VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In re: AJAIB SINGH	)	CM-2012-483
In re: GURMINDER SINGH BATTHI	)	CM-2012-490
In re: JAGTAR SINGH DHANOA	)	CM-2012-304
In re: BALBIR SINGH	)	CM-2012-305

BRIEF OF PEITITONERS

Petitioners Gurminder Singh Bhatti, Ajaib Singh, Balbir Singh and Jagtar Singh Dhanoa, by counsel, submit this brief requesting the Court to find certain requirements of Virginia Code §§ 20-23, 20-25 and 20-26 unconstitutional, and to grant each petitioner the authority to perform marriages without submission of the bond required by those statutes.

BACKGROUND

Under Virginia law, any ordained minister who can show that he "is serving as a regularly appointed pastor in his denomination" and is "in regular communion with" his congregation may be granted the authority to perform marriages by the circuit court. Va. Code § 20-23. Religious organizations that do not have ordained ministers may designate a person to be "responsible for completing the certification of marriage in the same manner as a minister or other person authorized to perform marriages." However, only one such person may be appointed, and a $500 bond, with surety, is required. Va. Code § 20-26. Additionally, upon petition and payment of clerk's fees, a circuit judge may appoint any other person to perform marriages within the circuit. A $500 bond is required for such a lay appointment, with or without surety, as the Court directs. Va. Code § 20-25.

The petitioners are members of the Sikh religion, which does not have ministers or other clergy. Instead, any person, such as the petitioners, who is able to read and understand Sikh scriptures is considered competent to perform marriages. Ajaib Singh and Gurminder Signh Bhatti are members of the Sikh Foundation of Virginia, and petitioners Jagtar Singh Dhanda are members of Singh Sabha Gurdwara. Each of them seeks an order from this Court authorizing them to perform marriages.

ARGUMENT

Virginia Code §§ 20-23, 20-25 and 20-26 (collectively, "the statutes") are unconstitutional because they explicitly discriminate based on religion. That is, they impose different requirements for attaining authority to perform marriage depending on whether an applicant is a representative of a religious organization, and on the type of religious organization to which the applicant belongs. These distinctions are unconstitutional, whether they are analyzed under the Equal Protection Clause of the Fourteenth Amendment, the Free Exercise Clause or Establishment Clause of the First Amendment, or Article I, §§ 11 and 16 of the Constitution of Virginia.[1]

I. THE STATE AND FEDERAL CONSTITUTIONS DEMAND STRICT SCRUTINY OF STATUTES THAT MAKE DISTINCTIONS BASED ON RELIGION.

A. Establishment Clause of the First Amendment and Article I, § 16 of the Constitution of Virginia.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). "'This prohibition is absolute.'" *Id.* at 246 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104

[1] In *Cramer v. Commonwealth*, 214 Va. 561, 564 (1974), the Supreme Court of Virginia determined that § 20-23 does not amount to a "religious test as a prerequisite to appointing ministers to perform marriages in Virginia." However, the court did not (and apparently was not asked to) consider whether the statute was unconstitutional under the specific constitutional provisions cited above.

(1968) (emphasis added). In *Larson*, the U.S. Supreme Court invalidated a statute that subjected religious organizations that received more than half of their contributions from nonmembers to certain registration and reporting requirements for soliciting funds, while religious organizations that received the majority of their funds from members were exempt. 456 U.S at 231-32. Although the statute did not single out particular religions by name, the Court found that the fifty percent rule "ma[de] explicit and deliberate distinctions between different religious organizations" because it "effectively distinguishe[d] between well-established churches that have achieved strong but not total financial support from their members, on the one hand, and churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members, on the other hand." *Id.* at 246 n.23 (citation and internal quotation marks omitted.) Therefore, the Court held, "that rule must be invalidated unless it is justified by a compelling governmental interest, and unless it is closely fitted to further that interest." *Id.* at 247 (citations omitted).

The statutes at issue here also draw "explicit and deliberate distinctions between different religious organizations." Under § 20-23, any number of ordained clergy from a single religious organization may be authorized to perform marriages, while only one person from a religious organization that does not have ordained clergy may be authorized under §20-26. Moreover, representatives of religions that do not have ministers must post a $500 bond, while ordained ministers do not. Because the statutes make these explicit religious distinctions, the Establishment Clause requires them to be examined under strict scrutiny.[2]

[2] Article I, § 16 of the Virginia Constitution is a "parallel provision to the Establishment Clause," and the Virginia Supreme Court has "always been informed by the United States Supreme Court Establishment Clause jurisprudence in [its] construction of Article I, § 16." *Virginia College Bldg. Auth. v. Lynn*, 260 Va. 608, 626 (2000). Thus, the Court should also apply strict scrutiny in evaluating the statutes under this state constitutional provision.

B. Free Exercise Clause of the First Amendment

The U.S. Supreme Court explained in *Larson* that "[T]he constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause." 456 U.S. at 245. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs . . . ." *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 532 (1993). Like the Establishment Clause, the Free Exercise Clause therefore requires that laws that are not religiously neutral "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531-32. As explained above, the statutes challenged here are not neutral because they draw explicit religious distinctions. Strict scrutiny therefore must be applied under the Free Exercise Clause.

C. Equal Protection Clause of the Fourteenth Amendment and Article I, § 11 of the Virginia Constitution.

Under the Equal Protection Clause, when a law discriminates based on a "suspect classification," the state must "demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." *Plyler v. Doe*, 457 U.S. 202, 217 (1982). Religion is such a classification. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Mahan v. National Conservative Political Action Committee*, 227 Va. 330, 336 (1984). The Virginia Constitution also expressly protects ". . . the right to be free from any governmental discrimination upon the basis of religious conviction . . ." Art I, § 11. Accordingly, these constitutional provisions also require strict scrutiny of any legislation, such as the statutes relating to authorization to perform marriage, that discriminate on the basis of religion.

II. THE STATUTES CANNOT SURVIVE STRICT SCRUTINTY.

The relevant government interest is "in the contract between the parties who marry, and in the proper memorializing of the entry into, and execution of, such a contract." *Cramer v. Commonwealth,* 214 Va. 561, 565 (1974). Regardless of whether this interest can be considered "compelling," the challenged statutes are not narrowly tailored to serve that interest.

A. Bond Requirement

In *Cramer*, the Supreme Court of Virginia described the reason for the statutes' preference for ordained ministers as follows:

> The state recognizes this preference but is confronted with the necessity that the marriage contract itself be memorialized in writing and by a person of responsibility and integrity and by one possessed of some educational qualifications. Ministers, as a profession, class or group, are persons of integrity and responsibility, and are persons qualified to perform a marriage in a proper manner, execute the necessary forms required by the state, and report the contract of marriage between two people within the time prescribed. . . . . The General Assembly assumes that the head of an eccesiastical order will be a responsible person and will, in turn, act responsibly in the selection of a minister. . . . [T]he General Assembly also assumes that a congregation, the body corporate, will act responsibly and select a proper person as a minister.

Cramer, 214 Va. at 565. In other words, the Commonwealth has an interest in ensuring that those who perform marriages are sufficiently literate and responsible to record the marriage, and the Commonwealth trusts churches to appoint ministers of sufficient literacy and responsibility.

The requirement that applicants who are not ordained ministers must post a $500 bond is not narrowly tailored to achieve these interests. One certainly does not need to be a minister in order to complete the relatively simple clerical requirements for recording a marriage. Indeed, any person who could fill out and file the Court's petition form would presumably possess the necessary literacy to "certify to the facts of marriage and file the record in duplicate with the officer who issued the marriage license within five days after the ceremony," Va. Code § 32.1-267, particularly given that the substance of the certificate is completed by the Circuit Court

Clerk. Va. Code § 20-16. Moreover, any marriage celebrant who fails to return a marriage license may be fined, Va. Code §§ 20-24, rendering it unlikely that any officiant would fail to file the license as required.

Moreover, it is impermissible for the Commonwealth to make assumptions about a person's ability to perform a secular function based on his religious qualifications, as the U.S. Supreme Court found in *McDaniel v. Paty*, a case that presents the other side of the coin from this one. 435 U.S. 618 (1978). In *McDaniel*, the Court invalidated a state constitutional provision that prohibited clergy from running for public office. The Court rejected the state's rationale that "if elected to public office [ministers] will necessarily exercise their powers and influence to promote the interests of one sect or thwart the interests of another." 435 U.S. at 628-29 (plurality opinion). "[T]he American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts." *Id.* at 629. *See also Id.* at 645 (White, J., concurring) ("the underlying assumption on which the Tennessee statute is based-that a minister's duty to the superiors of his church will interfere with his governmental service-is unfounded.") Just as it is impermissible for the state to assume that a person is not fit for public service based on his status as an ordained minister, it is likewise impermissible for the government to assume that a ordained ministers are uniquely qualified to certain civil functions, such that they – and only they – are exempt from a bond requirement.

B. <u>One-Per-Congregation Rule</u>

For similar reasons, the rule requiring religious societies that do not have ordained ministers to designate only one person to be responsible for completing the certificate of marriage, when other religious organizations are able to have as many representatives as they

have ordained ministers, is not narrowly tailored to serve a compelling state interest. The rule is burdensome to religious organizations such as the Sikh Foundation of Virginia and Singh Sabha Gurdwara and their congregants because if the designated individual is ill or out of town, there is no one who is legally authorized to certify the marriage. As explained above, there is no reason to assume that ordained clergy are uniquely qualified to perform this duty, and therefore no good reason to prohibit organizations without ordained clergy from designating more than one person to do so.

III. THE COURT MAY AVOID THE CONSTITUTIONAL QUESTION BY HOLDING THAT THE PETITIONERS ARE "ORDAINED MINISTERS" UNDER VA. CODE § 20-23.

"[W]henever possible, [a court] will interpret statutory language in a manner that avoids a constitutional question." *Commonwealth v. Doe*, 278 Va. 223, 229 (2009). In this case, the Court may avoid the serious constitutional issues raised above by treating the petitioners as ordained ministers under Va. Code § 20-23.

Precedent exists for such an interpretation. In *Application of Ginsburg*, 236 Va. 165 (1988), the Supreme Court of Virginia held that the Clerk of a Quaker Meeting was a minister who could be authorized to perform marriages without bond. The Clerk was the Meeting's designated "administrative official" who "me[t] with the members of the Meeting for weekly worship and 'perform[ed] such ministerial duties in meeting for worship and meeting for business as are consistent with Quaker discipline.'" Citing *Cramer*, the Court noted:

> We held . . . that the term "minister" applies to those for whom ministry is less than a full-time vocation, and that the terms "ordination" and "communion" are not used in the ecclesiastical sense, because the state has no concern with the religious aspect of the marriage ceremony. We noted that the word "ordain" is subject to such definitions as "appoint," "arrange," "order," "manage," and "to establish by appointment." We noted further that the word "communion" is subject to such definitions as "mutual participation," "joint or common action," and "a function performed jointly."

Ginsburg, 236 Va. at 167 (quoting *Cramer*, 214 Va. at 565, 567).

As set forth in their Petitions, Dr. Ajaib Singh and Gurminder Singh Bhatti are the Chairman and Secretary, respectively, of the Board of Trustees of the Sikh Foundation of Virginia. Similar to Ginsburg, Trustees are responsible for assuring that the Temple affairs and services are managed and conducted according to the constitution and by-laws of the organization. Likewise, Balbir Singh and Jagtar Singh Dhanda are the President and Treasurer, respectively, of Singh Sabha Gurdwara. All four have been selected for positions of trust by their religious organizations. Further, each has been designated by his congregation to perform marriages. Under these circumstances, the petitioners should be authorized to perform marriages without bond, and without limitation as to their number, under Va. Code § 20-23.

CONCLUSION

For the foregoing reasons, the Petitioners request that the Court declare Va. Code §§ 20-23, 20-25, and 20-26 unconstitutional to the extent that they impose bond requirements and numerical limitations on applicants for authorization to perform marriages who are not ordained ministers. Alternatively, Petitioners ask to be treated as ordained ministers pursuant to § 20-23. In either case, Petitioners request that the Court authorize each of them to perform marriages without any bond requirement.

Dated: December 19, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the above-referenced case by electronic mail on the following:

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