IN THE UNITED STTES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

ROBERT UPDEGROVE *et al.*,	)	
	)	
Plaintiffs,	)	Case No.1:20-cv-01141-CMH-JFA
v.	)	
	)	
MARK HERRING *et al.*,	)	
	)	
Defendants.	)	

MOTION OF NORTH CAROLINA VALUES COALITION (NCVC)
AND THE INSTITUTE FOR FAITH AND FAMILY (IFF)
TO FILE BRIEF AS AMICI CURIAE SUPPORTING THE PLAINTIFF

Pursuant to Rule 7(a) of the Local Rules of the Eastern District of Virginia, North Carolina Values Coalition ("NCVC") and The Institute for Faith and Family ("IFF") respectfully move for leave to file as *amici curiae* the brief appended hereto as Attachment 1 in support of Plaintiffs Robert Updegrove and Loudoun Multi-Images LLC d/b/a Bob Updegrove Photography's (collectively, "Plaintiffs").[1] Local counsel for the amici conferred with counsel of record for both the Plaintiffs and the Defendants and confirmed that each consents to the filing of this amicus brief.

Dated: December 14, 2020

[1] Consistent with disclosure practices for amicus briefs in appellate cases under FRAP 29(a), the following amicus brief is entirely the work of the attorneys listed on the signature page and not the work of any party or party's counsel in this case. No party or counsel for a party made any financial contribution to fund the amicus brief. The NCVC and IFF are nonprofit corporations and thus no corporation owns any portion of either of the two entities.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December 2020, I served a true and accurate copy of the foregoing by filing it electronically with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Robert Updegrove; and **Loudoun Multi-Images LLC** d/b/a **Bob Updegrove Photography,**

Plaintiffs,

v.

Mark R. Herring, in his official capacity as Virginia Attorney General; and **R. Thomas Payne, II**, in his official capacity as Director Of Virginia Division of Human Rights and Fair Housing,

Defendants

Case No. 1:20-cv-01141

Amicus Brief of North Carolina Values Coalition and The Institute of Faith and Family in Support of Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF *AMICI CURIAE*

North Carolina Values Coalition ("NCVC") is a nonprofit educational and lobbying organization based in Raleigh, NC that exists to advance a culture where human life is valued, religious liberty thrives, and marriage and families flourish. *See* www.ncvalues.org. The Institute for Faith and Family ("IFF") is a North Carolina nonprofit corporation established to preserve and promote faith, family, and freedom by working in various arenas of public policy to protect constitutional liberties, including the right to live and work according to conscience and faith. See https://iffnc.com.

NCVC and IFF have an interest in preserving the First Amendment freedoms of speech and religion in North Carolina. Both organizations are engaged in fighting local ordinances and statewide laws like the one being challenged in this case in Virginia. Because Virginia and North Carolina share the same federal circuit court—the Fourth Circuit—what happens in the courts in Virginia will affect North Carolina as well.

INTRODUCTION

Plaintiff Robert (Bob) Updegrove is a Christian photographer who respectfully serves many different people, including the LGBT community, but he does not create messages that conflict with his faith. The Virginia Values Act (VVA), which modifies the Virginia Human Rights Act, Va. Code § 2.2-3904 *et seq.*, added two provisions that place Bob in a Catch-22—either violate his religious faith or be forced out of business by crippling fines. Bob believes that marriage is the union of one man and one woman, but VVA's anti-discrimination provisions demand that he produce photography for same-sex weddings if he offers services for opposite sex weddings.

Many argue that anti-discrimination laws like the VVA are necessary to achieve *tolerance*, *diversity*, *inclusion*, and *equality* for the LGBT community. Properly understood and applied, these

values facilitate life in a free society and protect the rights of all Americans. But instead of eradicating invidious discrimination, the VVA creates it. The Act crushes dissent, promoting *intolerance, uniformity, exclusion,* and *inequality*. Virginia cements intolerance into state law and demands uniformity of speech, thought, belief, and action. The result is an unconscionable inequality where people who hold traditional marriage beliefs are excluded from offering creative services to the public. All of this is anathema to the First Amendment.

Specifically, applying the VVA to creative professionals like Bob destroys the values anti-discrimination laws should enhance, including diversity, tolerance, inclusion, and equality. The Act (1) compels uniformity of thought, belief, and values; (2) refuses to tolerate persons who disagree; (3) excludes dissenters from full participation in public life; and (4) renders them unequal citizens. "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018). A decision against Bob would be the "worst of all" possible speech violations—"a viewpoint-based compulsion to speak on politics or religion." *Chelsey Nelson Photography LLC v. Louisville/Jefferson County Metro Gov't*, No. 3:19-CV-851-JRW, 2020 U.S. Dist. LEXIS 146246 (*CNP*), *14 (W.D. Ky. Aug. 14, 2020).

I. THE VVA IS A VIEWPOINT-BASED REGULATION THAT COMPELS EXPRESSION.

A long line of unbroken authority confirms that photography is protected speech. A photograph conveys a message, often newsworthy or educational. *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984) (White, J., plurality op.); *CNP*, at *14 n. 93. Like other artwork, photography is protected speech.[1] Much like the VVA, the so-called "Fairness Ordinance" in *CNP* required

[1] *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (motion pictures); *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) ("pictures, films, paintings, drawings, and engravings"); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981) (motion pictures, music, dramatic works); *Hurley v. Irish-*

businesses to serve LGBT customers and refrain from advertising to the contrary. *CNP*, at *5. But the court observed that "photography is speech when the photographer's artistic talents are combined to tell a story about the beauty and joy of marriage." *CNP*, at *16-17. Similarly, the Eighth Circuit held that the custom videos "are a form of speech that is entitled to First Amendment protection." *Telescope Media Grp. v. Lucero (TMG)*, 936 F.3d 740, 751 (8th Cir. 2018). Like the creative professionals in *CNP* and *TMG*, Bob is engaged in protected expression.

The VVA lacks the "breathing space" needed for First Amendment liberties "to survive" and the "precision of regulation" that "must be the touchstone in an area so closely touching our most precious freedoms." *Brush & Nib Studio, LC v. City of Phoenix (B&N)*, 448 P.3d 890, 916 (Ariz. 2019), quoting *NAACP v. Button*, 371 U.S. 415, 433, 438 (1963). This court should apply the law's provisions in a manner that does not snuff out protected expression.

A. The VVA regulates speech based on content and viewpoint.

The VVA "[m]andat[es] speech that [Plaintiff] would not otherwise make" and "exacts a penalty on the basis of the content of" his speech. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). This is the essence of content-based regulation. *TMG*, 936 F.3d at 753. As in *TMG*, Plaintiff's choice to photograph opposite-sex weddings is "a trigger for compelling [him] to talk about a topic [he] would rather avoid—same-sex marriages." *TMG*, at 753. It is irrelevant that the Act does not mandate "posed photographs rather than candid shots" or "require

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American Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 569 (1995) (art, music, literature); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (books, plays, films, and video games); *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915, 924 (6th. Cir. 2003) ("music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures" are all protected expression); *Cressman v. Thompson*, 798 F.3d 938, 952 (10th Cir. 2015) (paintings, drawings, and original artwork); *White v. City of Sparks*, 500 F.3d 953, 955-56 (9th Cir. 2007) (original artwork); *Bery v. City of New York*, 97 F.3d 689, 694-96 (2d Cir. 1996) (same); *Piarowski v. Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625, 628 (7th Cir. 1985) ("art for art's sake"); *Jucha v. City of North Chicago*, 63 F. Supp. 3d 820, 825 (N.D. Ill. 2014) ("There is no doubt that the First Amendment protects artistic expression.")

every wedding album to contain a picture of the bride's bouquet." *Elane Photography, LLC v. Willock*, 309 P.3d 53, 66 (N.M. 2013). The Act is content-based because it "distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994); *see also Reed v. Town of Gilbert*, 576 U.S. 155, 163-164 (2015). The law "compels [Plaintiff] to speak favorably" about same-sex marriage "if [he] choose[s] to speak favorably about opposite-sex marriage." *TMG*, 936 F.3d at 752. Although the law "generally targets discriminatory conduct, not speech," it "operates as a content-based law" as applied to Plaintiff's custom photography services (*B&N*, 448 P.3d at 914) because it "necessarily alters the content." *Riley*, 487 U.S. at 795.

Worse yet, the VVA is riddled with viewpoint discrimination because it transgresses the "bedrock principle" that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Viewpoint discrimination is an "egregious form of content discrimination" (*Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829-830 (1995)) that is "poison to a free society." *Iancu v. Brunetti*, 139 S.Ct. 2294, 2302 (2019) (Alito, J., concurring). In *Iancu*, striking the prohibition on "immoral or scandalous" trademark registration, the Supreme Court acknowledged that First Amendment protection extends even to speech that many people would find highly offensive or even vulgar. "At a time when free speech is under attack, it is especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination." *Id*. at 2302-2303 (Alito, J., concurring).

A viewpoint-based *compulsion* to speak is particularly objectionable. No government official may "prescribe what shall be orthodox in politics, nationalism, religion, . . . or *force citizens to confess by word or act their faith therein*." *West Virginia Bd. of Ed. v. Barnette*, 319 U.

S. 624, 642 (1943) (emphasis added). "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command. . . ." *Janus*, 138 S.Ct. at 2463. It is also not the role of the state "to prescribe what shall be offensive." *Masterpiece Cake Shop, Ltd. v. Colorado Human Rights Commission*, 138 S.Ct. 1719, 1731 (2018). The government may not ban speech "on the ground that it expresses ideas that offend." *Matal v. Tam*, 137 S.Ct. 1744, 1851 (2017) (invalidating the Lanham Acts' "disparagement clause").

It is "always demeaning" to compel speech contrary to a citizen's deepest convictions. *Janus*, 138 S. Ct. at 2464. This is true regardless of the prevailing majority opinion. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Virginia may not like or agree with Plaintiff's viewpoint about the nature of marriage, but the Constitution demands that courts protect his freedom to "decide for himself . . . the ideas and beliefs deserving of expression, consideration, and adherence. . . . Government action that . . . requires the utterance of a particular message favored by the Government, contravenes this essential right." *Turner*, 512 U.S. at 646. The VVA is "a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression." *Nat'l Inst. of Family & Life Advocates v. Becerra ("NIFLA")*, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring).

Disclaimers. The presence or absence of a disclaimer does not change the conclusion that the Act and other similar laws discriminate as to both content and viewpoint. The New Mexico Supreme Court brushed off a photographer's free speech claims because she could simply "post a disclaimer" online or in her studio about her opposition to same-sex marriage. *Elane Photography*, 309 P.3d at 59. She could "disavow, implicitly or explicitly, any messages" she believed her photographs conveyed. *Id*. at 70. But as the Eighth Circuit explained, "the constitutional protection of a speaker's freedom would be empty if the government could require speakers to affirm in one

breath that which they deny in the next. *Hurley*, 515 U.S. at 576." *TMG*, 936 F.3d at 757 (internal citations and quotation marks omitted). Even if disclaimers could cure the constitutional deficiencies, some anti-discrimination laws prohibit them. The Phoenix Ordinance at issue in *B&N*, like the VVA, made it illegal to post any "communication which states or implies that any facility or service shall be refused or restricted because of an individual's protected status." *B&N*, 448 P.3d at 898. The regulation of content here is obvious, and the underlying viewpoint discrimination is transparent. The Phoenix Ordinance imposed criminal penalties—even possible jail time—for violating this patently unconstitutional ordinance. The VVA imposes financially crippling penalties likely to shut down a business.

B. The VVA attempts to regulate thought.

Virginia uses its anti-discrimination law to punish dissenting views and force uniformity of thought about the nature of marriage. "Freedom of speech secures freedom of thought and belief. This law imperils those liberties." *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring). Virginia contravenes "[t]he very purpose of the First Amendment . . . to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

The freedom of thought that undergirds the First Amendment merits "unqualified attachment." *Schneiderman v. United States*, 320 U.S. 118, 144 (1943). In the context of protected speech, the distinction between compelled speech and compelled silence is "without constitutional significance." *Riley*, 487 U.S. at 796. These complementary rights are components of "individual freedom of mind." *Barnette*, 319 U.S. at 637. Freedom of thought "is the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937)), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969). Like many past

cases, this case implicates a state law that "forces an individual . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Wooley*, 430 U.S. at 715; *B&N*, 448 P.3d at 904-905. The ideological coercion of public opinion "is not forward thinking." *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring).

Compelled speech causes "additional damage" because it coerces "free and independent" individuals "into betraying their convictions." *B&N*, 448 P.3d at 924, quoting *Janus*, 138 S. Ct. at 2464. The Eighth Circuit, the Arizona Supreme Court, and a United States District Court in Kentucky have all recently held in favor of creative professionals who objected to government compulsion to create custom-designed expression in favor of same-sex marriages if they chose to celebrate opposite-sex marriages. *TMG*, 936 F.3d at 752-53 (wedding videos); *B&N*, 448 P.3d at 914 (wedding invitations); *CNP*, at *18 (photography). The Arizona Court cited Justice Jackson's warning in *Barnette* about the ultimate futility of "government efforts to compel uniformity of beliefs and ideas." *B&N*, 448 P.3d at 896-897. These efforts have historically been doomed to failure: "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." *Barnette*, 319 U.S. at 641.

C. The commercial context is constitutionally irrelevant.

Citizens do not forfeit their constitutional rights when they enter the commercial sphere. Decades ago, the Supreme Court flatly rejected the idea that films fall outside the scope of the First Amendment merely because they are produced by "large-scale businesses conducted for private profit." *Joseph Burstyn*, 343 U.S. at 501. The same is true for "books, newspapers, and magazines . . . published and sold for a profit." *Id.* Recent precedent emphatically reaffirms the viability of free speech in the commercial realm. The Court struck down the "disparagement clause" of the

Lanham Act because it "offends [the] bedrock First Amendment principle" that "[s]peech may not be banned on the ground that it expresses ideas that offend." *Matal v. Tam*, 137 S. Ct. at 1751. The Lanham Act operates in the sphere of commerce, regulating the registration of trademarks. Similarly, the ban on registration of "immoral or scandalous" marks offends the Constitution. *Iancu*, 139 S. Ct. 2294. *See also Masterpiece Cakeshop*, 138 S. Ct. at 1745 (Thomas, J., concurring) ("[T]his Court has repeatedly rejected the notion that a speaker's profit motive gives the government a freer hand in compelling speech."). The right to speak—or remain silent—remains viable in that context.[2]

D. This case is not about hosting a forum for the message of a third party.

Some compelled speech cases involve a government regulation that requires incorporation of another speaker's message into the primary speaker's expression, rather than communicating a prescribed government message. *See, e.g.*, *Hurley*, 515 U.S. 557 (1995); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 5-7, 16-17, 21 (1986); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 244, 256-58 (1974). Such requirements still violate the fundamental principal that a speaker has autonomy and "thus may not be forced to speak a message he or she does not wish to say." *B&N*, 448 P. 3d at 904; *see also TMG*, 936 F.3d at 753.

The situations in *Hurley*, *Pac. Gas*, and *Tornillo* are not analogous to cases that merely require hosting a forum for speech that clearly is not attributable to the host. See, e.g., *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (shopping mall); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.* (*F.A.I.R.*), 547 U.S. 47 (2006) (law schools). The speech of the *PruneYard*

[2] The New Mexico Supreme Court departed from this longstanding principle in *Elane Photography*, attempting to distinguish "free-speech events such as privately organized parades" (*Hurley*) and "private membership organizations" (*Dale*). *Elane Photography*, 309 P.3d at 66. But these distinctions clash with relevant U.S. Supreme Court cases and subsequent cases involving creative professionals. *See TMG*, 936 F.3d at 751 ("It also does not make any difference that the Larsens are expressing their views through a for-profit enterprise. . . .").

shoppers, and the campus military recruiters in *F.A.I.R.*, was easily distinguished from the speech of the mall owner or the law schools in those cases. Moreover, the forum hosts had no responsibility to custom design creative expression for other speakers—unlike wedding photographers (*CNP*), wedding invitation designers (*B&N*), wedding video producers (*TMP*), or custom wedding cake designers (*Masterpiece Cakeshop*).

II. THE CONSTITUTION PROTECTS THE SERVICES NECESSARY TO CREATE PROTECTED EXPRESSION.

America has always valued diversity. The VVA destroys it by demanding uniformity of thought, belief, speech, and action concerning the nature of marriage—and by silencing one side of this hotly contested issue, the state engages in forbidden viewpoint discrimination. Worse yet, the VVA imposes a burden on creative professionals even more onerous than the compelled speech in *Wooley v. Maynard*, 430 U.S. 705. In *Wooley*, the *state* designed and created the license plate its citizens had to display. Here, *Plaintiff* must design and create expression that communicates a celebratory message he believes is false.

"It goes without saying that artistic expression lies within . . . First Amendment protection." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 602 (1998) (Souter, J., dissenting). So is the personal labor required to create it. First Amendment protection extends to "creating, distributing, or consuming" speech. *Brown v. Entertainment Merchants Ass'n.*, 564 U.S. 786, 792 n.1 (2011) (video games). The *TMG* plaintiffs did not merely "plant a video camera at the end of the aisle and press record"—they intended "to shoot, assemble, and edit the videos with the goal of expressing their own views about the sanctity of marriage." 936 F.3d at 751. Similar editing services are required for Bob's photography. Acts necessary to create expression—writing, painting, or editing—cannot be disconnected from the finished product. As the Ninth Circuit explained, "we have never seriously questioned that the processes of writing words down on paper, painting a

picture, and playing an instrument are purely expressive activities entitled to full First Amendment protection." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-62 (9th Cir. 2010). This case is similar: "Using a camera to create a photograph or video is like applying pen to paper to create a writing or applying brush to canvas to create a painting." *Ex parte Thompson*, 442 S.W.3d 325, 337 (Tex. Crim. App. 2014). "*[T]he process of creating the end product cannot reasonably be separated from the end product for First Amendment purposes*." *Id*. (emphasis added).

Other courts have applied these principles in favor of creative professionals. Producing wedding videos is protected speech. *TMG*, 936 F.3d at 756. So is designing wedding invitations. *B&N*, 448 P.3d at 910. The Phoenix Ordinance would have forced the *B&N* plaintiffs "to *personally* write, paint and create artwork celebrating a same-sex wedding . . . to design and create invitations that enable and facilitate the attendance of guests at a same-sex wedding." 448 P.3d at 922. In *Masterpiece Cakeshop*, "[f]orcing Phillips to make custom wedding cakes for same-sex marriages requires him to . . . acknowledge that same-sex weddings are 'weddings' and suggest that they should be celebrated—the precise message he believes his faith forbids." 138 S. Ct. at 1744 (Thomas, J., concurring in part and in the judgment).

Such state coercion does a grave disservice to customers who seek custom creative services. If an artist is repelled by the message he must create, and forbidden to even disclose his viewpoint to potential customers, the end product is unlikely to be satisfactory. Coercion produces a counterfeit. That is one reason courts are loathe to order specific performance as a remedy for breach of a contract for personal services—especially where artistic expression is required.[3] The

[3] *See, e.g.*, *Hamblin v. Dinneford*, 2 Edw. Ch. 529, 533-534 (N.Y. 1835) (actor); *Lumley v. Wagner*, 42 Eng. Rep. 687 (1852) (singer); *Duff v. Russell*, 14 N.Y.S. 134 (Super. Ct. 1891) (actress/singer); *Okeh Phonograph v. Armstrong*, 63 F.2d 636 (9th Cir. 1933) (jazz player); *Beverly Glen Music v. Warner Communications*, 178 Cal. App. 3d 1142, 1145 (1986) (singer) ("Denying someone his livelihood is a harsh remedy."). *See also* 5A Corbin, Contracts (1964) § 1204.

New York Court of Chancery, declining to compel a singer's performance for an Italian opera, expressed concern about "what effect coercion might produce upon the defendant's singing, especially in the livelier airs; although the fear of imprisonment would unquestionably deepen his seriousness in the graver parts of the drama." *De Rivafinoli v Corsetti*, 4 Paige Ch. 264, 270 (1833).

Generally, anti-discrimination laws regulate conduct but not expression. Many public accommodation laws have only an incidental impact on speech, e.g., speaking to customers to receive their orders. The law targets activities, like hiring employees or serving food, rather than speech itself. *TMG*, 936 F.3d at 757. But as in *TMG*, the VVA is "targeting speech itself." *Id*.

In some cases, conduct is *itself* expressive, rather than an activity required to *create* expression. There is a subtle but critical distinction. Both implicate the First Amendment, but the analysis differs. Conduct itself is expressive if it is "sufficiently imbued with elements of communication," i.e., the speaker intends to convey a message and a third-party observer would likely understand it. *Texas v. Johnson*, 491 U.S. at 404, 410-411; *Spence v. Washington*, 418 U.S. 405, 404, 409 (1974). Cases involving creative professionals implicate activity protected by the First Amendment because action is necessary to create an expressive end product—artwork, videos, photographs. In *B&N*, the court rejected the City's argument that creating custom wedding invitations "purely involves conduct, without implicating speech." 448 P.3d at 905. On the contrary, "[f]or such products, both the finished product *and the process of creating that product* are protected speech." *Id*. at 907 (emphasis added). Similarly, in *TMG*, the creative activities "c[a]me together to produce finished videos that are media for the communication of ideas." 936 F.3d at 752 (internal citations and quotation marks omitted).

Creative professionals, like other speakers, also have the right to remain silent, i.e., to decline to create expression. The First Circuit considered the case of a well-known actress who

sued the Boston Symphony Orchestra for cancelling her scheduled appearance in the wake of protests about her political views. *Redgrave v. Boston Symphony Orchestra, Inc*., 855 F.2d 888 (1st Cir. 1988). Actress Redgrave argued that the cancellation violated the Massachusetts Civil Rights Act (MCRA), which created a private cause of action for violations. *Redgrave*, 855 F.2d at 901. The Orchestra asserted "a right to be free from compelled expression," and the court agreed, observing that "[a] distinguished line of cases has underscored a private party's right to refuse compelled expression." *Id*. at 905. The "typical reluctance" of courts "to force private citizens to act" (*id*., citing *Lumley v. Wagner*, 42 Eng. Rep. 687, 693 (Ch. 1852)) "augments its constitutionally based concern for the integrity of the artist." *Id*. Since private expression is encouraged and protected the court saw "no reason why *less* protection should be provided where the artist refuses to perform; indeed, silence traditionally has been more sacrosanct than affirmative expression." *Id*. at 906. The Massachusetts Civil Rights Act could not lawfully foreclose the Orchestra's decision not to perform, because that decision was itself a constitutionally protected exercise of the right to be free of compelled speech. The same analysis applies here. The statutory rights of same-sex couples must be "measured against the [Bob's] constitutional right against the state" (*id*. at 904) to be free of compelled expression.

III. THE LAW COMPELS CELEBRATION OF RELIGIOUS BELIEFS AND EVEN PARTICIPATION IN RELIGIOUS CEREMONIES THAT CONFLICT WITH PLAINTIFF'S RELIGIOUS CONVICTIONS AND CONSCIENCE.

The VVA stifles *religious speech*, which is not only "as fully protected . . . as secular private expression," but historically, "government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (internal citations omitted).

This case implicates both the Free Speech Clause (Sect. I, II) and the Free Exercise Clause. Like the wedding invitation designers in *B&N*, Bob uses his creative skills to express a message about marriage consistent with his faith. *B&N*, 448 P.3d at 917. The video producers in *TMG* wanted to "affect the cultural narrative regarding marriage" through films that portrayed "their view of marriage as a 'sacrificial covenant between one man and one woman.'" 936 F.3d at 748. Minnesota's anti-discrimination law "burden[ed] their *religiously* motivated *speech*" about marriage and reinforced their free speech claims. *Id*. at 759 (emphasis added).

Marriage is a deeply personal matter that intersects religious beliefs, speech, and action. *See Turner v. Safley*, 482 U.S. 78, 96 (1987) ("[M]any religions recognize marriage as having spiritual significance ….") It is difficult to imagine a photographer providing wedding services without attending the ceremony where many of the pictures will be taken. In *CNP*, the court held that "[b]locking Louisville from forcing [plaintiff] to photograph same-sex weddings means that she won't have to attend same-sex weddings." *CNP*, at *23. The court protected the photographer's right not to participate in a religious ceremony that conflicted with her faith.

Free exercise extends beyond the freedom to believe and also embraces "the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736-737 (2014) (Kennedy, J., concurring). One of the reasons this nation is "so open, so tolerant, and so free is that no person may be restricted or demeaned by government" for exercising religious liberty. *Id.* at 739 (2014) (Kennedy, J., concurring). As the Sixth Circuit observed, "tolerance is a two-way street." *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012). So is dignity. Even though the Supreme Court has redefined marriage, same-sex couples have no corollary right to coerce an unwilling business owner to celebrate with them. The VVA operates

to "vilify" creative professionals "unwilling to assent to the new orthodoxy." *Obergefell v. Hodges*, 576 U.S. 644, 741 (2015) (Alito, J., dissenting). Virginia discards the Supreme Court's concern about stigma and "put[s] the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Id*. at 672.

Liberty of conscience. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. *Girouard v. United States*, 328 U.S. 61, 68 (1946). Religious liberty is closely correlated with the liberty of conscience that underlies the Establishment Clause and the unique taxpayer standing rules developed in *Flast v. Cohen*, 392 U.S. 83 (1968): "[T]he Framers' generation worried that conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 141 (2011), quoting Feldman, *Intellectual Origins of the Establishment Clause*, 77 N. Y. U. L. Rev. 346, 351 (2002). An equivalent principle applies here. Virginia requires a business owner to violate his conscience by creating messages and celebrating events he believes to be immoral. This is as much a frontal assault on conscience as the Establishment Clause evil of compelling citizens to support religious beliefs they do not hold.

Commercial sphere. *United States v. Lee*, 455 U.S. 252 (1982) has been cited to justify limitations on free expression. The argument is that citizens who enter the commercial world accept certain limitations on their conduct. But *Lee* does not hold that believers forfeit all constitutional rights in the business world, especially when such forfeiture would exclude them from even operating a business. *Lee* merely holds that "*every* person cannot be shielded from *all* the burdens incident to exercising *every* aspect of the right to practice religious beliefs." *United States v. Lee*, 455 U.S. at 261 (emphasis added). The limits on constitutional rights in the

commercial realm are narrow—not absolute. The First Amendment may not trump every statutory scheme applicable to commerce, but neither do commercial regulations erase religious liberty.

Bob wishes to conduct his business with integrity, setting company policies consistent with his conscience, moral values, and faith. Not everyone shares those values but cutting conscience out of commerce is a frightening prospect for business owners, employees, and customers. Customers expect businesses to operate with honesty and integrity. No American should ever have to choose between allegiance to the state and faithfulness to God just to remain in business. Conscientious objector claims are "very close to the core of religious liberty." Nora O'Callaghan, *Lessons From Pharaoh and the Hebrew Midwives: Conscientious Objection to State Mandates as a Free Exercise Right*, 39 Creighton L. Rev. 561, 565, 611, 615-616 (2006). "No person can be punished for entertaining or professing religious beliefs or disbeliefs . . . ." *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15-16 (1947). The government may not "exclude[] a person from a profession or punish[] him solely . . . because he holds certain beliefs." *Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971); *see also Keyishian v. Bd. of Regents*, 385 U.S. 589, 607 (1967) (professor). This Court has a "duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). The Framers intentionally protected "the integrity of individual conscience in religious matters." *McCreary County, KY v. ACLU*, 545 U.S. 844, 876 (2005).

Rights of free speech and religion "are not limited to soft murmurings behind the doors of a person's home or church, or private conversations with like-minded friends and family." *B&N*, 448 P.3d at 895. On the contrary, the Constitution guarantees the right to free expression in the public square, including "the right to create and sell words, paintings, and art that express a person's sincere religious beliefs." *Id.*

IV. PLAINTIFF'S OPERATION OF HIS PHOTOGRAPHY BUSINESS IN ACCORDANCE WITH HIS MORAL AND RELIGIOUS CONSCIENCE IS NOT THE IRRATIONAL, INVIDIOUS, ARBITRARY DISCRIMINATION THAT ANTI-DISCRIMINATION LAWS ARE DESIGNED TO PROHIBIT.

Anti-discrimination laws are designed to be a shield, not a sword. Plaintiff's refusal to create visual artwork is not the invidious, irrational, arbitrary discrimination that may be restricted—but the VVA is wielded as a sword to cut off his rights to free speech and religious liberty.

The word "discrimination" needs a clear, consistent definition in this context. Declining to advance a politically charged agenda is hardly "discrimination," particularly since no one has an unqualified right to demand the services of a *particular* photographer. "[C]ourts must more clearly evaluate when public accommodation laws have actually been violated, as opposed to when the individual or business is simply refusing to endorse a particular message." James M. Gottry, Note, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 Vand. L. Rev. 961, 999 (2011). Like the wedding invitation designers in *B&N*, Bob does not seek "to employ the coercive apparatus of government to impose disabilities on others," but rather the "right not to engage in speech that offends [his] deeply held religious beliefs . . . one of our nation's most cherished civil liberties." *B&N*, 448 P.3d at 929.

A. Early anti-discrimination laws were carefully crafted with narrow definitions of protected categories and the places regulated.

Anti-discrimination policies have ancient roots. The Massachusetts law at issue in *Hurley* was derived from the common law principle that innkeepers and others in public service could not refuse service without good reason. *Hurley*, 515 U.S. at 571. Anti-discrimination principles have expanded over the years to encompass more protected categories and classify more places as "public accommodations." The potential encroachment on religious liberty has also expanded.

Commentators have long recognized that the "conflict between the statutory rights of individuals against private acts of discrimination and the near universally-recognized right of free exercise of religion places a complex legal question involving competing societal values squarely before the courts." Jack S. Vaitayanonta, Note: *In State Legislatures We Trust? The "Compelling Interest" Presumption and Religious Free Exercise Challenges to State Civil Rights Laws*, 101 Colum. L. Rev. 886, 887 (2001).

Early anti-discrimination laws focused almost exclusively on eliminating the racial discrimination that plagued the nation for decades. *Just Shoot Me*, 64 Vand. L. Rev. 961, 965 (2011). Primary responsibility shifted to the states after the Supreme Court invalidated the Civil Rights Act of 1875. *The Civil Rights Cases*, 109 U.S. 3 (1883); *see Just Shoot Me*, 64 Vand. L. Rev. at 965 n. 7. Later federal attempts succeeded but again highlighted racial equality. The Civil Rights Act of 1964 "was enacted with a spirit of justice and equality in order to remove racial discrimination from certain facilities which are open to the general public." *Miller v. Amusement Enters., Inc*., 394 F.2d 342, 352 (5th Cir. 1968); *see* Civil Rights Act of 1964, 42 U.S.C. § 2000a.

This vast expansion of categories and pplaces has occurred with little analysis of the difference between race and newly protected classes—or as to how and when the criteria may be legitimately related to a business decision. The Thirteenth, Fourteenth, and Fifteenth Amendments were added to the U.S. Constitution to remedy the nation's extraordinary problem of racial discrimination. These provisions cannot readily be transported into any and every other category of "discrimination," particularly when imposed on private citizens whose own rights may be trampled in the process. It is one thing to impose nondiscrimination principles on the *state*—it is quite another to impose those same standards on private parties whose own liberties are at stake.

Early anti-discrimination laws were also narrow in defining "places of public accommodation" in terms of transient lodging, theaters, restaurants, and places of public entertainment. *Just Shoot Me*, 64 Vand. L. Rev. 961 at 966. But eventually these traditional "places" expanded beyond inns and trains to commercial entities and even membership associations—escalating the potential collision with First Amendment rights. *Dale*, 530 U.S. at 657. Even today, federal law is reasonably similar to common law rather than broadly sweeping in *any* establishment that offers *any* goods or services to the public. 42 U.S.C. § 2000a(b).

B. Action motivated by conscience or religious faith is not arbitrary, irrational, or unreasonable.

Discrimination is arbitrary where an entire class of persons is excluded on the basis of irrelevant factors. Where widespread refusals deny an entire group access to basic public goods and services—e.g., lodging, food, transportation—protective measures are reasonable. The Supreme Court rightly upheld federal legislation passed to eradicate America's long history of racial discrimination. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). But it is hardly arbitrary to avoid promoting a cause for reasons of conscience. As protection expands to more places and people, so does the potential to employ anti-discrimination principles to suppress traditional viewpoints and impose social change on unwilling participants. Religious liberty is particularly susceptible to infringement, because "advocates of social change" are often intolerant "toward the teachings of traditional religion." Michael W. McConnell, *"God is Dead and We have Killed Him!" Freedom of Religion in the Post-Modern Age*, 1993 BYU L. Rev. 163, 187 (1993).

Labeling religiously motivated conduct as "discrimination" tends to exhibit constitutionally prohibited hostility toward religion rather than neutrality. *See, e.g., Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 142 (1987); *Thomas v. Review Bd. of*

Ind. Emp't, 450 U.S. 707, 708 (1981). Here, VVA's threatened application exhibits hostility toward religion by characterizing Bob's religiously motivated photography as unlawful "discrimination."

C. The state must guard the rights of *all* citizens, including those whose deep faith collides with the values of current legislative majorities.

The Constitution is an inclusive document protecting the life, liberty, religion, and viewpoint of all within its realm. Inclusion is a key rationale for anti-discrimination provisions. "The Constitution does not require a choice between gay rights and freedom of speech. It demands both." *CNP*, at *6-7. But the liberty of all Americans will suffer irreparable harm if the government is granted power to coerce creative services that communicate its preferred message. "There is a reciprocity and universality to these rights of speech and conscience that give us all a direct stake in protecting them . . . ." *B&N*, 448 P.3d at 929. Non-discrimination principles should never be applied in a discriminatory, unequal manner that squelches First Amendment rights. Ironically, the Act creates an intolerable danger of *exclusion* for free speech and artistic expression. The state can easily use the law to punish persons who hold traditional marriage beliefs by *excluding* them from full participation in public life. If applied to Bob, the VVA would compel him to choose between his convictions and his livelihood, all because he refuses to sacrifice his conscience and faith on the altar of an agenda he cannot support.

The First Amendment protects a broad spectrum of expression, popular or not. Indeed, the increasing popularity of an idea makes it all the more essential to protect dissenting voices. *Dale*, 530 U.S. at 660. Censorship spells death for a free society. "Once used to stifle the thoughts that we hate...it can stifle the ideas we love." *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 167-168 (4th Cir. 1976). First Amendment freedoms "must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Communist Party v. SACB*, 367 U.S. 1, 137 (1961) (Black, J., dissenting).

Proponents of LGBT rights have accomplished dramatic social and political transformation in just a few years by exercising their rights to free speech, press, association, and the political process generally. Their "progress depended on the First Amendment's protection of expressive conduct that was once far less popular than it is today, from marching in pride parades to flying rainbow flags." *CNP*, at *26-27. These changes were possible because the Constitution guarantees free expression and facilitates the advocacy of new ideas. But advocates are not entitled to demand for themselves what they would deny to others—otherwise, the constitutional foundation crumbles and all Americans suffer. One group's overly aggressive assertion of its rights can erode protection for the liberties of others.

Although LGBT citizens "cannot be treated as social outcasts or as inferior in dignity and worth," (*Masterpiece Cakeshop*, 138 S.Ct. 1719, 1727), people of faith "are members of the community too." *Espinoza v. Montana Department of Revenue*, 140 S.Ct. 2246, 2277 (2020) (Gorsuch, J. concurring). "[U]nder our Constitution, the government can't force them to . . . create an artistic expression that celebrates a marriage that their conscience doesn't condone." *CNP*, at *6 (citations omitted).

The irony and implications have been recognized in prior creative professional cases. In *Masterpiece Cakeshop*, Colorado law "afforded storekeepers some latitude to decline to create specific messages the storekeeper considered offensive," i.e., a Denver bakery refused a Christian customer's request to create two bible-shaped cakes inscribed with messages about the sinfulness of homosexuality. *Jack v. Azucar Bakery*, Charge No. P20140069X, at 2 (Colo. Civil Rights Div. Mar. 25, 2015), *available at* http://perma.cc/5K6D-VV8U. *Masterpiece Cakeshop*, 138 S.Ct. at 1728. Properly applied, anti-discrimination law could not force a gay calligrapher to "create a program for a church that preached against same-sex marriage" or compel Michelangelo, if he

were alive today, "to paint a chapel ceiling in a way he deemed blasphemous"—although he could be required to sell completed sculptures free of discrimination. *B&N*, 448 P.3d at 929.

The ironic implications of applying anti-discrimination law are particularly striking where political affiliation is (or is not) a protected category.[4] In Michigan, a conservative consulting firm sued the city of Ann Arbor for outlawing discrimination based on political beliefs, forcing them to advocate views that contradict their principles.[5] In New York, bars are allowed to throw out Trump supporters because the law does not protect against political discrimination[6] and renters seeking roommates can advertise they do not want Trump supporters.[7] But in Seattle, where political beliefs are protected, a gym may lawfully ban a white supremacist.[8] The Eighth Circuit observed that if Minnesota's application of its law were correct, it could "require a Muslim tattoo artist to inscribe 'My religion is the only true religion' on the body of a Christian" if the artist "would do the same for a fellow Muslim" or "force a Democratic speechwriter to provide the same services to a Republican." *TMG*, 936 F.3d at 756.

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[4] *See, e.g.*, a current District of Columbia statute that prohibits discrimination based not only on race or color, but also "religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, genetic information, disability, matriculation, political affiliation, source of income, or place of residence or business of any individual." D.C. Code § 2-1402.31(a). The D.C. Office of Human Rights lists 21 protected traits applicable to housing, employment, public accommodations, and educational institutions. *Protected Traits in DC*, DC Office of Human Rights, https://ohr.dc.gov/protectedtraits.

[5] *ThinkRight Strategies v. City of Ann Arbor*, Case 2:19-cv-12233-DML-RSW (E.D. Mich. 2019) There was a stipulated dismissal in 2019 because the firm did not come within the definition of "public accommodation."

[6] Julia Marsh, *Judge: Bars are allowed to throw out Trump supporters*, New York Post (Apr. 25, 2018), https://nypost.com/2018/04/25/judge-bars-are-allowed-to-throw-out-trump-supporters/.

[7] Katie Rogers, *Roommates Wanted. Trump Supporters Need Not Apply.*, New York Times (Feb. 10, 2017), https://www.nytimes.com/2017/02/10/us/politics/roommates-trump-supporters.html.

[8] Nate Christiansen, *A gym banned a white supremacist, but Seattle law is on his side*, (Feb. 14, 2018) https://crosscut.com/2018/02/a-gym-banned-a-white-nationalist-but-seattle-law-is-on-his-side.

D. The government has a compelling interest in safeguarding the rights guaranteed by the Constitution.

A law like the VVA that commands "involuntary affirmation" demands "even more immediate and urgent grounds than a law demanding silence." *Janus*, 138 S.Ct. at 2464, citing *Barnette*, 319 U.S. at 633 (internal quotation marks omitted). But the government's most compelling interest is to preserve the constitutional rights of all citizens, including—or perhaps especially—those who reject the prevailing state orthodoxy. "[T]he same Constitution held by *Obergefell* to guarantee the right of same-sex couples to marry also protects religious and philosophical objections to same-sex marriage." *CNP*, at *25, citing *Obergefell*, 135 S. Ct. at 2605; *United States v. Windsor*, 570 U.S. 774, 775 (2013); *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

In *TMG*, Minnesota alleged an "important governmental interest—preventing discrimination" by ensuring that all its citizens were "entitled to full and equal enjoyment of public accommodations and services." 936 P.3d at 749, 754. "[M]ost applications of antidiscrimination laws . . . are constitutional," and a ruling in favor of a creative professional "is not a license to discriminate." *CNP*, at *26. But legislators and courts must beware of "peculiar" applications that require speakers "to alter the[ir] expressive content." *TMG*, 936 P.3d at 755, citing *Hurley*, 515 U.S. at 572-573. Where the government's apparent interest is "simply to require speakers to modify the content of their expression" to align with a preferred message, that interest is "not compelling." *CNP*, at *19.

The state's interest in preventing discriminatory conduct does not trump the Constitution. The Arizona Supreme Court found that the state's interest in ensuring equal access to publicly available goods and services did not "justify compelling Plaintiffs' speech by commandeering their creation of custom wedding invitations, each of which expresses a celebratory message, as the means of eradicating society of biases." *B&N*, 448 P.3d at 914-915.

"While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579; *see B&N*, 448 P.3d at 915; *TMG*, 936 F.3d at 755. Even if the state could craft a narrowly tailored law to accomplish its legitimate interest, "it might still lose" in cases like this one "where it is attempting to compel religious speech at the core of the First Amendment." *CNP*, at *18-19.

The alleged state interest in "protect[ing] individuals from humiliation and dignitary harm," *Elane*, 309 P.3d at 64, does not overcome the constitutional concerns. The state has no "compelling interest" in "regulating speech because it is discriminatory or offensive . . . however hurtful the speech may be." *TMG*, 936 F.3d at 755. No one escapes offense in a free society. The Supreme Court has flatly rejected the argument that "[t]he Government has an interest in preventing speech expressing ideas that offend." *Matal v. Tam*, 137 S. Ct. at 1764; *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (even hurtful or outrageous speech is protected). A ruling against Plaintiff virtually ensures the state's ability to freely engage in constitutionally forbidden viewpoint discrimination.

Even if the government's interest in eradicating sexual orientation discrimination were truly "compelling," the free exercise right set forth plainly in the First Amendment text is even more compelling.

V. PLAINTIFF HAS STANDING TO BRING THIS PRE-ENFORCEMENT CLAIM.

The Supreme Court has long endorsed pre-enforcement review, a "hold your tongue and challenge now" approach. *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). This procedure "promotes good public policy by breeding respect for the law" rather than demanding that speakers undergo prosecution as a prerequisite to challenging questionable statutes. *St. Paul Area Chamber*

of Commerce v. Gaertner, 439 F.3d 481, 488 (8th Cir. 2006). A plaintiff can satisfy the injury-in-fact element by alleging "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979); cited and affirmed in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-159 (2014).

This well-established approach has been followed in cases where creative professionals were threatened by anti-discrimination laws like the VVA. In *B&N*, the City of Phoenix asserted that its Ordinance, "which includes the threat of criminal prosecution and significant penalties," would apply to plaintiffs' custom wedding invitations. 448 P.3d at 901. The Arizona Supreme Court recognized that plaintiffs had suffered a legally cognizable injury because they "face[d] a real threat of being prosecuted for violating the Ordinance by refusing to create such invitations for a same-sex wedding." *Id*. Similarly, the Eighth Circuit acknowledged that video producers had alleged a "credible threat of enforcement" if they proceeded with plans to operate a wedding-video business and refuse to film same-sex ceremonies. 936 F.3d at 749-750. The Kentucky district court in *CNP* engaged in a similar analysis. The photographer there, like Bob, alleged a credible threat of prosecution.[9] In all these cases, the threat of enforcement forced creative artists to self-censor, chilling their free speech and religious exercise.

[9] "A credible threat of prosecution requires an allegation of subjective chill, which Nelson has undeniably alleged, and some combination of the following factors: (1) a history of past enforcement against the plaintiffs or others; (2) enforcement warning letters sent to the plaintiffs regarding their specific conduct; and/or (3) an attribute of the challenged statute that makes enforcement easier or more likely, such as a provision allowing any member of the public to initiate an enforcement action. An additional factor is (4) a defendant's refusal to disavow enforcement of the challenged statute against a particular plaintiff." *CNP*, at *9-10 (cleaned up), citing *McKay v. Federspiel*, 823 F.3d 862, 869 (6th Cir. 2016).

Bob meets the relevant criteria, as the Motion explains. He continues to photograph opposite-sex weddings but conducts business in fear of investigation, prosecution, and devastating penalties. Since the effective date of the VVA (July 1, 2020), Bob has self-censored by declining to adopt his preferred editorial policy or post his desired statement online. Mtn. 7; Compl. ¶ 174. The VVA provides that complaints may be filed by the Attorney General, private individuals, or the Division of Human Rights (Va. Code § 2.2-3907(A)), triggering an extensive process likely to impose devastating financial damages that can crush a small business. Va. Code § 2.2-3908(B); *see* Mtn. 6-7.

CONCLUSION

Plaintiff Bob Updegrove has a strong likelihood of success on the merits of his First Amendment claims, and accordingly, his claim should prevail against the government's Motion to Dismiss, and his Motion for Preliminary Injunction should be granted.

Respectfully submitted,

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IN THE UNITED STTES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

ROBERT UPDEGROVE *et al.*,	)	
	)	
Plaintiffs,	)	Case No.1:20-cv-01141-CMH-JFA
v.	)	
	)	
MARK HERRING *et al.*,	)	
	)	
Defendants.	)	

[PROPOSED] ORDER

THIS CAUSE COMES upon the Motion of the North Carolina Values Coalition ("NCVC") and The Institute for Faith and Family ("IFF") for leave to file an *Amici Curiae* Brief ("Brief") supporting the Plaintiff.

WHEREAS, counsel for Plaintiffs and Counsel for the Defendants have consented to the filing of this Brief;

WHEREAS, this Court finds that Amici NCVC and IFF, should be granted leave to file the aforementioned Brief as *amici curiae* and there is no objection to it; therefore, it is

ADJUDGED, ORDERED, and DECREED that:

1. The Motion is GRANTED, and
2. The *Amicus Curiae* Brief submitted by NCVC and IFF is deemed submitted and shall be considered part of the record in this matter.

The Honorable Claude M. Hilton
United States District Court
Eastern District of Virginia
Alexandria Division

Dated: December 14, 2020

NAMES OF PERSONS TO BE SERVED WITH PROPOSED ORDER UPON ENTRY

Listed below are the names and addresses of the attorneys and parties entitled to be notified of the Order's entry:

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