March 29, 2016

The Hon. Terry McAuliffe
Common Ground for Virginia
P.O. Box 1475
Richmond, VA 23218

Senate Bill 41: Why POFEV Urges Your Veto

Dear Governor McAuliffe:

You have received a separate letter, signed by more than forty members of the clergy on behalf of People of Faith for Equality in Virginia (POFEV), urging you to veto Senate Bill 41. SB 41 would authorize individuals and businesses to discriminate against same-sex couples who are married or who seek to be married. The following memo explains in more detail the legal and moral reasons why POFEV believes your veto of SB 41 is so important.

SB 41 attempts to solve a problem that does not exist. Clergy, individuals, and religious organizations in Virginia do not need any additional legislation to protect them from civil or criminal penalties if clergy elect not to marry a couple or congregations choose not to host a wedding for any couple who they do not believe is ready to marry or who does not meet their faith's requirements for marriage. There has been no legislation introduced in Virginia that would attempt to require otherwise, nor in light of the success of SB 41 itself does any such legislation seem remotely likely. Moreover, if such legislation were introduced and passed, protections from any such requirements are well-established in First Amendment law.[1]

The real purpose of SB 41 is not to protect clergy, individuals, and religious institutions from coercive state power. The real purpose is to single out and stigmatize lesbian and gay Virginians as deserving a lesser status in the Commonwealth and to formally authorize private discrimination against them.

SB 41 reaches well beyond affirming in statute a clergy member's or religious organization's right to refuse to solemnize a marriage. SB 41 would trump current laws granting certain rights to legally married couples and future laws banning discrimination on the basis of sexual orientation. Its broad grant of an exemption from compliance with other laws to "religious

organizations" and associated individuals would grant any group or business engaging in public commerce and claiming it has a religious basis for its work or operates on religious principles the right to discriminate against same-sex couples and their families in any context so long as the discrimination is rooted in the "religious belief or moral conviction" that same-sex marriages should not be recognized.

The effects on gay and lesbian couples and their families would be extensive and devastating to them and to the interests of the Commonwealth. A hospital affiliated with a religious group would have the right to refuse to recognize the authority of a legally married spouse or an adoptive parent to determine care for an incapacitated partner or child. Regardless of future state anti-discrimination laws, a business operated on religious principles could terminate the employment of an employee legally married to someone of the same sex. The same business would have a statutory right to refuse service to a legally married couple or a couple whom the owner perceives to be married. A restaurant owner would have the right to refuse a family table service. The owner of a hotel could refuse a family a room.

State and Federal Law Have Evolved Layers of Legal Protection for Religious Practice

Clergy, religious persons, and religious institutions already have multiple layers of legislation and court decisions protecting them in their beliefs and practices. Passage of the Virginia Statute for Religious Freedom[2] in 1786 gave clergy and individual believers the freedom to maintain their religious opinions and beliefs without fear that the state would retaliate by depriving them of the civil and political rights given to all other citizens and residents of the Commonwealth.

In 1940, protections for religious practice were expressly recognized when the U.S. Supreme Court in *Cantwell v. Connecticut* held that the Free Exercise Clause of the First Amendment to the U.S. Constitution allowed religious adherents to challenge state laws that interfered with religious practice.[3] Over the next several decades, the Supreme Court wrestled with the proper standard for the courts to use in determining whether a federal or state law unconstitutionally interfered with the free exercise of religion. However, over time the Court evolved a balancing test that required the government to show that it had a "compelling interest" in any law that "substantially burdened" an individual's religious practices and to show that the law was narrowly tailored to meet the government's objective.[4]

When the court substantially narrowed the circumstances in which this balancing test was applied in *Smith v. Employment Division*,[5] Congress in 1993 responded by passing the Religious Freedom Restoration Act (RFRA).[6] RFRA was widely supported by a broad coalition of more than sixty diverse groups from across a wide ideological and theological spectrum to restore the protections for religious liberty that the Court previously had found in the U.S. Constitution.[7]

RFRA provided even greater protections for religious adherents than the previous court standard had. It also expressly applied to both the Federal government and the states. RFRA incorporated the Court's earlier standard articulated in its *Sherbert* and *Yoder* decisions that the government must demonstrate a "compelling interest" in the subject matter of a regulation affecting religious practice, whether or not that regulation was targeted at religious adherents.[8] However, RFRA went further in protecting religious practice by also requiring that the government show that the law enacted was the "least restrictive means" of accomplishing the legislative goal, not just that the law was narrowly tailored to meet the goal as the *Sherbert* and *Yoder* courts had required.[9]

When several years later the Court determined that Congress had exceeded its Constitutional authority in applying RFRA to the states, Virginia joined other states in filling this void in the protections of religious liberties. In 2007 Virginia enacted its own version of RFRA (Va. Code § 57-2.02) containing the same test as the Federal RFRA statute for determining whether religious practice was improperly being impeded by a government statute or regulation:

> No government entity shall substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability unless it demonstrates that application of the burden to the person is (i) essential to further a compelling governmental interest and (ii) the least restrictive means of furthering that compelling governmental interest.[10]

Any believers or organizations whose religious belief or practice is impinged by state law can assert Virginia's RFRA as a claim or defense in judicial or administrative proceedings to avoid application of the offending law and can obtain court costs and attorney's fees if they prevail.[11]

Virginia's RFRA Provides Better Protection for Religious Liberties

While POFEV as an organization and each of us as individuals jealously guard religious liberties and cherish the absolute legal right to our religious beliefs, we recognize that we live in a diverse society in which religious practice may come into conflict with compelling interests of the state and other community interests. We also recognize that there are circumstances in which the state has a compelling interest in legislating in an area despite the effect on religious practice. The approach in Virginia's existing RFRA law in which a court determines whether the state has shown it has used the least restrictive means to address a compelling interest provides a much more appropriate means for resolving this conflict between religious practice and the state's interests than would the free pass for believers to disobey other laws proposed by SB 41.

The difference in the two approaches and in the results they are able to produce is stark. For example, under Va. Code § 54.1-2986, individuals have the right to direct medical care of an incapacitated spouse where the spouse has not executed an advanced medical directive. If a doctor working at a religious hospital or operating a practice expressly under religious principles were to refuse to proceed to treat an incapacitated patient as directed by the patient's spouse of

the same sex on the basis that the doctor had a religious belief that marriage should be only between a man and a woman and therefore the doctor did not have to recognize the spouse's legal authority, the spouse would have the right to bring a claim in the courts enforcing the spouse's rights to direct the patient's medical care. Under Virginia's current RFRA law, the doctor or hospital could raise a defense that the doctor's or hospital's religious practice would be substantially impaired were the doctor or hospital forced to follow the directives given by the same-sex spouse. The court would have three principal determinations to make: (1) was the doctor's religious practice substantially burdened by the law, and if so, (2) did the state show it had a compelling interest in enacting the spousal medical directive law, and (3) was the legislation as enacted the least restrictive way possible of enforcing the state's interest. In doing so, the court would be giving substantial weight to the requirements of religious practice, but would be balancing this against the interests of the state in granting to a legally married individual to authority to determine medical care for an incapacitated spouse.

However, under SB 41, the religious adherent, not the court, in effect would be the final arbiter of whether the refusal to comply with an otherwise valid law. SB 41 would provide a clergyperson, religious organization, or affiliate, employee, or volunteer of a religious organization an absolute right to ignore or refuse to comply with any law so long as the organizations or persons invoking it can show they acted "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."[12] As a result, when the doctor or hospital refused to comply with the medical directives provided by a same-sex spouse, the case would proceed quite differently under the proposed SB 41. Under SB 41, the court would not be able to consider the state's interest in providing that individuals should be able to provide care directives to medical personnel for incapacitated spouses, no matter how compelling the need. Because SB 41 would provide an absolute defense, the case likely would be determined on a summary judgment motion in favor of the doctor or hospital unless there was a basis for challenging whether the doctor's or hospital's beliefs regarding marriage were not "sincerely held."

Similarly, were the state to pass legislation prohibiting discrimination on the basis of sexual orientation, an individual fired from employment at a religious hospital or a business run expressly on religious principles because the individual was married to someone of the same sex would be able to bring an anti-discrimination claim in the courts. Under current law, the religious hospital could raise a defense under Virginia's RFRA, Va. Code § 57-2.02, that its religious practice would be substantially impaired were it forced to retain the employee. Considering the particular facts of the case, the court again would have three principal determinations to make: (1) was the hospital's or business's religious practice substantially burdened by employing someone married to someone of the same sex, and if so, (2) did the state have a compelling interest in enacting anti-discrimination legislation protecting the employee, and (3) was the legislation as enacted the least restrictive way possible of enforcing the state's interest. However, were SB 41 in force, the hospital or business would have an absolute defense:

its belief that marriage only should be between persons of different sexes. The only inquiry available to the Court would be whether the defendant indeed had a "sincerely held" belief. The issue of the state's interest in legislating against discrimination and the means by which it enforced that goal could never be considered by the court.

Courts Should Balance Competing Religious and Governmental Interests

It is not hard to imagine amidst massive resistance in Virginia sixty years ago the impact a religious conscience clause similar to SB 41 but regarding race would have had on Virginia's progress on race relations and on opening the privileges of full citizenship and of greater economic opportunity to African Americans and other minorities. Just as religious groups now seek license to discriminate against same-sex couples, institutions in Virginia and across the South made similar claims that their religion forbade them from integrating or otherwise allowing "race-mixing."

Indeed, one of the most important Free Exercise Clause cases arose from a dispute between the Internal Revenue Service and Bob Jones University in South Carolina over the IRS's decision to terminate the university's tax-exempt status because of its expressly racist policies and the university's claim that the IRS decision impinged upon its religious free exercise rights under the First Amendment. In 1983, sixteen years after the Court's decision in *Loving v. Virginia* struck down the nation's miscegenation laws, the U.S. Supreme Court found that the university, which refused to admit any student married to someone of another race, "genuinely believe[d] that the Bible forbids interracial dating and marriage."[13] However, the Court held, due to the long-standing discrimination in education under official sanction, the government's interest in eradicating racial discrimination was so compelling that it "substantially outweigh[ed] whatever burden" loss of tax benefits placed on the university's religious practice and that no less restrictive means of achieving the governmental objective was available.[14] The University was free to continue its racist admissions policy as an expression of its religious belief, but in view of the strong Federal interest affirmed by Congress in ending racial discrimination it could not do so fueled by the benefits of its tax exempt status.

This result in *Bob Jones University v. United States* was without question the right one. However, had the university had an absolute right of religious conscience to ignore the rule of law without legal consequence due to its beliefs that interracial marriage was wrong – such as SB 41 would provide regarding same-sex marriage – the court would not have been allowed to weigh the competing governmental interest of ending official support for racial discrimination in education, and the same result never would have been reached.

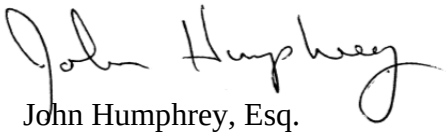
In no other area of law does the Commonwealth allow individuals to determine whether they may refuse to comply with a law without legal consequence, and Virginia does so for good reason. We live in a society in which the rights of individuals and organizations naturally come into conflict with one another, and we need common, neutral institutions to resolve these

conflicts in a peaceful, orderly manner. SB 41 would have the practical effect of eliminating the authority of the courts to resolve such conflicts and making adherents of a particular religious tenet the judge and jury over their own actions with respect to matters relating to legal recognition of marriage and to discrimination against same-sex couples. If signed into law, SB 41 would set a dangerous precedent of creating special classes of religious beliefs in state law that trump other legal rights and responsibilities without review and would amount to an impermissible establishment of religion.

No business or organization offering services to the public should be given absolute license to discriminate on the basis of those individuals' sexual orientation any more than it should be given license to discriminate on the basis of race, ethnicity, disability, sex or gender. With the strong layers of Virginia and Federal legal protection for religious belief and practice already in place, granting such a license is not needed to preserve any organization's or individual's religious liberty in Virginia. It only would serve to deprive the victims of the discrimination that would result of their rights and their dignity.

Please veto Senate Bill 41.

Sincerely,



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[1] *Obergefell v. Hodges*, 576 U.S. ___ (2015), Case No. 14-566, at 27.
[2] Virginia Statute for Religious Freedom , Va. Code § 57-1
[3] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).
[4] See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 402-403 (1963), *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).
[5] *Employment Division v. Smith*, 494 U.S. 872, 882 (1990).
[6] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993 (codified at 42 U.S. § 2000bb *et seq*).
[7] J. Brent Walker, *Remembering the Origins of RFRA* (Baptist Joint Committee for Religious Liberty, October 28, 2013) (http://bjconline.org/remembering-the-origins-of-rfra/).
[8] 42 U.S. § 2000bb-1(b).
[9] *Sherbert v. Verner*, 374 U.S. 398, 402-403 (1963), *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972).
[10] Va. Code § 57-2.02(B).

[11] Va. Code § 57-2.02(D).
[12] Virginia Senate Bill 41 (2016) (An Act to amend the Code of Virginia by adding a section numbered 57-2.03, relating to religious freedom; marriage solemnization, participation, and beliefs).
[13] *Bob Jones Univ. v. United States*, 461 U.S. 574, 580 (1983).
[14] *Id.* at 604.