ACLJ
American Center
for Law & Justice

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[redacted]

Re: Proposed Regulation 22 VAC 40-131-170(B)

To Whom it May Concern,

The American Center for Law and Justice (ACLJ) strongly opposes 22 VAC 40-131-170(B), a proposed regulation that would force faith-based adoption placement agencies to either violate the tenets of their faith or forfeit their licenses. By way of introduction, the ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion. *See, e.g.*, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987).

The proposed regulation would jeopardize the best interests of children in pursuit of a political agenda by forcing religiously affiliated adoption agencies to close their doors or compromise their standards and principles. The regulation is entirely unnecessary, as married couples or individuals desiring to adopt a child have ample opportunity to do so without any need to trample upon the religious freedom of faith-based adoption agencies.

The Proposed Regulation Is Unwise and Unnecessary

Proposed regulation 22 VAC 40-131-170(B), which would apply to adoption placement agencies, states, "The licensee shall prohibit acts of discrimination based on race, color, gender, national origin, age, religion, political beliefs, sexual orientation, disability, or family status to:

[redacted]

1. Delay or deny a child's placement; or
2. Deny an individual the opportunity to apply to become a foster or adoptive parent."

22 VAC 40-131-170(B), 27:11 VA.R. 1219 (Jan. 31, 2011).

While the stated purpose of the regulation is to "ensure that activities, services, and facilities provided by [licensed private child-placing agencies] are conducive to the welfare of the children under their custody or control," 27:11 VA.R. 1203 (Jan. 31, 2011), it would be counterproductive by harming the best interests of children. The inclusion of religion, sexual orientation, and family status as protected classes in the proposed regulation would have a devastating impact upon faith-based adoption agencies that operate in accordance with the principles of a particular religion or denomination by forcing them to accept prospective adoptive or foster parents whose lifestyles or religious worldviews conflict with the agency's religious principles.

The proposed regulation would drive some faith-based agencies out of the market, thus limiting services rather than expanding them. In addition, it would virtually eliminate the ability of a biological parent to ensure that his or her child will be adopted by a family that shares the same religious worldview.

Many faith-based adoption agencies operate in accordance with their sincerely-held religious belief that marriage is the union of one man and one woman, and the related belief that the optimal environment for children to learn and grow is in a home led by a married couple. These principles are fully consistent with the Constitution of Virginia, which states that "only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions." Va. Const. Art. I, § 15-A.

Furthermore, Virginia law recognizes the difference between a married couple and an unmarried cohabiting couple in terms of fitness for adoption, stating, "[i]n determining the appropriate home in which to place a child for adoption, a married couple or an unmarried individual shall be eligible to receive placement of a child for purposes of adoption." Va. Code Ann. § 63.2-1225(A). As such, a faith-based agency's religious objection to handling adoption placements for unmarried cohabiting couples (whether opposite-sex or same sex) is fully consistent with Virginia law. The proposed regulation would contradict the important public policy expressed by the Virginia Constitution and the General Assembly elevating marriage between one man and one woman as the ideal family structure for raising children.

It is clear that, in general, children who live in a home led by a married man and woman are better off than children who do not. For example, children who grow up without a father have higher rates of poverty, illness or injury, incarceration, pregnancy, drug or alcohol abuse, and dropping out of high school than children who grow up with a father. National Fatherhood Initiative, *The Father Factor*, http://www.fatherhood.org/Page.aspx?pid=403. In addition, there is a disturbing relationship between children raised in a home led by an unmarried cohabiting couple and physical or sexual abuse. *See, e.g.*, Associated Press, *Children at higher risk in*

nontraditional homes; Abusive-boyfriend syndrome part of broader trend, experts worry, Nov. 18, 2007, http://www.msnbc.msn.com/id/21838575/ns/health-kids_and_parenting/. As such, the proposed regulation harms the best interests of children by penalizing faith-based organizations that promote the raising of children in homes led by a married couple.

The regulation is also unnecessary because a married couple or individual whose lifestyle or worldview is inconsistent with the tenets of a particular adoption agency has numerous other options available to them. A directory of licensed child-placing agencies recently prepared by the Department of Social Services lists over 75 different agencies licensed for adoption, foster care, and/or independent living services in Virginia. Virginia Dep't of Social Servs., Div. of Licensing Programs, *Directory of Licensed Child-Placing Agencies*, Jan. 2011, http://www.dss.virginia.gov/pub/pdf/childplacedir.pdf. The large number of existing agencies ensures that any prospective adoptive parent will be able to find an agency suitable to his or her needs.

The Proposed Regulation Is Invalid

Protection for "sexual orientation" status is conspicuously absent from the Virginia Code, despite various efforts to enact legislation that would add "sexual orientation" as a protected class. The proposed regulation is just the latest of many *ultra vires* attempts to add "sexual orientation" as a protected status in Virginia law without legislative approval.

In 2006, Governor McDonnell, then acting as Attorney General of Virginia, concluded that an executive order changing the Commonwealth's nondiscrimination policy to include "sexual orientation" as a protected class was unconstitutional. His opinion stated, "the addition of sexual orientation as a protected employment class within state government was intended to, and in fact did, alter the public policy of the Commonwealth. . . . *[C]hanging the public policy of the Commonwealth is within the purview of the General Assembly; therefore, that portion of Executive Order No. 1 is beyond the scope of executive authority and, therefore, unconstitutional.*" Va. A.G. Op. No. 05-094, 2006 Va. AG LEXIS 12 (Feb. 24, 2006) (emphasis added).

Previous Attorney General opinions had similarly concluded that the addition of "sexual orientation" status as a protected class in Virginia would require the approval of the General Assembly. *See, e.g.*, Va. A.G. Op. No. 02-089, 2002 Va. AG LEXIS 79 (Nov. 8, 2002) ("[W]ithout enabling legislation, the Fairfax County School Board has no authority to include sexual orientation in its nondiscrimination policy."); Va. A.G. Op. No. 02-029, 2002 Va. AG LEXIS 64 (Apr. 30, 2002) (concluding that enabling legislation is required to allow "(1) Fairfax County to prohibit discrimination due to sexual orientation or (2) the Fairfax County Human Rights Commission to investigate cases involving alleged discrimination based on sexual orientation"). As such, the proposed regulation unconstitutionally attempts to legislate public policy through executive regulation.

In addition, the creation of "sexual orientation" as a protected status in the proposed regulation raises a host of policy questions within the purview of the General Assembly, not an

executive agency. The term "sexual orientation" is not defined in the regulation. Is it intended to only refer to whether an individual is attracted to males, females, or both, or is there some connection to the individual's conduct? Would a faith-based adoption agency discriminate on the basis of "sexual orientation" by declining to place a child with a single individual who has a lifestyle of numerous sexual partners? Would it be "sexual orientation" discrimination to decline to place a child with a non-monogamous couple that believes in "open" relationships with other sexual partners? This kind of dangerous Pandora's Box ought not to be opened, and only the General Assembly has the authority to consider such drastic changes to Virginia law.

The Proposed Regulation Violates Religious Freedom

The proposed regulation's disregard for faith-based adoption agencies squarely conflicts with the Commonwealth's longstanding, venerable tradition of providing robust protection for the free exercise of religion. Article I, Section 16 of the Constitution of Virginia declares, in part, that "religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience." Va. Const. Art. I, § 16. This language first appeared in the Virginia Declaration of Rights, a highly influential document that influenced Thomas Jefferson and James Madison when they drafted the Declaration of Independence and the Bill of Rights, respectively. Virginia Declaration of Rights, http://www.loc.gov/rr/program/bib/ourdocs/mason.html.

In addition, the Virginia Act for Religious Freedom, drafted by Thomas Jefferson, has been part of the Virginia Code for over two centuries. It declares that free exercise of religion is among "the natural rights of mankind; and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right." Va. Code. Ann. § 57-1 (enacted Jan. 16, 1786). Jefferson viewed this statute as one of his greatest accomplishments, and his tombstone reads, "Here was buried Thomas Jefferson, author of the Declaration of American Independence, of the Statute of Virginia for Religious Freedom, and father of the University of Virginia." *Brief Biography of Thomas Jefferson*, http://www.monticello.org/site/jefferson/brief-biography-thomas-jefferson. In 1986, the 200th anniversary of the Virginia Act for Religious Freedom, the General Assembly reaffirmed the importance of religious freedom by declaring the second week of January to be Religious Freedom Week in the Commonwealth, and by designating the 16th of January as Religious Freedom Day. Va. Code Ann. § 57-2.01.

In addition, Virginia's Religious Freedom Restoration Act protects the free exercise of religion by declaring that "[n]o 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." Va. Code Ann. § 57-2.02(B). To "substantially burden" one's religious exercise means "to inhibit or curtail religiously motivated practice." Va. Code Ann. § 57-2.02(A).

Imposing the proposed regulation upon faith-based adoption placement agencies violates the principles cited above. The regulation would substantially burden the religious exercise of faith-based agencies by curtailing religiously motivated practice, namely, providing adoption services in accordance with the tenets of their faith. The government could not demonstrate that imposing the regulation is essential to further a compelling interest, nor could it prove that the regulation is the least restrictive means of furthering such an interest. The rights and interests of children, prospective adoptive parents, and adoption agencies are furthered and protected by existing law, and the proposed regulation does not enhance the well-being of children.

Conclusion

The ACLJ supports the invaluable work of faith-based adoption agencies, and strongly urges the rejection of 22 VAC 40-131-170(B). The proposed regulation would further a political agenda at the expense of Virginia's children and faith-based adoption agencies. It is bad law and bad policy.

Sincerely,

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