extremes of rational-basis review and strict scrutiny. Under the standard, if a statute contains a quasi-suspect classification (such as gender or legitimacy), the classification must be substantially related to the achievement of an important governmental objective."
[40] *Vance v. Bradley*, 440 U.S. 93, 97 (1979).
[41] *Reitman v. Mulkey*, 387 U.S. 369, 375 (1967) (reasoning that "'(t)he instant case presents an undeniably analogous situation' wherein the State had taken affirmative action designed to make private discriminations legally possible."); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 717 (1961) (finding that discrimination by a lessee of an agency created by the State was sufficient to find that the there was "discriminatory state action in violation of the Equal Protection Clause of the Fourteenth Amendment.").
[42] *Shelley v. Kraemer*, 334 U.S. 1, 21 (1948).
[43] *See Windsor v. U.S.*, 699 F. 3d 169, 181-82 (2d Cir. 2012), *aff'd on other grounds*, 133 S.Ct. 2675 (2013); *Golinski v. Office of Personnel Mgmt*, 824 F. Supp. 2d 968, 985-86 (N.D. Cal. 2012).

basis review and are unconstitutional.[44] However, in 2004, the Eleventh Circuit Court of Appeals held that Florida's law prohibiting homosexuals from adopting did not burden a fundamental right and withstood rational basis scrutiny.[45] This case remains good law[46] and established federal precedent that, under Florida law, homosexuals are not a suspect or quasi-suspect class.

On the other hand, the Supreme Court in *Obergefell*

> emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.[47]

It is unclear how a court would analyze a challenge to the bill in light of the constitutional provisions and case law provided above. To date, there does not appear to be any precedent directly concerning a conflict between these constitutional rights and how such conflict would be resolved.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

It is unclear what entity would qualify as "an organization . . . in connection with a church or religious organization" or how such an organization is different than an "organization supervised or controlled by . . . a church or religious organization."

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

[44] *Florida Dept. of Children and Families v. Adoption of X.X.G.*, 45 So. 3d 79, 86 (Fla. 3d DCA 2010); *Bassett v. Snyder*, 2014 WL 5847607 (E.D. Mich. 2014). BLACK'S LAW DICTIONARY (10th ed. 2014) defines the "rational-basis test" as "[t]he criterion for judicial analysis of a statute that does not implicate a fundamental right or a suspect or quasi-suspect classification under the Due Process or Equal Protection Clause, whereby the court will uphold a law if it bears a reasonable relationship to the attainment of a legitimate governmental objective. Rational basis is the most deferential of the standards of review that courts use in due-process and equal-protection analysis."

[45] *Lofton v. Secretary of Dept. of Children and Family Services*, 358 F.3d 804, 818 (11th Cir. 2004).

[46] The Supreme Court denied certiorari on January 10, 2005. *See Lofton v. Secretary, Florida Dept. of Children and Families*, 543 U.S. 1081 (2005).

[47] *Obergefell*, 135 S.Ct. at 2607.