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Governor Terry McAuliffe
Common Ground for Virginia
P.O. Box 1475
Richmond, VA 23218

Re: Veto SB 41 – Bill Would Allow for Discrimination Against Virginians

Dear Governor McAuliffe:

We write to urge you veto SB 41 because the bill would sanction discrimination and consequently, would violate the First and Fourteenth Amendments to the U.S. Constitution.

Freedom of religion is a fundamental American value. It means that neither the Commonwealth nor any couple can force a clergy member, house of worship, or similar religious organization to perform or host marriage ceremonies to which they have religious objections. Indeed, the First Amendment already allows, for example, a rabbi to refuse to marry an interfaith couple or a priest to refuse to solemnize a marriage for a divorced person.

Religious freedom also means that we are all free to believe or not as we see fit, and act on our beliefs so long as we do not harm others. It is not a justification for denying others their rights.

SB 41 goes far beyond underscoring the rights of clergy members and houses of worship and instead would allow *any* individual, business, non-profit entity, and taxpayer-funded organization to ignore any law that conflicts with their religious beliefs or moral conviction that marriage should be recognized only as “the union of one man and one woman” and that the term “man” and “woman” refer “to an individual’s immutable biological sex as objectively determined by anatomy and genetics of the individual at the time of birth.” Rather than uphold true religious freedom, this bill would undermine it by sanctioning discrimination in the name of religion. We urge you to reject SB 41 and its unprecedented attempts to enshrine discrimination.

SB 41 Is Unconstitutional and Would Sanction Discrimination

The bill is extraordinarily broad and would allow a range of individuals and organizations—including those that receive taxpayer funding to perform social services—to refuse to provide *any service* to same-sex couples and their families.¹ Indeed, it could allow for a taxpayer-funded homeless shelter to deny a place to stay for a same-sex couple or a hospital to refuse to permit a man the right to speak to his dying spouse for the last time. In short, this bill could cause real harm to real people in the Commonwealth.

¹ One of the central principles of our constitutional order: the government cannot aid discrimination. *Norwood v. Harrison*, 413 U.S. 455, 465-66 (1973).

SB 41 Would Violate the Equal Protection Clause of the U.S. Constitution

“[C]entral 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.”² When 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.”³ The Supreme Court, however, rejected this justification and determined that the law was unconstitutional because it was passed to make LGBT Coloradans “unequal to everyone else.”⁴ SB 41 has the same insufficient and unconstitutional justification because it would result in treating LGBT Virginians differently.

As Justice Anthony Kennedy stated in *Obergefell v. Hodges*, the Equal Protection Clause also guarantees the right of same-sex couples to marry.⁵ Although it is true under this bill that such couples may still get married, their marriages would be treated differently, even by entities providing state-funded public services. This Commonwealth cannot deem the disparate treatment of certain individuals protected under the law. To do so violates the Equal Protection Clause.

SB 41 Would Violate the Establishment Clause of the U.S. Constitution

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,⁶ its ability to provide religious accommodations is not unlimited: “At some point, accommodation may devolve into an unlawful fostering of religion”⁷ 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].”⁸ An accommodation is unconstitutional if it “unyielding[ly] weight[s]” the religious interest “over all other interests.”

This bill would grant individuals and religious organizations that hold a specific religious belief about marriage a blanket exemption to laws that conflict with that belief. The exemption fails to take into account any potential harms such exemptions would cause to others, like customers, co-workers, or those seeking taxpayer-funded social services. Allowing, for example, a city-funded domestic violence shelter to refuse to offer a woman safety because she is married to a woman clearly burdens and harms others, and is impermissible under the Establishment Clause.

Additionally, this bill would allow religiously affiliated organizations to take taxpayer funds to provide services to the public and then use a religious litmus test to determine whom they will

² *Romer v. Evans*, 517 U.S. 620, 633 (1996).

³ *Id.* at 635.

⁴ *Id.*

⁵ 135 S. Ct. at 2602 (2015).

⁶ Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.

⁷ *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted).

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

and will not serve. This is not just unfair, but unconstitutional. The government cannot delegate or share “important, discretionary governmental powers” with religious institutions,⁹ yet this bill would do that by allowing them to use religious criteria to determine who gets and who is denied public services.

SB 41 Would Violate the Free Speech Clause of the U.S. Constitution

SB 41 would violate the Free Speech Clause of the U.S. Constitution because it would result in both content-based and viewpoint-based discrimination.

Laws that target speech based on content, or subject matter, are “presumptively unconstitutional.”¹⁰ Just last year, Justice Clarence Thomas, writing for the Supreme Court, explained that a law that “singles out [a] specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter” is “a paradigmatic example of content-based discrimination.”¹¹ SB 41 falls into this trap: On its face, it treats speech and activities based on the belief “that marriage is or should be recognized as the union of one man and one woman” more favorably than all other speech on other subject matters.

And laws that discriminate among viewpoints or regulate speech “based on ‘the specific motivating ideology or the opinion or perspective of the speaker’” are even “‘more blatant’ and ‘egregious.’”¹² 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.”¹³ In *Rosenberger v. Rector and Visitors of University of Virginia*, the Supreme Court explained that a state university newspaper could not select “for disfavored treatment those student journalistic efforts with religious editorial viewpoints.”¹⁴ In the same way the state may not disfavor non-religious viewpoints. Unfortunately, SB 41 does just that by allowing religious viewpoints—and not secular viewpoints—to justify trumping existing law.

Conclusion

Virginia should not enact legislation that sanctions discrimination and interferes with the fundamental right to marry. For the reasons discussed, we urge you to reject the House amendments to SB 41 and any other attempts to enshrine discrimination in the guise of religious freedom. Thank you for your consideration on this important matter.

Sincerely,



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Americans United for Separation of Church and State

⁹ *Larkin v. Grendel's Den*, 459 U.S. 116, 127 (1982).

¹⁰ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

¹¹ *Id.* at 2223.

¹² *Id.* at 2230 (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

¹³ *Id.* (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983)).

¹⁴ 515 U.S. at 831.