February 18, 2016

Re: Oppose HB 757 Because it Harms Others and Violates the U.S. Constitution

Dear Senator:

I write to urge you to oppose HB 757, “the Georgia First Amendment Defense Act.” We have serious concerns about the staggering consequences and the constitutional infirmities of this bill. In short, this bill allows any individual or “faith-based” business, non-profit entity, or taxpayer-funded organization to ignore any law that conflicts with their religious beliefs about marriage. This bill would cause real harm to real people. In addition, it would (ironically) violate the Free Speech and Establishment Clauses of the First Amendment and violate the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

Thus, any person, business, or taxpayer-funded organization could refuse anyone else rights, services, and benefits because they:

- are part of an interracial couple;
- are part of an interfaith couple;
- are a single mother;
- are part of a same-sex couple;
- are divorced;
- are remarried;
- live or have lived with a partner without being married; or
- have had sex outside of marriage at any time in their life.

Just a few of the troubling real life consequences could include:

- a single mother and her child being denied safety at the town’s only publicly funded domestic violence shelter;
- a hospital denying a man the opportunity to say goodbye to his dying husband;
- a cemetery corporation denying an interracial couple a shared cemetery plot;
- a restaurant refusing to allow a child’s birthday party because his parents are divorced; or
- an unmarried couple and their child being denied a room at a hotel late at night after their car broke down.

The Bill Would Violate the Free Speech Clause of the U.S. Constitution

HB 757 would violate the Free Speech Clause of the U.S. Constitution because it would result in both content-based and viewpoint based discrimination.
Content-Based Discrimination
Laws that target speech based on content, or subject matter, are subject to “strict scrutiny” and are “presumptively unconstitutional.”¹ In Reed v. Town of Gilbert,² a church successfully challenged a sign ordinance that treated political signs more favorably than the church’s meeting signs. Justice Clarence Thomas, writing for the Court, explained that a law that “singles out [a] specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter” is “a paradigmatic example of content-based discrimination.”³ HB 757 falls into the same trap: On its face, it treats speech and activities “related to marriage between two people, including the belief that marriage should only be between a man and a woman or that sexual relations are properly reserved to such a union,” more favorably than all other speech on other subject matters. This more favorable treatment cuts across a host of topics under the bill—taxes, government benefits, and even speech itself.

Viewpoint Discrimination
As also explained in Reed, “government discrimination among viewpoint[s]—or the regulation of speech based on ‘the specific motivating ideology or the opinion or perspective of the speaker’—is a ‘more blatant’ and ‘egregious form of content discrimination.’”⁴ Indeed, “the government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”⁵ In Rosenberger v. Rector and Visitors of Univ. of Va,⁶ the U.S. Supreme Court explained that a state university newspaper could not select “for disfavored treatment those student journalistic efforts with religious editorial viewpoints.” In the same way the state may not disfavor non-religious viewpoints. Unfortunately, HB 757 does just that by allowing religious viewpoints—and not secular viewpoints—to justify trumping existing law.

The Bill Would Violate the Establishment Clause of the U.S. Constitution
HB 757 would violate the Establishment Clause of the U.S. Constitution in two ways: it creates a religious exemption that causes real harm to other people and it grants discretionary powers to religious organizations and businesses that may then place a religious litmus test on who they serve.

Religious Exemptions Violate the Establishment Clause When They Harm Others
Although the state may offer religious exemptions even where it is not required to do so by the Free Exercise Clause of the U.S. Constitution,⁷ its ability to provide religious accommodations is not unlimited: “At some point, accommodation may devolve into an unlawful fostering of religion”⁸ that violates the Establishment Clause of the U.S. Constitution. To avoid an Establishment Clause violation, a religious exemption “must be measured so that it does not override other significant interests” and may not “impose unjustified burdens on other[s].”⁹ In Estate of Thornton v. Caldor, Inc.,¹⁰ for example, the Supreme Court struck down a blanket exemption for Sabbatarians because it “unyield[ing]ly weight[ed]” the religious interest “over all other interests,” including the interests of co-workers.

² Id.
³ Id. at 2233 (citing Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).
⁴ Id. (citing Perry Ed. Assn. v. Perry Local Educators’ Assn., 460 U.S. 37, 46 (1983)).
⁵ 515 U.S. at 2517.
⁶ 515 U.S. at 2517.
⁷ Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.
The Georgia FADA grants individuals and religious organizations that hold religious beliefs about marriage a blanket exemption to all laws that conflict with their religious beliefs. The exemption fails to take into account any potential harms such exemptions would cause to others. Under this bill, a taxpayer funded homeless shelter could refuse a single mother and her child a bed; a hospital could deny a man the right to speak to his dying spouse for the last time; or a city-funded domestic violence shelter could refuse to offer a woman safety because she is sleeping with a man not her husband. Such results clearly burden and harm others and are impermissible results under the Establishment Clause.

**The Government May Not Give Religious Organizations Discretionary Government Powers**

In accordance with this bill, faith-based organizations can take state, local, and federal funds to provide services to the public and then use a religious litmus test to determine whom they will and will not serve. This is not just unfair, but unconstitutional. In *Larkin v. Grendel’s Den*, for example, the Supreme Court overturned a law that allowed churches to veto applications for liquor licenses in their neighborhoods. The Court explained that that the government cannot delegate or share “important, discretionary governmental powers” with religious institutions. This bill, however, delegates government authority to religious organizations and specifically allows them to use religious criteria to determine who gets and who is denied public services.

**The Bill Would Violate the Equal Protection Clause of the U.S. Constitution**

As explained by the U.S. Supreme Court, “central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.” In *Romer v. Evans*, for example, the state of Colorado passed a law to overturn all state and local nondiscrimination protections for LGBT Coloradans and to prohibit state and local governments from instituting new nondiscrimination protections. The justification for the law was that it would protect those “who have personal or religious objections to homosexuality” and the bill was described as “a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores.” The Supreme Court, however, rejected these justifications and determined that the law was unconstitutional because it was passed to make LGBT Coloradans “unequal to everyone else.”

HB 757 has the same insufficient justification—“to offer protections [to those] who hold to the traditional view of marriage and that it should be between a man and a woman”—and the same problematic effect—to nullify current and future nondiscrimination protections for married LGBT Georgians.

Furthermore, HB 757 defies the ruling in *Obergefell v. Hodges*. In that case, Justice Kennedy stated that “[t]he right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment’s guarantee of the equal protection of the laws.” Although it is true that such couples may still obtain a marriage licenses under the bill, their marriages would continue to be viewed as unequal.

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12 Id.
14 Id. at 635.
15 Id. at 646 (Scalia, J., dissenting).
16 Id. at 635.
19 Id. at 2602.
would be treated differently and with fewer rights than other couples, even by entities providing state-funded public services. The State of Georgia cannot deem the disparate treatment of certain individuals as protected under the law. To do so violates the Equal Protection Clause.

**Conclusion**
For all the above reasons and more, I urge you to reject this bill. Thank you for the consideration of my views.

Sincerely,

Maggie Garrett
Legislative Director
Americans United for Separation of Church and State