AMERICANS UNITED
FOR SEPARATION OF CHURCH AND STATE

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Representative Elijah Haahr
Chair, House Emerging Issues Committee
State Capitol
201 West Capitol Avenue
Room 410-A
Jefferson City, MO 65101

Representative Gary L. Cross
Vice-Chair, House Emerging Issues Committee
State Capitol
201 West Capitol Avenue
Room 112
Jefferson City, MO 65101

RE: Oppose SJR 39 Because It Would Cause Real Harm to Real People and Violate the U.S. Constitution

Dear Chair Haahr and Vice-Chair Cross:

On behalf of its Missouri members and supporters, Americans United for Separation of Church and State urges you to oppose SJR 39. This resolution would take the drastic step of amending the state constitution to enshrine discrimination. This resolution 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.

Freedom of religion is a fundamental American value. It 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 also means that neither the State 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 is *not* a justification for denying others their rights. SJR 39, however, would allow businesses and taxpayer-funded organizations to ignore nearly any law that conflicts with their "sincere religious belief concerning marriage between two persons of the same sex." We urge you to reject SJR 39.

The Resolution Would Allow Businesses and Taxpayer-Funded Organizations to Discriminate

The drafters of the resolution try to hide its real consequences by stating that only "religious organizations" may defy laws that conflict with their "sincere religious beliefs concerning marriage between two persons of the same sex." But the resolution defines "religious organization" as any entity, including a "corporation," that "holds itself out to the public in whole or in part as religious and its purposes and activities are in whole or in part religious." That definition is so broad that "religious organizations "could include any business that adopts a mission statement or otherwise makes a proclamation on religion, whether that business is a craft store, restaurant, hotel, or airline. In short, SJR 39 could give these businesses a blanket exemption to laws protecting same-sex, married couples.

SJR 39 would also prohibit the state from denying a grant or contract to "religious organizations." This includes organizations that accept taxpayer dollars to perform public services, like running domestic violence shelters and soup kitchens, or assisting at-risk youth. Thus, this resolution would allow taxpayer-funded entities to refuse to provide certain people essential public services because of who they married.

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

SJR 39 would violate the Free Speech Clause of the U.S. Constitution because it would result in both content-based and viewpoint-based discrimination.

Content-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] a church successfully challenged a sign ordinance that treated political signs more favorably than the church's meeting signs. Justice Clarence Thomas, writing for the Court, explained that a law that "singles out [a] specific subject matter for differential treatment, even it if does not target viewpoints within that subject matter" is "a paradigmatic example of content-based discrimination."[3] SJR 39 falls into the same trap: On its face, it treats speech and activities "concerning marriage between two persons of the same sex" more favorably than all other speech on other subject matters. This more favorable treatment cuts across a host of topics under the resolution—taxes, government benefits, and even speech itself.

Viewpoint Discrimination

As also explained in *Reed, "*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.'"[4] 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."[5] In *Rosenberger v. Rector and Visitors of Univ. of Va,*[6] the U.S. Supreme Court explained that a state university newspaper could not select "for disfavored treatment those student journalistic efforts with religious editorial viewpoints." In the same way, the state may not disfavor non-religious viewpoints. Unfortunately, SJR 39 would do just that by allowing religious viewpoints—and not secular viewpoints—to justify trumping existing law.

The Resolution 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,[7] its ability to provide religious accommodations is not unlimited: "At some point, accommodation may devolve into an unlawful fostering of religion"[8] 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]."[9] In *Estate of Thornton v. Caldor, Inc.,*[10] for example, the

[1] *Reed v.* Gilbert, 135 S.Ct. 2218 (2015).
[2] *Id.*
[3] *Id.* at 2223.
[4] *Id.* at 2230 (citing *Rosenberger v. Rector* and *Visitors of Univ. of Va*., 515 U.S. 819, 829 (1995).
[5] *Id.* (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 46 (1983).
[6] 515 U.S. at 2517.
[7] Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.
[8] *Corporation of the Presiding Bishop v. Amos,* 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted).
[9] *Cutter v. Wilkinson,* 544 U.S. 709 (2005); *see also Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n. 8 (1989).
[10] 472 U.S. 703, 704 (1985).

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.

This resolution would grant individuals, for-profit entities, and religious organizations that hold a specific religious belief about marriage and LGBT people 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. 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 resolution 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 and will not serve. This is not just unfair, but unconstitutional. The government cannot delegate or share "important, discretionary governmental powers" with religious institutions,[11] yet this resolution would do that by allowing them to use religious criteria to determine who gets and who is denied public services.

The Resolution 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."[12] 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."[13] 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."[14] SJR 39 has the same insufficient and unconstitutional justification because it is explicitly aimed at treating LGBT Missourians differently.

As Justice Anthony Kennedy stated in *Obergefell v. Hodges*, the Equal Protection Clause also guarantees the right of same-sex couples to marry.[15] Although it is true under this resolution that such couples may still get married, their marriages would be treated differently, even by entities providing state-funded public services. This state cannot deem the disparate treatment of certain individuals protected under the law. To do so violates the Equal Protection Clause.

[11] *Larkin v. Grendel's Den,* 459 U.S. 116, 127 (1982).
[12] *Romer v. Evans*, 517 U.S. 620, 633 (1996).
[13] *Id.* at 635.
[14] *Id.*
[15] 135 S. Ct. at 2602 (2015).

Conclusion

This resolution 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 to the U.S. Constitution. For all of these reasons and more, I ask you to oppose SJR 39.

Regards,

Amrita Singh
State Legislative Counsel

cc: Members of the Committee