The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 110
INTRODUCER:	Senator Bean
SUBJECT:	Churches or Religious Organizations
DATE:	January 25, 2016
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Cibula	JU	**Favorable**
2.			CA	
3.			RC	

I. Summary:

SB 110 provides that clergy, churches and religious organizations, and their employees may not be required to solemnize[1] a marriage or provide certain services or accommodations for a marriage if the action would cause them to violate a sincerely held religious belief. A refusal to solemnize a marriage or provide certain services or accommodations may not become the basis for a civil or criminal cause of action by the state or its political subdivisions. Additionally, the refusal may not become the basis for the state or its subdivisions to penalize or withhold benefits or privileges, including tax exemptions or government contracts, grants, or licenses from the refusing individuals or entities.

II. Present Situation:

Conscience Protection Laws

History

A conscience protection law is an assurance that a person will not be required to participate in an activity that violates his or her religious beliefs, morals, or conscience. Some of the earliest American conscience protection laws were exemptions from military service, commonly referred to as conscientious objector exemptions.[2] These exemptions have been recognized by the legislative branch of government and enforced by the judicial branch since the Continental Congress announced in 1775 that it would respect the beliefs of people who could not bear arms

[1] "Solemnize" is defined in Black's Law Dictionary to mean to enter into a marriage or contract by a formal act, usually before witnesses. 7th Edition, page 1398.

[2] James M. Newton, *Constitutional Law – Conscientious Objectors – The End of the Selective Conscientious Objector*, 21 DEPAUL L. REV. 1051, 1052 (1972), *available at* http://www.bing.com/search?q=james+m.+newton+constitutional+law+21+de+paul+law+review&src=IE-TopResult&FORM=IETR02&conversationid.

because of the conflict it presented with their religious principles.[3] As American jurisprudence has evolved, so have additional categories of conscience protection laws.

Additional Categories of Conscience Protection Laws

Healthcare

In response to the U.S. Supreme Court's 1973 *Roe v. Wade* decision,[4] Congress,[5] the District of Columbia, and 47 state legislatures passed conscience protection laws to assure that health care workers would not be required to participate against their will in performing abortions.[6] Florida law similarly provides conscience protection clauses for those who refuse to participate in abortions[7] or refuse to furnish contraceptives, family planning services, supplies, or similar information due to medical or religious reasons. The refusing physician or other personnel may not be held liable for their refusal to participate.[8]

Federal Prosecutions, Executions, and Euthanasia

Federal laws also ensure that employees are not required to participate in the prosecution of capital crimes, executions,[9] or euthanasia if doing so is contrary to the moral or religious convictions of the employee.[10]

Education and Adoption Services

Conscience protection laws have also emerged in the field of education to guarantee that students do not have to participate in academic assignments that violate their religious beliefs.[11] In the area of adoption services, several states have enacted varying degrees of conscience protection laws to prevent child placement agencies from being required to place children in situations that would violate their written religious or moral convictions.[12]

The Solemnization of Same-Sex Marriage Ceremonies

Most recently, conscience protection laws have been enacted to protect clergy members from being required to solemnize or perform same-sex marriage ceremonies. These laws have ranged

[3] *Id*.
[4] *Roe v. Wade*, 410 U.S. 113 (1973).
[5] The Church Amendment, passed by congress in 1973, provides that the receipt of federal monies does not authorize an official to require someone to perform or assist in any sterilization procedure or abortion or make facilities available for those procedures if doing so would be contrary to his or her religious beliefs or moral convictions. 42 U.S.C. s. 300a-7.
[6] Claire Marshall, *The Spread of Conscience Clause Legislation*, American Bar Association.org, http://www.americanbar.org/publications/human_rights_magazine_home/2013_vol_39/january_2013_no_2_religious_freedom/the_spread_of_conscience_clause_legislation.html.
[7] Section 390.0111(8), F.S.
[8] Section 381.0051(5), F.S.
[9] 18 U.S.C. s. 3597.
[10] 42 U.S. C. s. 18113.
[11] Mo. Const. Article 1 s. 5. While Missouri amended its constitution to establish this protection, a majority of other states have adopted legislation permitting parents to opt out of an education curriculum that conflicts with their religious beliefs. Marshall, *supra* note 6.
[12] Comm. on Judiciary, The Florida Senate, *CS/HB 7111 (2014) Staff Analysis*, p. 2, (1st Eng. April 17, 2015) (on file with the Senate Committee on Judiciary).

from protection for clergy members and other religious officiants, to protections for not providing accommodations for ceremonies that would violate their convictions, to permitting state officials to opt-out of performing same-sex marriage ceremonies.

State Legislation Authorizing Same-Sex Marriage and Conscience Protection Laws

Before the U.S. Supreme Court ruled on the legality of same-sex marriage in 2015,[13] 13 jurisdictions had enacted legislation authorizing same-sex marriage. Between 2009 and 2014, same-sex marriage was statutorily recognized in Connecticut, Delaware, Washington, D.C., Hawaii, Illinois, Maryland, Maine, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington.[14]

As each of those 13 jurisdictions amended its constitution or statutes to guarantee the rights of same-sex couples to marry, each jurisdiction simultaneously enacted conscience protection laws to provide religious exemptions for clergy members who believed that conducting or solemnizing same-sex marriages violated their religious beliefs.[15] These laws have become known as pastor protection laws. Ten of the states and the District of Columbia crafted specific provisions that exempted religious organizations from being required to provide services, accommodations, or facilities when doing so was contrary to their religious beliefs. Several of the statutes further stated that a refusal to solemnize a same-sex marriage ceremony or provide accommodations did not create a civil cause of action and the refusing person or entity could not be penalized or punished for those choices.

According to information supplied by the National Conference of State Legislatures,[16] a number of states considered legislation in 2015 to provide conscience protection laws in one form or another. Some of the legislation passed, some proposals failed, and occasionally the session adjourned before a vote was taken. Two states, Kansas and Louisiana, enacted pastor protection laws through executive orders. Currently, at least 17 states have legislation pending to amend their marriage solemnization statutes.[17] Several of these proposals would provide clergy or state employees with conscience protection laws for the solemnization of a marriage based upon the officiant's or government employee's religious objections.

2015 Conscience Protection Laws In States Without Same-Sex Marriage Laws

In 2015, at least three states that had not previously enacted same-sex marriage statutes enacted conscience protection laws for religious officials. Oklahoma, Texas, and Utah enacted

[13] *Obergefell v. Hodges, et al*., 135 S. Ct. 2584 (2015).
[14] Same-sex marriage was declared constitutional in other states through litigation in the courts, not legislation.
[15] Email from Rochelle Finzel, Group Director, National Conference of State Legislatures, (Oct. 30, 2015) (on file with the Senate Committee on Judiciary).
[16] Email from Rochelle Finzel, Group Director, National Conference of State Legislatures, (Sept. 9, 2015) (on file with the Senate Committee on Judiciary).
[17] Emails from Kyle Ramirez, Research Analyst, National Conference of State Legislatures, (Jan. 22, 2016) (on file with the Senate Committee on Judiciary).

conscience protection laws for religious officials and provided immunity from civil suits or protection from government retaliation.[18]

North Carolina[19] passed legislation during this past session to establish procedures under which a magistrate could be recused from performing marriages and an assistant or deputy register of deeds could be recused from issuing marriage licenses based upon a sincerely held religious objection. The bill was vetoed by the governor but the veto was overridden by the legislature.[20] In contrast to other legislation, North Carolina conscience protection law does not apply to religious officials but to government employees.

Religious Freedom Protections

Religious Freedom in the U.S. Constitution and State Constitution

The constitutional guarantee of religious freedom is found in two clauses in the First Amendment to the U.S. Constitution.[21] The First Amendment provides, in part, that:

> Congress shall make no law *respecting an establishment of religion*, or prohibiting the *free exercise thereof*; . . .

The first clause, which is referred to as the Establishment Clause, prohibits government from enacting laws that advance religion or prefer one particular religion over another religion. The second clause, which is referred to as the Free Exercise Clause, ensures that the government will not burden or interfere with an individual's right to practice his or her religion. The two clauses, acting together, were designed to keep government in a balanced, neutral position so that religion was not advanced or restricted.

The Florida Constitution similarly establishes an almost identical guarantee. Article I, section 3 provides that:

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety…..

Legal Tests to Determine Whether a Law Affecting Religion Is Unconstitutional

The U.S. Supreme Court recently recounted the tests it has used over time to determine whether a challenged government action violated the Free Exercise Clause of the First Amendment.[22] In

[18] Oklahoma House Bill No. 1007 (2015), Texas Committee Substitute for S.B. 2065 (2015), and Utah S.B. 297 (2015). The Utah bill also provided that a county clerk or a willing designee, be available during business hours to solemnize a marriage.
[19] North Carolina Senate Bill 2 (2015).
[20] See North Carolina Ch. SL 2015-75.
[21] U.S. CONST. amend. I.
[22] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). In this decision, the U.S. Supreme Court held that the contraceptive mandate of the Patient Protection and Affordable Care Act of 2010 violated the Religious Freedom Restoration Act of 1993 as applied to three businesses. The Court determined that requiring the three closely held businesses to provide insurance coverage for certain contraceptives that could be determined to induce abortions, violated their sincere religious

decisions rendered before 1990, the Court used a balancing test to decide whether a challenged government action imposed a "substantial burden" on someone's religious practice, and if it did, whether the action in question was necessary to serve a "compelling government interest."[23] Applying that test, the Court held that an employee who was fired because she refused to work on the Sabbath could not be denied her unemployment benefits.[24] Similarly, the Court decided that Amish children could not be required to comply with state law requiring them to remain in school until they were 16 years old when their beliefs required them to focus on Amish values during the adolescent years.[25]

In a 1990 case, however, the Court rejected the higher balancing test it had established earlier and adopted a new standard. The Court lowered the constitutional test and required simply that the governmental action not intentionally infringe upon someone's religious exercise. The case of *Employment Div., Dept. of Human Resources of Ore. v. Smith*[26] involved two members of the Native American Church in Oregon who were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony at their church. Peyote was a controlled substance and its possession was a felony. Their unemployment compensation applications were rejected because they were discharged for work-related misconduct. The Oregon Supreme Court held that the denial of benefits was a violation of the Free Exercise Clause. The U.S. Supreme Court reversed and observed that the use of the balancing test when someone raised religious objections to the enforcement of a general law "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[27]

Religious Freedom Restoration Act of 1993

Congress responded to the *Smith* Court's decision in 1993 by enacting the Religious Freedom Restoration Act (RFRA).[28] Congress noted in its "Findings" to the act that the Supreme Court "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion" and that the compelling interest test used in previous Federal decisions was a workable test that struck a balance between religious liberty and governmental interests.[29] Congress further stated in the act that its purposes are:

(1) to restore the compelling interest tests set forth in *Sherbert* and *Yoder* and guarantee its application in all cases where free exercise of religion is substantially burdened; and
(2) provide a claim or defense to persons whose religious exercise is substantially burdened by government.

The Religious Freedom Restoration Act provides that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general

beliefs and substantially burdened their free exercise of religion. The RFRA only applies to federal government actions, not state or local actions, which may burden someone's religious exercise.

[23] *Id*. at 2760.
[24] *Sherbert v. Verner*, 374 U.S. 398 (1963).
[25] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
[26] 494 U.S. 872 (1990).
[27] *Burwell*, 134 S. Ct. at 2760-61 (quoting Smith, 494 U.S., at 888).
[28] 42 U.S.C. 2000bb et seq.
[29] 42 U.S.C. 2000bb(a)(4) and (5).

applicability" unless the Government is able to demonstrate that the burden on the person furthers a compelling governmental interest and is the least restrictive means of furthering that compelling government interest.[30] The act was amended in 2000 to cover "any act of religion, whether or not compelled by, or central to, a system of religious belief."[31] The act originally applied to federal, state, and local actions but its application was limited to federal government actions in 1997.[32] In response to this limitation, the Florida Legislature enacted the "Religious Freedom Restoration Act of 1998."

Florida's Religious Freedom Restoration Act of 1998

The Religious Freedom Restoration Act[33] provides that the government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that the 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.[34] The Florida Supreme Court has held that a "substantial burden" on the free exercise of religion is a burden 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.[35]

Federal Recognition of the Legal Right to Same-Sex Marriage

The U.S. Supreme Court issued the landmark decision, *Obergefell v. Hodges, et al.,*[36] on June 26, 2015, which held that couples of the same sex could not be deprived of the constitutional right to marry. Among the issues not addressed in the decision is the question of whether a religious official may be required to perform a same-sex marriage ceremony to which he or she has religious objections.[37]

Before the *Obergefell* decision was rendered, Florida[38] and 39 other states adopted laws defining marriage as exclusively existing between one man and one woman.[39] As state and federal courts began overturning traditional marriage laws, judicial jurisdictions across the country were split on the legality of same-sex marriage.

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[30] 42 U.S.C. 200bb-1(a) and (b).
[31] 42 U.S.C. 2000cc-5(7)(A). Religious Land Use and Institutionalized Persons Act of 2000.
[32] See *City of Boerne v. Flores*, 521 U.S. 507 (1997).
[33] Section 761.01-761.05, F.S.
[34] Section 761.03, F.S.
[35] *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1033 (2004).
[36] *Obergefell v. Hodges, et al*., 135 S. Ct. 2584 (2015).
[37] Cynthia Brown and Erika K. Lunder, Congressional Research Service, *Recognition of Same-Sex Marriage: Implications for Religious Objections*, (Oct. 23, 2015) available at https://fas.org/sgp/crs/misc/R44244.pdf. The issue has also been raised as to whether a church or other religious organization could be denied tax-exempt status if it acted in opposition to same-sex marriage. Additional issues involve the civil rights of same-sex couples, the protections of civil servants who object to participation in same-sex ceremonies, whether providers of public accommodations may be required to accommodate same-sex couples, and protections for religious social service providers in programs receiving federal funds.
[38] Fla. Const. art. I, s. 27.
[39] Email from Rochelle Finzel, Group Director, National Conference of State Legislatures, (October 19, 2015) (on file with the Senate Committee on Judiciary).

At the federal level, the Fourth, Seventh, Ninth, and Tenth U.S. Circuit Court of Appeals held that state prohibitions against same-sex marriage were unconstitutional. The U.S. Court of Appeals for the Sixth Circuit,[40] however, disagreed with those conclusions in 2014 and held that there was no constitutional obligation to license same-sex marriages or recognize those marriages performed in other states.[41] That decision, which created a split of authority among the federal circuit courts, provided an opportunity for the U.S. Supreme Court to grant certiorari, a petition for appellate review, and settle the issue conclusively.

The Supreme Court granted review of the Sixth Circuit decision and limited the issues on appeal to two questions:

- Are states required by the Fourteenth Amendment to grant marriage licenses to two people of the same sex?
- Are states required by the Fourteenth Amendment to recognize a marriage of two people of the same sex when the marriage is lawfully licensed and performed in a state that grants that right?

The Court issued a 5-4 decision and answered both questions in the affirmative. This decision has raised concerns among religious groups as to whether certain ministers and members of the clergy may be compelled to perform same-sex marriage ceremonies if doing so is a violation of their sincerely held religious beliefs.

The Authority to Solemnize or Perform Marriage Ceremonies in Florida

Under Florida law, marriages may be solemnized by certain members of the clergy, specified state officials, and notaries public. The statute specifically provides that marriages may be solemnized by "regularly ordained ministers of the gospel or elders in communion with some church, or other ordained clergy, and all judicial officers, including retired judicial officers, clerks of the circuit courts, and notaries public of this state" and by certain Quakers.[42]

III. Effect of Proposed Changes:

This bill establishes a conscience protection law for certain religious officials and organizations and provides that they may not be required to solemnize any marriage or provide certain services or items if the action would cause them to violate a sincerely held religious belief. The bill is closely modeled after a Texas law that was passed in 2015.[43]

The bill creates s. 761.061, F.S., which provides that:

- A church or religious organization;
- An organization supervised or controlled by or in connection with a church or religious organization;

[40] The Sixth Circuit is comprised of Michigan, Kentucky, Ohio, and Tennessee. Those states all defined marriage as a union of one man and one woman. *Obergefell* at 2593.
[41] *DeBoer v. Snyder*, 772 F.3d 388 (C.A.6 2014).
[42] Section 741.07, F.S.
[43] Committee Substitute for S.B. No. 2065, now codified at TEX Family Code s. 2.601-2.602 (2015).

- An individual employed by a church or religious organization while acting in the scope of that employment; or
- A clergy member or minister

may not be required to solemnize any marriage, or provide services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, or celebration of any marriage if that action would cause the church, organization, or individual to violate a sincerely held religious belief.

If any of those individuals or entities refuses to solemnize a marriage or provide any of the enumerated items for the solemnization of the marriage, that refusal may not serve as the basis for a civil or criminal cause of action or any other action by the state or a political subdivision of the state to penalize or withhold benefits or privileges, including tax exemptions or governmental contracts, grants, or licenses.

The bill takes effect July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

It is not abundantly clear from the wording of subsection (2) whether all civil causes of action are precluded against an individual or entity that refuses to participate in the marriage or if the civil cause of action may not be initiated by the state or its political subdivisions.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates s. 761.061, of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.