

Key facts about H.767

The loophole in anti-discrimination law that H.767 seeks to close

- Massachusetts law currently prohibits many forms of discrimination, in employment, housing, credit, and service at public accommodations, on grounds such as race, color, religious creed, national origin, sex, gender identity, sexual orientation, genetic information, disability, ancestry, or veteran status.
- These laws already include carefully crafted exceptions. For example, ch. 151B exempts employers with fewer than six employees. And it specifically *allows* religious non-profit organizations (e.g., religious schools) to give religious-based employment preferences. These exceptions are not at issue.
- The problem is that *business corporations* are now using religious freedom claims to challenge anti-discrimination law.
- These types of arguments go back to the 1960s, when businesses would challenge the federal Civil Rights of 1964, claiming that owners' religious views forbade racial integration. But until quite recently, these arguments by for-profit businesses were unsuccessful.
- That began to change after the Supreme Court's 2014 *Hobby Lobby* decision. Since then, for-profit corporations have been arguing for exemptions from anti-discrimination law based on corporate religious views. For example, when a transgender employee sued after being fired by a for-profit multi-location funeral home company, a federal judge in Michigan held that the company was exempt from the law on this ground.
- The Supreme Court's 2018 decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* left this question open for another case.

H.767's narrow fix closes the loophole

- H.767 closes this loophole by using an underappreciated source of legal authority. Corporations derive their existence and powers from state law. The bill uses the state's power to define the powers of the corporations that it creates to specify that, for for-profit business corporations, these powers do *not* include raising religious claims for corporate exemptions from anti-discrimination law.
- H.767 only affects for-profit business corporations organized under chapter 156D and comparable out-of-state corporations doing business here. It has no effect on *nonprofit* corporations organized under chapter 180, or on LLCs organized under chapter 156C.
- H.767 neither expands nor shrinks the reach of the state's underlying anti-discrimination laws, such as chapters 151B or 272. Any conduct that violates those laws today will continue to violate those laws, and any conduct does *not* violate those laws today will not be made into a violation.
- H.767 simply prevents a business corporation from playing a "get out of jail free" card by arguing that anti-discrimination laws violate corporate religious views.

Myths and facts

Myth: This bill would “disenfranchise those business owners who organize themselves as corporations from exercising their constitutional rights. . . . Under this proposed law, if a Massachusetts business owner chooses to incorporate, for tax or investment reasons, then he or she would forfeit certain legal protections guaranteeing their rights of conscience.”

Fact: People do not “organize themselves as corporations” or choose to “incorporate” themselves. A corporation is not a suit of armor that one puts on, but rather a separate legal entity created by an act of state law—in this case, MGL chapter 156D. As chapter 156D puts it, when incorporators file an application (known as “articles of organization”) for creation of a corporate entity, “corporate existence begins.”

The *entire point* of filing such articles with the state is to create a legally distinct entity which can sue and be sued, buy and sell property, and enter contracts—in other words, engage in business transactions—as a legally distinct entity, separate from the stockholders. The wall between a corporation and its stockholders is known as the “corporate veil” and law-abiding corporations try to maintain it because of its benefits for stockholders. Creating a corporation necessarily means that the corporate legal entity has different rights and obligations than the stockholders. For example, the stockholders are generally not personally liable for corporate debts. On the other hand, the Supreme Court has repeatedly emphasized that a corporation (as opposed to its stockholders) does not have a constitutional privilege against self-incrimination.

A more correct statement would be: “Under this proposed law, when a for-profit business corporation operating in Massachusetts chooses to discriminate, then it may not claim in court that it gets all of the benefits but none of the responsibilities of being a separate legal entity. In other words, it cannot argue that it is legally identical to its individual stockholders when convenient but not when inconvenient. And its stockholders cannot simultaneously take advantage of special privileges that the state has granted to corporate entities but not individuals while also seeking special individual-conscience exemptions from laws against harming the people of the commonwealth.”

Myth: The purpose of the bill is to coerce or punish members of specific religious groups.

Fact: The bill is not against (or for) any religious views or groups. The purpose of the bill is to ensure that the existing set of laws against discrimination in housing, employment, etc. that already apply to businesses within the commonwealth are not subject to corporate claims for exemptions based on religious or secular objections. Furthermore, the bill *protects* people from being discriminated against based on their religion. Under current law, a for-profit business corporation might refuse to hire members of certain religions and then try to claim, in a discrimination lawsuit, that the laws against discrimination in hiring should not apply because of the corporation’s or owners’ religious beliefs. This bill would prevent such arguments.