March 7, 2017

Governor Terry McAuliffe
Third Floor, Patrick Henry Building
1111 East Broad Street
Richmond, VA 23219

Re: Veto SB 1324 & HB 2025 – Bills That Would Allow for Discrimination against any Virginian

Dear Governor McAuliffe:

We write to urge you to veto SB 1324 and HB 2025 because these bills would sanction discrimination against LGBT Virginians—including by government contractors and grantees in performing publically funded services and in places of public accommodation—and would interfere with their fundamental right to marry.

Freedom of religion is a core American value. Even before the First Amendment was adopted, Virginia adopted Thomas Jefferson's Virginia Statue for Religious Freedom which states every Virginian is free to believe or not as they see fit, and no Virginian shall "otherwise suffer on account of his religious opinions or belief." However, these bills do not protect religious liberty. Instead, they provide absolute rights to the detriment of others by creating special rights to persons whose religious or moral beliefs disapprove of same-sex marriage These bills could allow taxpayer-funded organizations like hospitals and healthcare agencies, as well as homeless shelters and mental health treatment programs to deny Virginians services because of the provider's religious beliefs even if those services are funded by taxpayers.

These bills each have two parts, both of which would allow for discrimination in the name of religion. The first part, related to solemnization of weddings, is so broad that it could allow organizations that provide commercial services for weddings and operate a place of public accommodation to engage in discrimination on any grounds they can claim is based religious or moral belief. The second component of each bill eliminates any penalty for a person's "belief, speech, or action" based on the religious or moral belief that marriage is or should between one man and one woman. This provision is extraordinarily broad and would allow a range of individuals and organizations—including those that receive taxpayer funding to provide social services—to refuse to provide *any service* to same-sex couples and their families. In addition, it elevates one religious belief, opposition to same sex marriage, over all other beliefs.

The General Assembly should not have adopted SB 1342 or HB 2025. Religious freedom in Virginia is already very well protected from government interference or burden by the Virginia Constitution and existing statutes.[1]

This offensive legislation would not add to protections against violations of religious free exercise but would violate the U.S. Constitution and would provide a license to discriminate against LGBT Virginians. The U.S. District Court for the Southern District of Mississippi just barred a similar law in Mississippi from going into effect, concluding that it "violates both the guarantee of religious neutrality and the promise of equal protection of the laws" in the U.S. Constitution.[2]

We have attached a full analysis of these discriminatory bills and urge you to swiftly veto them.

Sincerely,

Claire Guthrie Gastañaga
Executive Director
American Civil Liberties Union of Virginia

Maggie Garrett
Legislative Director
Americans United for the Separation of Church and State

Doron Ezickson
Washington, DC Regional Director
Anti-Defamation League

Darcy Hirsh
Director of Virginia Government and Community Relations
Jewish Community Relations Council of Greater Washington

cc: The Honorable Mark Herring, Attorney General

[1] Virginia Constitution Article I, Sections 11 and 16, http://law.lis.virginia.gov/constitution/article1/section16/ http://law.lis.virginia.gov/constitution/article1/section11/; the Virginia Statute on Religious Freedom, http://law.lis.virginia.gov/vacode/title57/chapter1/section57-1/ and the Virginia Religious Freedom Restoration Act., http://law.lis.virginia.gov/vacode/title57/chapter1/section57-2.02/ .

[2] *Barber v. Bryant*, 193 F. Supp. 3d 677, 688 (S.D. Miss. 2016)

SB 1324 and HB 2025 Would Violate the U.S. Constitution

Participation in Solmization of Marriage Provision Is Ambiguous and Broad

The first part of each of these bills is designed to allow any "person"[3] to refuse to "participate" in the solemnization of a marriage in violation of the person's religious or moral beliefs. We certainly agree that the state should not and may not force clergy members to perform any marriage ceremony, and that religious bodies, along with their faith leaders, get to decide who may be married in their houses of worship by their clergy. Indeed, the First Amendment already protects this by allowing a rabbi to refuse to marry an inter-faith couple or a church to refuse to host a marriage ceremony in its sanctuary for a divorced person. Though the full reach of this legislation is unclear, it undeniably goes well beyond those constitutional protections.

Definition of Person

Both bills define a "person" to broadly include religious organizations (which is undefined), organizations supervised by, controlled by, or operated in connection with a religious organization, employees, volunteers, representatives, and agents of these entities, and members of the clergy. This definition could include religiously affiliated organizations well beyond the houses of worship. A for-profit subsidiary of a religiously affiliated institution, for example, would be included under this definition because it is "operated in connection with a religious organization." There are clear differences between a house of worship that hosts weddings for its members and a religious organization that owns a commercial wedding hall that is open to the public and operated for profit or to generate revenues for its activities.

Definition of Participation

Further, SB 1324 and HB 2025 both allow these "persons" to refuse to "participate" in the solemnization of a marriage. However, the bills do not define "participate," and it is unclear what that means. Does renting out a commercial wedding hall to a couple constitute "participation?" Similarly, does providing the accompanying catering, security, or custodial services?

Unfortunately, SB 1324 and HB 2025 are ambiguously drafted and may be so broad that they would also allow organizations that engage in commercial activities and operate a place of public accommodation[4] to engage in discrimination on any grounds they can claim is based religious or moral belief. For instance, a commercial wedding hall could turn away a couple because they are same-sex, interracial, interfaith, previously divorced, or of a particular faith. Simply put, it is unfair to allow a person to reap the rewards of a commercial enterprise but then escape generally applicable nondiscrimination requirements with which all other competing entities have to comply.

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[3] SB 1324 and HB 2505 define a "person" any (i) religious organization; (ii) organization supervised or controlled by or operated in connection with a religious organization; (iii) individual employed by a religious organization while acting in the scope of his paid or volunteer employment; (iv) successor, representative, agent, agency, or instrumentality of any of the foregoing; or (v) clergy member or minister.

[4] It is the policy of the Virginia to "safeguard all individuals within the Commonwealth from unlawful discrimination because of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status," Va. Code Ann. § 2.2-3900.

The Bills' Second Provisions Are Unconstitutional and Would Sanction Discrimination

The second part of each bill removes any penalty for a person's "belief speech or action in accordance with a sincerely held religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman." This provision 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.[5] Indeed, it could allow for a taxpayer-funded homeless shelter to deny a place to stay for a same-sex couple or an after-school program to reject a student because her parents are a same-sex couple. In short, these bills could cause real harm to real people in the Commonwealth.

Violation of the Free Speech Clause of the U.S. Constitution

SB 1324 and HB 2025 would violate the Free Speech Clause of the U.S. Constitution because of their 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."[6] In *Reed v. Town of Gilbert,*[7] 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."[8] SB 1324 and HB 2025 fall into the same trap: On their face, the bills treat speech and activities "in accordance with a sincerely held religious belief or moral conviction 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. Speech about marriage is deemed more important to protect than other topics—even other topics informed by one's religious or moral beliefs.

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.'"[9] 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."[10] SB 1324 and HB 2025 do exactly this in two distinct ways. First, the bills favor the view that "marriage is or should be recognized as the union between one man and one woman." An alternative view, even if similarly motivated by religious or moral belief, is not equally protected. If enacted, the Commonwealth of Virginia would be favoring and, in fact protecting, one specific "opinion or perspective of the speaker."

Additionally, these bills favor religious or moral "motivating ideology" over a non-religious one. In *Rosenberger v. Rector and Visitors of University of Virginia,*[11] the U.S. Supreme Court explained that a

[5] One of the central principles of our constitutional order: the government cannot aid discrimination. N*orwood v. Harrison,* 413 U.S. 455, 465-66 (1973).
[6] *Reed v.* Gilbert, 135 S.Ct. 2218 (2015).
[7] *Id.*
[8] *Id.* at 2223.
[9] *Id.* at 2230 (citing *Rosenberger v. Rector* and *Visitors of Univ. of Va*., 515 U.S. 819, 829 (1995).
[10] *Id.* (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983).
[11] 515 U.S. at 2517.

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 viewpoint. Unfortunately, SB 1324 and HB 2025 do just that by allowing a certain religious viewpoint—and not secular viewpoints—to be specifically protected.

Violation of the Establishment Clause of the U.S. Constitution

SB 1324 and HB 2025 would also violate the Establishment Clause of the U.S. Constitution in two ways: the bills create 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. Just last year, when reviewing similar language in Mississippi's HB 1523, the U.S. District Court enjoined the law from taking effect reasoning "the Establishment Clause is violated because persons who hold contrary religious beliefs are unprotected—the State has put its thumb on the scale to favor some religious beliefs over others."[12] It is likely that if Virginia enacts this legislation, the bills would meet the same fate.

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,[13] its ability to provide religious accommodations is not unlimited: "At some point, accommodation may devolve into an unlawful fostering of religion"[14] 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]."[15] In *Estate of Thornton v. Caldor, Inc.,*[16] for example, the Supreme Court struck down a blanket law allowing anyone to designate and take off his or her Sabbath because it "unyieldingly weighted" the religious interest "over all other interests," including the interests of co-workers.

These bills exempt from penalty individuals and religious organizations that hold certain religious beliefs about marriage. This runs afoul of existing nondiscrimination protections,[17] and does not take into account the human harm and suffering caused by discrimination. Under these bills, for example, a government-funded shelter could deny a gay married man a bed and safe space because of a religious objection to his marriage. Thus, exemptions like these, which would result in harm to others, are impermissible under the Establishment Clause.[18]

The Government May Not Give Religious Organizations Discretionary Government Powers

In accordance with these bills, faith-based organizations can 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.

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[12] *Barber v. Bryant*, 193 F. Supp. 3d 677, 688 (S.D. Miss. 2016). Like SB 1324 and HB 2025, Mississippi's HB 1532 provided an exemption to generally applicable laws, including civil rights laws, for those acting in accordance with their "sincerely held religious beliefs or moral convictions."

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

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

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

[16] 472 U.S. 703, 704 (1985).

[17] Va. Exec. Order No. 61 (Jan. 5, 2017), https://governor.virginia.gov/media/8225/eo-61-executive-action-to-ensure-equal-opportunity-and-access-for-all-virginians-in-state-contracting-and-public-services.pdf.

[18] *See, e.g., Barber v. Bryant*, 193 F. Supp. 3d 677, 721 (S.D. Miss. 2016) (explaining that the Mississippi FADA violates "this 'do no harm' principle").

This is not just unfair, but unconstitutional. In *Larkin v. Grendel's Den*,[19] for example, the Supreme Court overturned a law that allowed churches to veto applications for liquor licenses in their neighborhoods. The Court explained that the government cannot delegate to or share with religious institutions "important, discretionary governmental powers".[20] These bills, however, delegate government authority to religious organizations and specifically allow them to use religious criteria to determine who gets and who is denied public services. In the example discussed above, a religiously affiliated shelter, which serves an important public function of protecting victims of domestic violence, would now be subject to a religious test.

Violation of the Equal Protection Clause of the U.S. Constitution

Finally, SB 1324 and HB 2025 would violate the Equal Protection Clause because these bills would authorize "arbitrary discrimination" against people in same sex relationships seeking to marry.[21] The U.S. Supreme Court has explained that "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."[22] 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"[23] and the bill was described as "a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores."[24] 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."[25]

SB 1324 and HB 2025 have the same insufficient justification. A strict reading of the text would lead one to assume the legislature's goal is to offer special protections to those who hold to the religious view that "marriage is or should be recognized as the union of one man and one woman"—and the same problematic effect—to nullify current and future nondiscrimination protections for married LGBT Virginians. SB 1324 and HB 2025 "would demean LGBT citizens [and others], remove their existing legal protections, and more broadly deprive them their right to equal treatment under the law."[26] Indeed, "[t]he deprivation of equal protection of the laws is [SB 1324 and HB 2025's] very essence."[27]

Furthermore, SB 1324 and HB 2025 defy the ruling in *Obergefell v. Hodges.*[28] In that case, Justice Kennedy found "[t]he right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws."[29] Although it is true that such couples may still obtain a marriage licenses under these bills, their marriages would be treated differently and with fewer rights than other couples, even by entities

[19] 459 U.S. 116, 127 (1982).
[20] *Id.*
[21] *Barber v. Bryant*, 193 F. Supp. 3d 677, 688 (S.D. Miss. 2016)
[22] *Romer v. Evans*, 517 U.S. 620, 633 (1996).
[23] *Id.* at 635.
[24] *Id*. at 646 *(Scalia, J., dissenting).*
[25] *Id.* at 635.
[26] *Barber* at 709.
[27] *Id.* at *711.
[28] 135 S. Ct. 2584 (2015).
[29] *Id.* at 2602.

providing state-funded public services. Discriminating against certain marriages, in this case LGBT Virginians' constitutionally protected marriages, in the provision of state-funded social services would violate the Equal Protection Clause.