



January 31, 2016

Mark D. Obenshain  
Chair, Senate Courts of Justice  
Senate of Virginia #327  
Box 396  
Richmond, VA 23218

**Re: SB 40 – A Bill That Would Allow for the Discrimination against any Virginian**

Dear Chair Obenshain:

We write to urge you to oppose SB 40 because it would sanction taxpayer-funded discrimination and could deny Virginians the fundamental right to marry.

If passed, this bill would allow all clerks and deputy clerks in the commonwealth to refuse to issue a marriage license to any couple if the clerk objects to the marriage based on “personal, ethical, moral, or religious grounds.” This would be true even though both the clerks and the deputy clerks are required by the Constitution of Virginia and the Code of Virginia to take an oath to uphold the constitution and laws of the United States and the Commonwealth and to “faithfully and impartially fulfill all the duties incumbent” on them as clerks.<sup>1</sup> This bill purports to authorize the clerks and deputy clerks to violate their constitutionally required oath.

If this legislation is passed and signed into law, clerks would believe that they could refuse to issue marriage licenses because they do not approve of marriage for couples who are interfaith, interracial, same sex, or divorcees. The language of the bill can even be read to allow clerks to deny marriage licenses simply because the clerk does not believe in or want to sanction the couple’s religion, including because they practice the “wrong” brand of Christianity. Indeed, the bill is so broad that it is not limited to religiously-based views, but would allow a clerk to deny marriage licenses based on any “personal” belief, no matter how arbitrary. Government officials—funded with taxpayer dollars—should not be allowed to pick and choose which of their duties they will fulfill or which services they will provide and to whom, especially when the result would be blatant discrimination and the service to be denied involves a fundamental human right.

**Freedom of Religion Does Not Mean Freedom to Discriminate**

Freedom of religion is a fundamental American value. It means that we are all free to believe or not as we see fit, but it does not mean that government employees can use their religion as a justification for denying the rights of others, including the right to obtain a marriage license. Nor does it mean government employees have the right to impose their personal religious beliefs on those whom they

<sup>1</sup> Article II, Section VII of the Constitution of Virginia; Section 16.1-69.17 of the Code of Virginia.

serve. Yet, this bill would allow just that by allowing clerks and deputy clerks to refuse to perform their job of issuing marriage licenses in the name of religion and to violate their oath to perform all of their duties faithfully and impartially.

Allowing government employees to discriminate against Virginians who have a lawful right to marriage is simply unfair. All Virginians should expect their government to treat them equally and fairly, and no one should be denied the services their own tax dollars fund because of a personal whim of a government official. Providing marriage licenses is part of clerks' duties. They should be expected and required to provide licenses to all couples who are eligible to marry.

### **No Law Authorizes or Requires an Accommodation of Religious Beliefs that Burdens Others**

The patron of the legislation asserted in Committee that other laws require the accommodation of employees' beliefs, such as the accommodation of Saturday Sabbath by employers. But, neither Title VII of the Civil Rights Act nor any other state or federal law requires or permits an accommodation of belief that results in discrimination against a customer or other person employed or served by the employer.<sup>2</sup> At most, such laws require an employer to make a "reasonable" accommodation of an employee's beliefs if the accommodation would not impose an "undue hardship" on the employer. In this case, the undue hardship on the Commonwealth and Virginians is twofold. First, the Establishment Clause of the U.S. Constitution precludes the government from providing religious exemptions that come at the expense of innocent third parties, such as those denied marriage licenses.<sup>3</sup> Second that accommodating the clerks' personal beliefs in the manner allowed in this legislation would require the Commonwealth to endorse unlimited discrimination against her people.

### **SB 40 Would Deny Virginians the Fundamental Right to Marry**

The United States Supreme Court has long held that marriage is a fundamental right,<sup>4</sup> and in June of last year, the Supreme Court decided *Obergefell v. Hodges*,<sup>5</sup> holding that the U.S. Constitution protects the right of same-sex couples to marry. As a result, allowing clerks to deny licenses to same sex-couples violates the U.S. Constitution. Indeed, a federal court in Kentucky recently determined that withholding marriage licenses from same-sex couples based on religious objections violates both the First and Fourteenth Amendments.<sup>6</sup> This bill seeks to extend protections to clerks acting not just on sincerely held religious beliefs, but on personal whim. The Commonwealth should not be burdened with, nor be forced to use taxpayer dollars to defend a law in court that so blatantly violates the Constitution, yet passage of this bill would make such litigation likely.

### **Allowing Couples to Get Licenses Elsewhere Does Not Save this Bill**

SB 40 states that if a clerk refuses to provide a license to a couple, they can obtain a license from the State Registrar of Vital Records at the Department of Motor Vehicles. But no mechanism currently exists for the Registrar to issue marriage licenses. Currently, the Registrar is the "curator" that maintains vital

---

<sup>2</sup> *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

<sup>3</sup> *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (striking down a state law that granted employees a statutory right not to work on their Sabbath because the accommodation failed to consider the burdens that would be imposed on the employer or other employees); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (striking down a sales-tax exemption for religious periodicals in part because the burden third parties would experience in raised tax bills).

<sup>4</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.")

<sup>5</sup> 135 S. Ct. 2584 (2015).

<sup>6</sup> *Miller v. Davis*, No. 15-044, slip op. at 27-28 (E.D. Ky. Aug. 12, 2015).

records produced by others, in this case clerks of court. The DMV currently is simply a “portal” to access existing records. This legislation would require an entire new system for issuing marriage licenses to be established, access to which could not be denied other Virginians who simply find DMV offices more accessible than courthouses. Moreover, forcing only certain couples, whose desire to get married offends some clerk or deputy clerk’s beliefs, no matter how idiosyncratic, to go somewhere else does not cure the problem. Instead it would place additional and unfair obstacles in the way of certain couples who seek to marry. And, of course, it fully ignores the dignitary harms caused to the couples being turned away at the clerk’s office. No one should have to “test” their rights against the personal views of a local clerk.

**Conclusion**

The Virginia legislature should not support legislation that sanctions taxpayer-funded discrimination and denies Virginians the fundamental right to marry and the equal protection of the laws. For the reasons discussed, we urge you to oppose SB 40. Thank you for your consideration on this important matter.

Sincerely,

Claire Gastanaga  
Executive Director  
ACLU of Virginia

Amrita Singh  
State Legislative Counsel  
Americans United for Separation of Church and State

Eric M. Wachter  
Associate Regional Director  
Anti-Defamation League

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