February 11, 2019

The Honorable Chris Kennedy
Chair
State, Veterans, & Military Affairs Committee
Colorado House of Representatives
200 E Colfax Avenue
Denver, CO 80203

The Honorable Sonya Jaquez Lewis
Vice Chair
State, Veterans, & Military Affairs Committee
Colorado House of Representatives
200 E Colfax Avenue
Denver, CO 80203

Re: Oppose HB 1140 – This Bill Would Allow for Discrimination Against Any Coloradan

Dear Chair Kennedy and Vice Chair Jaquez Lewis:

On behalf of the Colorado chapter, members, and supporters of Americans United for Separation of Church and State, I write to urge you to oppose HB 1140, which would have staggering consequences and violate the United States Constitution.

Freedom of religion is a fundamental American value. It means that we are all free to believe or not as we see fit. It is not a justification for denying rights to others. This bill does not protect religious freedom; instead, it sanctions discrimination. HB 1140 would allow state employees, corporations, individuals, healthcare providers, and nonprofit organizations to use religion as a justification to discriminate against nearly everyone—including same sex couples, single mothers, divorcees, and anyone who has had sex outside of marriage. In short, it would cause real harm to real people. It also violates the Free Speech and Establishment Clauses of the First Amendment and violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

This Bill Would Cause Real Harm to Real People

This bill would allow government employees and government-funded organizations to discriminate against Coloradans, including refusing to provide them taxpayer-funded services. Government officials and organizations that are funded by taxpayer dollars should not be allowed to pick and choose which of their duties they want to fulfill or which services they will provide and to whom. Government services should be provided to everyone, free of discrimination. This bill would also allow individuals, corporations, healthcare providers, and nonprofit organizations to discriminate.
These are just a few examples of the types of discrimination that HB 1140 could sanction:

- a government clerk could refuse to issue marriage licenses and a judge could refuse to solemnize weddings—with no repercussions—if they have religious objections to a couple’s marriage;
- a taxpayer-funded adoption agency could refuse to place a child with a happy and loving family because the parents lived together before they were married;
- a taxpayer-funded organization that provides shelter to kids who have suffered child abuse could turn away a pregnant teenager;
- a doctor could refuse to see a mother and her teen who is experiencing severe depression because the woman is unmarried; and
- a counselor could refuse to help a gay teenager who called a suicide hotline.

**HB 1140 Would Violate the Establishment and Free Exercise Clauses of the U.S. Constitution**

The religious exemption in HB 1140 violates the religion clauses of the First Amendment in two ways: it creates a religious exemption that causes 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. In a case involving a similar Mississippi law, a U.S. District Court held that “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.”1 Although that case was later reversed on standing (not the merits), it is likely that if Colorado enacts this legislation, it would similarly be found unconstitutional.

**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,2 its ability to provide religious accommodations is not unlimited: “At some point, accommodation may devolve into an unlawful fostering of religion”3 that violates the Establishment Clause of the 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].”4 In *Estate of Thornton v. Caldor, Inc.*,5 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.

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1 *Barber v. Bryant*, 193 F. Supp. 3d 677, 688 (S.D. Miss. 2016), rev’d on other grounds. Like HB 1140, 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.”
2 Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.
This bill privileges individuals and religious organizations that hold certain religious beliefs about marriage and gender. And it does not take into account the human harm and suffering caused by discrimination. Under this bill, for example, a government-funded foster care agency could refuse to place a child with her aunt because the aunt is married to someone of the same sex. This would not just harm the human dignity of the parents but would allow the agency to put its religious beliefs over the best interest of the child. Because exemptions like these would result in harm to others, they are impermissible under the Establishment Clause.6

The Government May Not Give Religious Organizations Discretionary Government Powers
This bill would allow faith-based organizations to take state, local, and federal funds to provide services to the public and then use their own religious test to determine whom they will and will not serve. This is not just unfair, but unconstitutional. In Larkin v. Grendel’s Den,7 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.”8 HB 1140, 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. For example, a religiously affiliated shelter, which serves an important public function of protecting victims of domestic violence, would now be subject to a religious test.

**HB 1140 Violates the Free Speech Clause of the First Amendment**
This bill would violate the Free Speech Clause of the U.S. Constitution because 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.”9 In Reed v. Town of Gilbert,10 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 if it does not target viewpoints within that subject matter” is “a paradigmatic example of content-based discrimination.”11 HB 1140 falls into the same trap. On its face, it treats speech and activities about marriage and gender identity more favorably than all other speech on other subject matters. Speech about marriage and gender is deemed more important to protect than other topics—even other topics informed by one’s religious or moral beliefs.

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6 See, e.g., Barber, 193 F. Supp. at 721 (explaining that the Mississippi FADA violates “this ‘do no harm’ principle”).
8 Id.
10 Id.
11 Id. at 2223.
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.’”\textsuperscript{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.”\textsuperscript{13} HB 1140 does exactly this in two distinct ways. First it favors views “regarding the sex of the two individuals who may enter into a marriage” and views that “the term male (man) and female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at the time of birth.” Alternative views, even if similarly motivated by religious or moral belief, are not equally protected. The State of Colorado would be favoring—in fact privileging and protecting—one specific “opinion or perspective of the speaker” on these two matters.

Additionally, this bill favors religious or moral “motivating ideology” over a non-religious one. In Rosenberger \textit{v. Rector and Visitors of University of Virginia},\textsuperscript{14} 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.” Similarly, the state may not disfavor non-religious viewpoints. Unfortunately, HB 1140 does just that by allowing certain religious viewpoints—and not secular viewpoints—to be specifically protected.

\textbf{HB 1140 Violates the Equal Protection Clause of the U.S. Constitution}

HB 1140 would also violate the Equal Protection Clause of the Fourteenth Amendment because it would authorize “arbitrary discrimination against lesbian, gay, transgender, and unmarried persons.”\textsuperscript{15} 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.”\textsuperscript{16} In \textit{Romer v. Evans}, for example, 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”\textsuperscript{17} and the bill was described as “a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores.”\textsuperscript{18} 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.”\textsuperscript{19}

\begin{footnotesize}
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  \item \textsuperscript{12} Id. at 2230 (citing Rosenberger \textit{v. Rector and Visitors of Univ. of Va.}, 515 U.S. 819, 829 (1995)).
  \item \textsuperscript{13} Id. (citing \textit{Perry Ed. Assn. v. Perry Local Educators’ Assn.}, 460 U.S. 37, 46 (1983)).
  \item \textsuperscript{14} 515 U.S. at 2517.
  \item \textsuperscript{15} \textit{Barber v. Bryant}, 193 F. Supp. 3d 677, 688 (S.D. Miss. 2016), rev’d on other grounds.
  \item \textsuperscript{17} Id. at 635.
  \item \textsuperscript{18} Id. at 646 (Scalia, J., dissenting).
  \item \textsuperscript{19} Id. at 635.
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These constitutional principles were applied to an almost identical piece of legislation in *Barber v. Bryant*²⁰ in Mississippi. In issuing a preliminary injunction against the measure, the Court found that legislation established “a broad-based system by which LGBT persons . . . can be subjected to differential treatment based solely on their status. This type of differential treatment is the hallmark of what is prohibited by the Fourteenth Amendment.”²¹ The Court rejected Mississippi’s rationale for its bill—the need to protect religious freedom—as “implausible.”²²

Likewise, HB 1140 “would demean LGBT citizens [and others], remove their existing legal protections, and more broadly deprive them their right to equal treatment under the law.”²³ Indeed, “[t]he deprivation of equal protection of the laws is [HB 1140’s] very essence.”²⁴ And, on its face, it is clear that the bill’s goal is to offer special protections to those who hold preferred religious views on marriage and gender “at the expense of LGBT . . . citizens.”²⁵

Furthermore, HB 1140 defies the ruling in *Obergefell v. Hodges.*²⁶ 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.”²⁷ 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 Coloradans’ constitutionally protected marriages, in the provision of state-funded social services would violate the Equal Protection Clause.

This offensive legislation would violate the U.S. Constitution and would provide a license to discriminate against LGBT Coloradans. We therefore urge you to reject HB 1140. Thank you for your consideration on this important matter.

Sincerely,

Nikolas Nartowicz
State Policy Counsel

cc: Members of the House State, Veterans, & Military Affairs Committee

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²⁰ 193 F. Supp. at 688.
²¹ Id. at 699
²² Id. at 700
²³ Id. at 709.
²⁴ Id. at 711.
²⁵ Id. at 700.
²⁷ Id. at 2602.