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BY HAND DELIVERY

Governor Nathan Deal
Office of the Governor
206 Washington Street
111 State Capitol
Atlanta, Georgia 30334

Re: Georgia Free Expression Protection Act – Amended House Bill 757

Dear Governor Deal:

I am writing you concerning the updated version of HB 757 ("Amended HB 757"), which passed the House and Senate last week. After my February 24, 2016 correspondence with you and Speaker Ralston concerning the First Amendment Defense Act, I was pleased to see that you spoke out against "anything that will be perceived as allowing discrimination in the State of Georgia." I credit your leadership with that version of the legislation losing momentum in the Assembly, and ensuring that Georgia did not become a flashpoint for controversy that could damage our reputation nationally.

Now that the Assembly has passed Amended HB 757, I again write to encourage you not to accept this revised version of proposed legislation. While Amended HB 757 does remove some of the provisions of the prior version, it does nothing of substance to protect religious liberty and expression that is not already protected by the U.S. Constitution. As I noted in my previous letter, the First Amendment already protects all Americans' rights to speech, to worship freely, and to be free from a state-established creed, and the United States already has a robust tradition and body of law protecting free expression. It is difficult for me to imagine any form of religious expression that is not already protected by the First Amendment or federal statutory law,[1] and nothing covered by Amended HB 757 could be enhanced by its becoming a law.

Simply put, Amended HB 757 is a solution in search of a problem.

Amended HB 757 appears to create a pretext for discrimination against some Georgians and visitors to our State. The provisions of Amended HB 757 fall within three basic categories. The *first*, and most problematic, are provisions that actually *expand* on the prior HB 757's grant of rights for faith-based organizations to discriminate. The *second* are provisions that

[1] *See* Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb, *et seq.*

superfluously restate basic principles of First Amendment law, but in a context that seems intended to send a message to LGBT Georgians, among others, that they are second-class citizens. The *third* are provisions of Amended HB 757 that may make it substantially more difficult for local governments, such as the City of Atlanta, to respond to local concerns regarding the protection of its LGBT community.

A. Amended HB 757 Still Allows a Broad Range of Discrimination

Contrary to several statements made by various legislators in support of this bill, Amended HB 757 will permit a broad range of discrimination that will likely meet with many costly legal challenges.

First, Section 4, 10-1-1001(b) provides that "[n]o faith-based organization shall be required to provide social, educational, or charitable services that violate such faith-based organization's sincerely held religious belief." Thus, under the plain language of this section, any "faith-based" organization is permitted to refuse to provide otherwise-available services—and to in effect discriminate against—any person it deems to violate its beliefs.

This "right to discriminate" is troubling in that Georgia currently contracts with a number of religiously affiliated organizations to provide secular public services. If passed, Amended HB 757 would permit such organizations to refuse to provide the taxpayers with the services they paid for, allowing faith-based organizations to discriminate with state funds with respect to both provision of services and (as discussed below) hiring. While I do believe that such public-private partnerships with faith-based organizations are oftentimes beneficial, it is unfair to ask Georgia's citizens to support groups with their tax dollars that may later discriminate against them.

These provisions still would be problematic even if no tax dollars were at stake. I have no doubt that in limiting its coverage to this language "faith-based organizations," HB 757's drafters intended readers to believe they had narrowly tailored this provision to protect only religious expression. It is, however, a bait-and-switch, because the definition of "faith-based organization" would apply to *any 501(c)(3) organization* that declares itself to be "religious."

While the drafters of the Amended HB 757 would require that such organization "is qualified as an exempt religious organization," under the U.S. Department of the Treasury regulations, the IRS "can't evaluate the content of a doctrine an org[anization] claims is religious."[2] In other words, if a non-profit entity organizes itself as "religious" or "faith-based," the federal government will treat it as such. Similarly, courts have recently given entities wide latitude to declare themselves organized along religious principles.[3]

Moreover, while Section 4, 10-1-1001(b) goes on to specify that a "sincerely held religious belief" must be "demonstrated by . . . practices, expression, or clearly articulated tenet

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[2] Internal Revenue Service, *Internal Revenue Manual*, § 4.76.6.2.

[3] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. __, 134 S. Ct. 2751 (2014).

of faith"; as I discussed in my previous letter to you, courts ***do not*** review or pass judgment on the "sincerity" of a purported expression of religious freedom.[4]

Therefore, if this provision were to become law, we may assume that (a) any non-profit could determine for itself to be "faith-based," and (b) any idea that an organization declared was a tenet of its "belief" would be accepted as such by courts, and would be (c) an acceptable basis under the law to deny "social, educational, or charitable services."

Let us ponder a few potential effects of a landscape where Georgia has enacted Amended HB 757, and any non-profit organization may refuse service to any person it deems offensive to its doctrine:

- A religious organization's thrift stores could refuse service to LGBT persons;
- A domestic abuse crisis center could turn away a woman who has the intention to seek a divorce from her abusive husband;
- A church-sponsored recreation league could disallow the children of same-sex parents from joining their soccer teams; and
- A religiously affiliated, non-profit healthcare organization could refuse to provide services to an interracial couple.

In suggesting these hypotheticals, I do not want to impugn the dignity of Georgia's existing not-for-profits, the vast majority of which are operated by persons of goodwill and generosity. My concern is that laws such as Amended HB 757 may create an environment of animosity that could encourage persons with less than charitable motivations to seek leadership roles at non-profits with the intention of moving those organizations in a less-generous direction, or starting new non-profits with the explicit intention of discriminating in order to "prove a point" about sexual orientation or other lifestyle choices.

In addition to discriminating in the provision of services, Amended HB 757 would allow the same "faith-based organizations" to discriminate against employees, allowing that they "shall [not] be required to hire or retain as an employee any person whose religious beliefs or practices or lack of either are not in accord" with those of the organization.

"Religious" or "faith-based" organizations already enjoy a broad exemption from state and federal anti-discrimination laws under the "ministerial exception." The ministerial exception gives religious organizations considerable latitude to hire and fire employees who are involved in the organization's religious work, even when doing so might otherwise run afoul of civil rights and fair employment laws. Thus, by way of example, Catholic and Baptist churches may refuse to hire female priests and ministers based on their doctrinal beliefs. Moreover, the United States

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[4] *See Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 834 (1989).

Supreme Court has interpreted the scope of employees who are considered to hold "ministerial" positions expansively,[5] meaning that churches are afforded a considerable amount of discretion in their hiring practices as to any employee who arguably affects its religious mission. Thus, any fear or implication that churches would suddenly be forced to hire, for example, a LGBT pastor against its will is misplaced.

Amended HB 757 would turn the ministerial exception into a blanket exemption from anti-discrimination laws. Free expression concerns are not justified when it comes to the question of employing staff that serve no ministerial function whatsoever, but Amended HB 757 would arguably, for example, provide justification for a faith-based organization to fire a female janitor, or refuse to hire an African American receptionist. Moreover, as discussed above, because a number of religiously affiliated organizations contract with the State to provide secular services, Amended HB 757 would allow a religious test to be imposed on employees whose work was for the benefit of the State and with the public's money. Amended HB 757, thus, would put many Georgians in the paradoxical position of supporting with their tax dollars the same organizations that may refuse to hire them.

While I am respectful of religious organizations' need to limit their ministerial leadership to only those whose lives and lifestyles conform to the organization's doctrine, I can think of no basis to exempt them from generally applicable employment laws when it concerns employees that would have no effect on the organizations' missions or employees engaged in secular, state-funded activities.

B. A "Substantial Burden" Test Would Severely Constrain Local Governments Ability to Respond to the Needs of Its Residents

Section 6, subsection 50-15A-2 provides that, within the State, any "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a law, rule, [or] ordinance . . . of general applicability" unless the government can show that the burden is in "furtherance of a compelling governmental interest" and is the "least restrictive means" of furthering that interest.

This provision is similar to one set forth in federal law that direct courts to apply "strict scrutiny" review to free exercise claims. In doing so, federal courts have generally determined substantial burdens in the same way they have the sincerity of religious belief, that is, once a claimant pleads that a law or a regulation is a substantial burden, then it is, and courts do not have the ability to second guess that claim. Federal courts also apply these provisions to both individuals and closely held for-profit corporations.[6]

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[5] *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Employment Opportunity Comm'n*, 565 U.S. ___, 132 S. Ct. 694 (2012). In *Hosanna-Tabor*, a unanimous Supreme Court held that a fourth-grade math and language teacher's termination by the church-run school was subject to the ministerial exception even though she only spent about 45 minutes per day leading religious activities.

[6] *See Burwell*, 134 S. Ct. at 2751.

Here, it is of significant concern that this provision could be used to overturn municipal anti-discrimination ordinances. As the "first responder" of government to its citizens and visitors, the City of Atlanta is in the best position to understand and respond to local needs. Out of respect for the social and economic contributions that its LGBT community makes to the City, Atlanta has passed municipal ordinances prohibiting discrimination based on gender identity and sexual orientation.

Amended HB 757 could undermine the City's responsiveness to its residents and allow any person who declares abiding by anti-discrimination ordinances a "substantial burden" on the individual's religious beliefs a free pass from abiding with those ordinances. This would turn free exercise of religion from a protection of freedom of conscience into a weapon allowing individuals to declare a law unto themselves.

As I have shown above, the Constitution provides substantial safeguards for religious liberty that have stood the test of time. Replacing an established regime for a new system that makes it more difficult for local governments to respond to local concerns is unnecessary and unwise.

C. The First Amendment's Guarantees of Free Expression Already Satisfy the Concerns Addressed in Amended HB 757

A significant portion of Amended HB 757 is devoted to provisions that purport to "protect" religious expressions that are already constitutionally protected. For example, Section 2, subsection (b) provides that ministers and other religious leaders "shall be free to solemnize any marriage . . . or decline to do the same, in their discretion." As I noted in my February 24, 2016 letter to you and Speaker Ralston, I am unaware of *any* case where a religious organization has been compelled by the state to perform any religious rite for any reason. A protestant may not demand a Catholic funeral mass; a gentile cannot compel a *mohel* to perform a *bris*; and no religious leader can be compelled to solemnize any marriage that contradicts a tenet of the leader's faith or institutional doctrine. Any lawsuit against a religious leader who refused to perform a marriage ceremony would be immediately dismissed on First Amendment grounds. Subsection (b), provides no right or remedy that does not already exist.

Subsection (d) is similar to Subsection (b), and addresses a situation that is equally unheard of in U.S. history. Subsection (d) provides that "[a]ll individuals shall be free to attend or not attend . . . the solemnization of any marriage." It is difficult to comprehend what harm the General Assembly is contemplating here. The Free Assembly Clause of the First Amendment provides for the right of free assembly and association, and is sufficient protection for anyone who does not want to attend.

Creating a specific statutory right not to attend a wedding could generate more problems than it addresses, even to the point of creating conflicts within itself. For example, Section 6, subsection 50-15A-5(b)(4) provides that Amended HB 757 will not protect "a public officer or employee who fails or refuses to perform his or her official duties." Given these two provisions, does a judge, magistrate, or justice of the peace have to solemnize a marriage as part of her "official duties," or can she "decline to do the same, in [her] discretion"? Moreover, must an

employee who works for a business involved in the wedding industry follow her employer's instruction to provide services at a particular wedding, or is the State now stepping into the employer/employee relationship and giving s particular employee the right to refuse their boss's instructions? There is little reason to purposefully generate more litigation when the First Amendment already provides more than adequate protection.

Moving on to Section 4, subsection 10-1-1001(a) states that "[n]o faith-based organization shall be required to rent, lease, or otherwise grant permission for property to be used . . . for an event which is objectionable to such faith-based organization." As with the performance of religious rites, religious organizations have a broad right under the First Amendment to use their property in conformity with their doctrines. This principle is embodied, for example, in the Fair Housing Act, which allows religious organizations to limit the "sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or [to give] preference to such persons."[7]

These provisions, along with their definitions and other implementing actions, constitute approximately 117 of Amended HB 757's 208 substantive lines of text. In other words, more than half of Amended HB 757 is dedicated to enacting a statutory scheme that would not change current protections for free expression.

That being the case, I recognize that the Amended HB 757 supporter might offer the counterargument that, if Amended HB 757 simply restates existing law, shouldn't we just go ahead and adopt it? After all, what's the harm in simply restating the law?

I suggest not. Given that Amended HB 757 would not move the baseline of existing protections for religious expression or serve any distinct legal purpose, we must therefore consider the context of enacting it at this moment in history. The conclusion that some could reasonably draw is that its purpose is to make members of the LGBT community, visitors to our state, and others feel unwelcome in Georgia, and to send a message that the leaders of our government believe that Georgians need some special protection from them. A law that appears to serve no other purpose than to send a message to the LGBT community and their supporters that the State of Georgia disapproves of them is not at all a neutral restatement of the law.

I appreciate that many of my fellow Georgians strongly disagree with the Supreme Court's decision upholding same-sex marriage in *Obergefell v. Hodges*, a decision that they believe has changed long-held religious traditions. However, I encourage them to look to the protection of our U.S. Constitution and our State's long heritage of respect for freedom of belief and conscience.

D. Conclusion

You have, no doubt, heard from many leaders in the business, educational, sports and arts communities who are advising you that Georgia may face an economic backlash if Amendment

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[7] 42 U.S.C. § 3607(a).

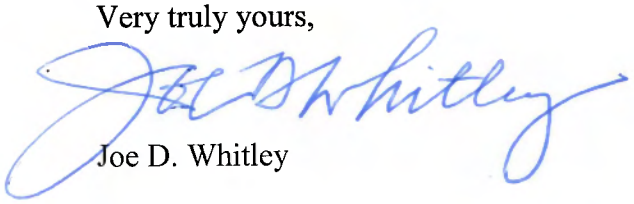
HB 757 is enacted. We have only to look to Indiana's situation to be reminded that these warnings could prove to be accurate.

Finally, I write to you to reassure you that there is no reason that Georgia should confront any dilemma between protecting religious expression and protecting our state's reputation. Amended HB 757 does nothing of substance to protect free expression that is not already enshrined in the law and the U.S. Constitution. On the other hand, what Amended HB 757 does is to create the legal right to discriminate against other Georgians and visitors to our State. Again, there is simply no place in our State and under the U.S. Constitution for such laws.

I would like to close by respectfully urging you to veto Amended HB 757. I believe it is the right and courageous thing to do.

As always, I appreciate your time and attention, and your service to our State.

Very truly yours,



Joe D. Whitley

cc: Speaker of the House David Ralston