February 8, 2016

Senator Frank M. Ruff, Jr.
Chair, Senate Committee on General Laws and Technology
General Assembly Building, Room 431
Capitol Square
Richmond, VA 23219

Re: Oppose HB 2025 – A Bill That Would Allow for the Discrimination against any Virginian

Dear Chair Ruff:

We write to urge you to oppose HB 2025 because it would sanction discrimination against LGBT Virginians—including by government contractors, grantees in performing publically funded services and in places of public accommodation, and 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 describing how every Virginian was free to believe or not as they see fit and no Virginian shall "otherwise suffer on account of his religious opinions or belief." However, this bill would cause suffering because of religious beliefs. Many religious organizations provide human services such as adoption, counseling, healthcare. These services could be denied to Virginians because of the provider's religious beliefs even if those services are funded by taxpayers.

This bill would cause real harm and suffering to real people, would violate the Free Speech and Establishment Clauses of the First and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Any "person"—which may include for-profit corporations and government contractors and grantees—could refuse another Virginian rights, services, and benefits on the basis religious belief.

This bill would allow for discrimination in two distinct but interrelated ways. The first part focuses on the participation in solemnization of marriage while the second, more broadly 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.

The Virginia legislature should not adopt HB 2025. This bill would violate the U.S. Constitution and would result in harm to Virginians. We have attached a full analysis and appreciate your consideration on this important matter.

Sincerely,

Claire Guthrie Gastañaga
Executive Director
American Civil Liberties Union of Virginia

Doron Ezickson
Washington, DC Regional Director
Anti-Defamation League

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

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

cc: Members of the Senate Committee on General Laws and Technology

Participation in Solmization of Marriage Provision Is Ambiguous and Broad

The part of this this bill is designed to allow any "person"[1] to refuse to "participate" in the solemnization of a marriage in violation of the person's religious 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 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 unclear, it undeniably goes well beyond those constitutional protections.

Definition of Person

This legislation defines 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, HB 2025 allows these "persons" to refuse to "participate" in the solemnization of a marriage. However, the bill does 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, HB 2025 is ambiguously drafted and may be so broad that it would also allow organizations that engage in commercial activities and operate a place of public accommodation[2]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, 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.

The Bill's Second Provision Is Unconstitutional and Would Sanction Discrimination

The second part of this 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

[1] HB 2505 defines 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.

[2] 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.

services—to refuse to provide *any service* to same-sex couples and their families.[3] 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 or has a transgender parent. In short, this bill could cause real harm to real people in the Commonwealth.

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

HB 2025 would violate the Free Speech Clause of the U.S. Constitution because it of its 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."[4] In *Reed v. Town of* Gilbert,[5] 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."[6] HB 2025 falls into the same trap: On its face, it treats 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.'"[7] 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."[8] HB 2025 does exactly this in two distinct ways. First it favors 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. The Commonwealth of Virginia would be favoring—in fact protecting—one specific "opinion or perspective of the speaker."

Additionally, this bill favors religious or moral "motivating ideology" over a non-religious one. In *Rosenberger v. Rector and Visitors of University of Virginia,*[9] 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 viewpoint. Unfortunately, HB 2025 does just that by allowing certain religious viewpoints—and not secular viewpoints—to be specifically protected.

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[3] 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).
[4] *Reed v.* Gilbert, 135 S.Ct. 2218 (2015).
[5] *Id.*
[6] *Id.* at 2223.
[7] *Id.* at 2230 (citing *Rosenberger v. Rector* and *Visitors of Univ. of Va*., 515 U.S. 819, 829 (1995).
[8] *Id.* (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983).
[9] 515 U.S. at 2517.

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

HB 2025 would also 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,[10] its ability to provide religious accommodations is not unlimited: "At some point, accommodation may devolve into an unlawful fostering of religion"[11] 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]."[12] In *Estate of Thornton v. Caldor, Inc.*,[13] 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.

This bill exempts from penalty individuals and religious organizations that hold certain religious beliefs about marriage. This runs afoul of existing nondiscrimination protections[14] does not take into account the human harm and suffering. Under this bill, 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.

The Government May Not Give Religious Organizations Discretionary Government Powers

In accordance with this bill, 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. This is not just unfair, but unconstitutional. In *Larkin v. Grendel's Den*,[15] 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 to or share with religious institutions "important, discretionary governmental powers".[16] 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. 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, HB 2025 would also violate the Equal Protection Clause. The U.S. Supreme Court 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."[17] In *Romer v. Evans*, for example, the state of Colorado passed a law to overturn all state and

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[10] Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.
[11] *Corporation of the Presiding Bishop v. Amos,* 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted).
[12] *Cutter v. Wilkinson*, 544 U.S. 709 (2005); *see also Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n. 8 (1989).
[13] 472 U.S. 703, 704 (1985).
[14] 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
[15] 459 U.S. 116, 127 (1982).
[16] *Id*.
[17] *Romer v. Evans*, 517 U.S. 620, 633 (1996).

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"[18] and the bill was described as "a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores."[19] 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."[20]

HB 2025 has 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 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.

Furthermore, HB 1025 defies the ruling in *Obergefell v. Hodges.*[21] 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."[22] 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. 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.

[18] *Id.* at 635.
[19] *Id*. at 646 *(Scalia, J., dissenting).*
[20] *Id.* at 635.
[21] 135 S. Ct. 2584 (2015).
[22] *Id.* at 2602.