HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS

BILL #: HB 43

SPONSOR(S): Plakon; Cortes, B. and others

COMPANION BILLS: SB 110

FINAL HOUSE FLOOR ACTION:

82 **Y's** 37 **N's**

GOVERNOR'S ACTION: Approved

SUMMARY ANALYSIS

HB 43 passed the House on March 2, 2016, and subsequently passed the Senate on March 3, 2016.

Conscience protection laws prevent individuals and entities from being required, under threat of civil or criminal penalties, to perform services that violate their religious beliefs or moral convictions. Such laws have historically applied to abortion, sterilization, and contraception. The bill creates conscience protections for clergy, churches, and certain 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 was approved by the Governor on March 10, 2016, ch. 2016-50, L.O.F., and will become effective on July 1, 2016.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Conscience Clauses

Conscience clause laws 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 in a form similar 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

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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 v. City of Boca Raton*, 64 F. Supp. 2d 1272, 1287 (S.D. Fla. 1999)).
[27] 494 U.S. 872.

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 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 the following entities and individuals may not be required to solemnize any marriage or provide services, facilities, or goods related to the marriage if such action would cause the individual or entity to violate a sincerely held religious belief:

- a church, religious organization, or religious corporation or association;
- an individual employed by a church or religious organization while acting in the scope of that employment;
- a religious fraternal benefit society;
- a religious school or educational institution;
- an integrated auxiliary of a church; or
- a clergy member or minister.

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 a private civil action or any action, including a civil or criminal cause of action, by this state or any political subdivision to penalize or withhold benefits or privileges, including tax exemptions, governmental contracts, grants, or licenses.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

[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).
[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).

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

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.