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Senator Craig Tieszen
Chair, Senate Judiciary Committee
State Capitol
500 E Capitol Ave
Pierre, SD 57501

Senator David Novstrup
Vice-Chair, Senate Judiciary Committee
State Capitol
500 E Capitol Ave
Pierre, SD 57501

RE: Oppose HB 1107 Because It Would Cause Real Harm to Real People and Violate the U.S. Constitution

Dear Chair Tieszen and Vice Chair Novstrup:

On behalf of Americans United for Separation of Church and State, I urge you to oppose HB 1107. This bill would allow any individual, business, non-profit entity, and taxpayer-funded organization to ignore any law that conflicts with their religious beliefs that marriage should be recognized only as “the union of one man and one woman” and that “sexual relations are properly reserved to marriage.” This bill would cause real harm to real people. In addition, it would 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.

This Bill Would Cause Real Harm to Real People

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

- are a single mother;
- are part of an LGBT 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 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; or

- a same-sex couple and their hungry child being denied a meal at the city's taxpayer funded soup kitchen.

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

HB 1107 would violate the Free Speech Clause of the U.S. Constitution because it would result in viewpoint 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 Justice Clarence Thomas, writing for the Court, explained that “government discrimination among viewpoints—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.’”³ 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.”⁴

This bill, however, specifically targets one viewpoint on marriage—that marriage is between a man and woman and sexual relations are reserved for marriage—for favored treatment. Only people and entities with those viewpoints are exempt from laws that conflict with their beliefs. People and entities with other viewpoints are not exempt from the law. Accordingly, this bill would violate the Free Speech Clause of the U.S. Constitution.

The Bill Would Violate the Establishment Clause of the U.S. Constitution

HB 1107 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,⁵ its ability to provide religious accommodations is not unlimited: “At some point, accommodation may devolve into an unlawful fostering of religion”⁶ 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].”⁷ In *Estate of Thornton v. Caldor, Inc.*,⁸ for example, the Supreme Court struck down a blanket exemption for Sabbatarians because it “unyielding[ly] weight[ed]” the religious interest “over all other interests,” including the interests of co-workers.

¹ *Reed v. Gilbert*, 135 S.Ct. 2218 (2015).

² *Id.*

³ *Id.* at 2230 (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 Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.

⁶ *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted).

⁷ *Cutter v. Wilkinson*, 544 U.S. 709 (2005); see also *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n. 8 (1989).

⁸ 472 U.S. 703, 704 (1985).

This bill grants individuals, corporations, 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; 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 could 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*,⁹ 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.¹⁰ 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.”¹¹ 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”¹² and the bill was described as “a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores.”¹³ 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.”¹⁴

The plain language of HB 1107 targets LGBT couples, revealing that it too has a discriminatory purpose. Although it is true that such couples may still obtain a marriage licenses under the bill, their marriages would be treated differently and with fewer rights than other couples, even by entities providing state-funded public services. This violates the Equal Protection Clause.

Conclusion

Freedom of religion is a fundamental American value that is protected by the First Amendment. It allows all of us the freedom to believe or not as we see fit, but it does not allow us to use religion as an excuse to harm or take away the rights of others. Unfortunately, despite the bill's title, which asserts that it prevents discrimination, it actually would cause real harm and permit

⁹ 459 U.S. 116, 127 (1982).

¹⁰ *Id.*

¹¹ *Romer v. Evans*, 517 U.S. 620, 633 (1996).

¹² *Id.* at 635.

¹³ *Id.* at 646 (*Scalia, J., dissenting*).

¹⁴ *Id.* at 635.

discrimination, most frequently against LGBT couples. In addition, this bill would violate the U.S. Constitution. Accordingly, I ask you to oppose HB 1107.

Thank you for your consideration of these important issues.

Regards,

A handwritten signature in cursive script, appearing to read "Amrita Singh".

Amrita Singh
State Legislative Counsel