Case No. 21-1506

In the United States Court of Appeals for the Fourth Circuit

ROBERT UPDEGROVE,
LOUDOUN MULTI-IMAGES, LLC, d/b/a Bob Updegrove Photography

Plaintiffs – Appellants

v.

MARK R. HERRING, in his official capacity as Virginia Attorney General;
R. THOMAS PAYNE, II, in his official capacity as
Director of the Virginia Division of Human Rights and Fair Housing

Defendants - Appellees

On appeal from the United States District Court for the
Eastern District of Virginia, Alexandria Division No. 1: 20-cv-1141

Brief of *Amici Curiae* Institute for Faith & Family and North Carolina Values Coalition in Support of Plaintiff-Appellant and Reversal

---

Tami Fitzgerald
North Carolina Values Coalition
Institute for Faith & Family
9650 Strickland Road, Ste. 103-226
Raleigh, NC 27615
(980) 404-2880
tfitzgerald@ncvalues.org

Deborah J. Dewart
Deborah J. Dewart, Attorney at Law
111 Magnolia Lane
Hubert, NC 28539
(910) 326-4554
lawyerdeborah@outlook.com

Attorneys for Amici Curiae

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

FRAP RULE 26.1 and LOCAL RULE 26.1

Amici curiae, North Carolina Values Coalition and Institute for Faith & Family, both nonprofit corporations, make the following disclosures:

1. Neither *amicus* is a publicly held corporation or other public entity.

2. Neither *amicus* has a parent corporation.

3. No publicly held corporation or other publicly held entity owns 10% or more of the stock of either *amicus*, because both are nonprofit corporations and neither issue stock.

4. No publicly held corporation or other publicly held entity has a direct financial interest in the outcome of the litigation.

DATED: July 21, 2021

/s/Deborah J. Dewart
Deborah J. Dewart
Counsel for *Amici Curiae*
North Carolina Values Coalition
Institute for Faith & Family

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICI[1]

Amici curiae respectfully urge this Court to reverse the District Court decision.

North Carolina Values Coalition is a nonprofit educational and lobbying organization established 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 exists to preserve and promote faith, family, and freedom through public policies that protect constitutional liberties, including the right to live and work according to conscience and faith. See https://iffnc.com. Both *amici* are engaged in fighting state and local laws like the one challenged here. Judicial decisions in Virginia impact North Carolina because both states are in the Fourth Circuit.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Plaintiff Robert (Bob) Updegrove is a Christian photographer who respectfully serves many 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

[1] The parties have consented to the filing of this brief. *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

provisions that require Bob to either violate his religious faith or be forced out of business by crippling fines. Bob believes marriage is the union of one man and one woman, but the VVA's anti-discrimination provisions demand that he produce photography for same-sex weddings if he offers services for opposite sex weddings. Instead of eradicating invidious discrimination, the VVA creates it.

Anti-discrimination laws are intended to promote *tolerance, diversity, inclusion,* and *equality*. Properly understood and applied, these values facilitate life in a free society and protect all Americans. But as applied to creative professionals like Bob, the VVA destroys these values. The Act (1) compels *uniformity* of thought, belief, and values; (2) shows *intolerance* toward dissenters; (3) *excludes* them from full participation in public life; and (4) renders them *unequal* citizens. This is anathema to the First Amendment. "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. 479 F. Supp. 543, 555 (W.D. Ky. 2020).

ARGUMENT

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

The VVA's viewpoint-based regulation of speech is facially flawed and its draconian penalties threaten to destroy Bob's business. Bob qualifies for 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 satisfies 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," coupled with "a credible threat of prosecution." *Babbitt v. Farm Workers,* 442 U.S. 289, 298 (1979); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-159 (2014).

The threat of enforcement against Bob is credible because it "is not imaginary or wholly speculative, chimerical, or wholly conjectural." *Davison v. Randall*, 912 F.3d 666, 678 (4th Cir. 2019), citing *Kenny v. Wilson*, 885 F.3d 280, 288 (4th Cir. 2018) (cleaned up). Lawsuits targeting wedding vendors pervade the legal landscape. *See, e.g.*, *Masterpiece Cake Shop, Ltd. v. Colorado Human Rights Commission*, 138 S. Ct. 1719 (2018), *Arlene Flowers*, U.S. Supreme Court Docket

No. 19-333;[2] *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013). Comparable recent cases follow this approach. In *Brush & Nib Studio, LC v. City of Phoenix*, the city asserted its Ordinance would apply to plaintiffs' custom wedding invitations. 448 P.3d 890, 901 (Ariz. 2019). Plaintiffs "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, video producers alleged a "credible threat of enforcement" if they implemented plans to operate a wedding-video business but refused to film same-sex ceremonies. *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 749-750 (8th Cir. 2018). *CNP* photographer "undeniably alleged" a credible threat of prosecution, based on subjective chill and a combination of other factors, e.g., a history of enforcement, warning letters to plaintiff about specific conduct, an attribute of the statute that makes enforcement easier or more likely, and/or the defendant's refusal to disavow enforcement against a particular plaintiff. *CNP*, 479 F. Supp. 3d at 551, citing *McKay v. Federspiel*, 823 F.3d 862, 869 (6th Cir. 2016). As in this case, the threat of enforcement forced creative artists to self-censor, chilling their speech and religious exercise.

Bob continues to photograph opposite-sex weddings but conducts business in fear of investigation and devastating penalties that would destroy his business. Since

[2] Petition for writ of certiorari denied (07/02/21) after years of litigation; *see Arlene's Flowers,* 138 U.S. 2671; *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019).

the VVA's effective date (July 1, 2020), Bob has self-censored by not adopting his preferred editorial policy or posting his desired statement online, much like the *CNP* photographer. *CNP*, 479 F.Supp.3d at 551. Mtn. 7; Compl. ¶ 174. The VVA allows complaints 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).

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

A long line of unbroken authority confirms that photography is protected speech.[3] A photograph conveys a message, often newsworthy or educational. *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984) (White, J., plurality op.); *CNP*, 479

[3] *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-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, video games); *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915, 924 (6th. Cir. 2003) ("music, pictures, films, photographs, paintings, drawings, engravings, prints, sculptures"); *Cressman v. Thompson*, 798 F.3d 938, 952 (10th Cir. 2015) (paintings, drawings, 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.")

F.Supp.3d at 555 n. 93. Like the VVA, *CNP*'s "Fairness Ordinance" required businesses to serve LGBT customers and refrain from advertising to the contrary. *Id.* at 547. But "photography is speech when the photographer's artistic talents are combined to tell a story about the beauty and joy of marriage." *Id.* at 557. So are custom videos. *TMG*, 936 F.3d at 751. Like the artists 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." *B&N*, 448 P.3d at 916, quoting *NAACP v. Button*, 371 U.S. 415, 433, 438 (1963). The VVA should not be applied in a way that snuffs 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" based on content. *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. Plaintiff's choice to photograph opposite-sex weddings is "a trigger" that compels him to speak "about a topic [he] would rather avoid—same-sex marriages." *TMG*, at 753. The Act "distinguish[es] favored speech from disfavored speech" based on viewpoint. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994); *see 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 "speak[s] favorably about opposite-sex marriage." *TMG,* 936 F.3d at 752. The law "operates as a content-based law" as applied to Plaintiff's photography (*B&N*, 448 P.3d at 914) because it "necessarily alters the content." *Riley*, 487 U.S. at 795.

Worse yet, the VVA transgresses the "bedrock principle" that government may not prohibit expression of an idea "simply because society finds [it] offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Such 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). "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). "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*, 138 S.Ct. at 1731. The

government may not ban speech "on the ground that it expresses ideas that offend." *Matal v. Tam*, 137 S.Ct. 1744, 1851 (2017).

It is "always demeaning" to compel speech contrary to a citizen's deepest convictions. *Janus*, 138 S. Ct. at 2464; *see Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Virginia may not agree with Plaintiff's viewpoint about 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).

B. The VVA attempts to regulate thought about the nature of marriage.

Virginia uses anti-discrimination law to crush dissent and force uniformity of thought. "Freedom of speech secures freedom of thought and belief. This law imperils those liberties." *Id*. 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).

Freedom of thought undergirds the First Amendment and merits "unqualified attachment." *Schneiderman v. United States*, 320 U.S. 118, 144 (1943). For constitutional purposes, the distinction between compelled speech and compelled silence is "without constitutional significance." *Riley*, 487 U.S. at 796. These are complementary 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.

Compelled speech is especially damaging 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 Kentucky District Court have all recently held in favor of creative professionals who objected to government compulsion to create custom-designed expression celebrating same-sex marriages if they do so for opposite-sex marriages. *TMG*, 936 F.3d at 752-53 (wedding videos); *B&N*, 448 P.3d at 914 (wedding invitations); *CNP*, 479 F.Supp.3d at 558 (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 are doomed: "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 in 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*. The Supreme Court emphatically reaffirmed this precedent in *Matal*, striking the Lanham Act's "disparagement clause" because it "offends [the] bedrock First Amendment principle" that "[s]peech may not be banned on the ground that it expresses ideas that offend." 137 S. Ct. at 1751. Similarly, the ban on registration of "immoral or scandalous" trademarks offend the Constitution. *Iancu*, 139 S. Ct. 2294. *See also Masterpiece*, 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."); *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. . . ."). The right to speak—or remain silent—remains viable in that context.

D. This case is not about hosting a forum for a third party's message.

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).[4] 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.

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

America values diversity. The VVA destroys it by demanding uniformity of thought, belief, speech, and action concerning marriage. The state engages in forbidden viewpoint discrimination by silencing one side of this hotly contested issue. Worse yet, the VVA's burden on creative professionals is even more onerous

[4] *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).

than the compelled speech in *Wooley v. Maynard*, 430 U.S. 705, where the *state* designed and created the license plate citizens had to display. Here, *Plaintiff* must design and create expression that communicates a 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). 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. Bob's photography requires similar editing services. 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). Here, "[u]sing 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*.

Courts have applied these principles to creative professionals. *TMG*, 936 F.3d at 756 (producing wedding videos); *B&N*, 448 P.3d at 910 (designing wedding invitations). The Phoenix Ordinance in *B&N* would have forced plaintiffs "to *personally* write, paint and create artwork celebrating a same-sex wedding . . . ." *Id*. at 922. In *Masterpiece*, "[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. Coercion produces counterfeit. If an artist is repelled by the message and forbidden to disclose his viewpoint to potential customers, the end product is unlikely to be satisfactory. Courts are loathe to order specific performance as a remedy for breach of a contract for personal services—especially where artistic expression is required.[5] One court,

[5] *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.

declining to compel a singer for perform, 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).

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. *TMG*, 936 F.3d at 757. But as in *TMG*, the VVA is "targeting speech itself." *Id*.

There is a subtle but critical distinction between conduct that is *itself* expressive and activity required to *create* expression. Conduct itself is expressive if "sufficiently imbued with elements of communication," i.e., the speaker intends to convey a message that a third-party observer would understand. *Texas v. Johnson*, 491 U.S. at 404, 410-411; *Spence v. Washington*, 418 U.S. 405, 404, 409 (1974). But in cases that involve creative professionals, the First Amendment protects the action necessary to create the artwork, videos, photographs or other product. 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, "both the finished product *and the process of creating that product* are protected speech." *Id*. at 907 (emphasis added). The creative activities in *TMG*

"c[a]me together to produce finished videos that are media for the communication of ideas." 936 F.3d at 752.

Like other speakers, creative professionals have the right to remain silent by declining to create expression. The First Circuit upheld an orchestra's "right to be free from compelled expression," observing that "[a] distinguished line of cases has underscored a private party's right to refuse compelled expression." *Redgrave v. Boston Symphony Orchestra, Inc*., 855 F.2d 888, 905 (1st Cir. 1988). The "typical reluctance" of courts "to force private citizens to act" (*id*., citing *Lumley*, 42 Eng. Rep. at 693) "augments its constitutionally based concern for the integrity of the artist." *Id*. 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 statutory rights of same-sex couples must be "measured against [Bob's] constitutional right against the state" (*id*. at 904) to be free of compelled expression.

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

The VVA stifles *religious* speech which is "as fully protected . . . as secular private expression." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). 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." *Id*. (internal citations omitted).

This case implicates both free speech and religious liberty. Bob uses his creative skills to express a message about marriage consistent with his faith. *B&N*, 448 P.3d at 917. The videographers in *TMG* wanted to "affect the cultural narrative regarding marriage" through films that portrayed 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. *Id*. at 759 (emphasis added).

Marriage is a deeply personal matter that "many religions recognize . . . as having spiritual significance." *Turner v. Safley*, 482 U.S. 78, 96 (1987). It is difficult to imagine a photographer providing wedding services without attending the ceremony. The *CNP* court protected a photographer's right not to participate in a religious ceremony that conflicted with her faith, noting that "[b]locking Louisville from forcing [plaintiff] to photograph same-sex weddings means that she won't have to attend same-sex weddings." *CNP*, 479 F.Supp.3d at 562.

Free exercise embraces "the right to express [one's] 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 reason 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). "[T]olerance is a two-way street." *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012). So is dignity. Even though the Supreme Court redefined marriage, same-sex couples have no corollary right to coerce others to celebrate with them. The VVA "vilif[ies]" 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.

Conscience. The 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 underlying the Establishment Clause. "[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). Virginia requires Bob to violate his conscience by creating messages and celebrating events he

believes to be immoral. This is a frontal assault on conscience as great as the evil of compelling citizens to support religious beliefs they do not hold.

Commercial sphere. Citizens who engage in commerce accept *some* limitations on their conduct but do not forfeit *all* constitutional rights. *United States v. Lee*, 455 U.S. 252, 261 (1982) ("*every* person cannot be shielded from *all* the burdens incident to exercising *every* aspect of the right to practice religious beliefs"). The First Amendment does not trump every statutory scheme applicable to commerce, but neither do commercial regulations erase religious liberty.

Customers expect businesses to operate with honesty and integrity. Bob conducts his business with integrity, setting 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 everyone. 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). The Framers intentionally protected "the integrity of individual conscience in religious matters." *McCreary County, KY v. ACLU*, 545 U.S. 844, 876 (2005). Courts have 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).

Speech and religious liberty "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. 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*.

V. 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 ADDRESS.

Anti-discrimination laws are designed to be a shield, not a sword. Plaintiff's refusal to create artwork is not the invidious, irrational, arbitrary discrimination that may be restricted. But the state holds the VVA as a sword ready to sever his rights to speech and religion.

The word "discrimination" needs a clear, consistent definition. Declining to advance a contentious agenda is hardly "discrimination," particularly since no one

has an unqualified right to demand the services of a *particular* photographer. In considering discrimination claims, courts must discern whether an "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 places regulated.

Anti-discrimination policies have ancient roots. The law in *Hurley* was derived from the principle that common carriers could not refuse service without good reason. *Hurley*, 515 U.S. at 571. The Thirteenth, Fourteenth, and Fifteenth Amendments were added to the Constitution to remedy the extraordinary problem of racial discrimination. These provisions cannot readily be transported into every other type of "discrimination," particularly when imposed on private citizens whose own rights may be trampled. It is one thing to impose nondiscrimination principles on the *state* but quite another to foist those standards on private parties whose own liberties are at stake.

Early anti-discrimination laws focused almost exclusively on racial discrimination. *Just Shoot Me*, 64 Vand. L. Rev. 961, 965 (2011). But more protected categories were added and more places classified as "public accommodations." This vast expansion occurred with little analysis of the difference between race and other newly protected classes. The potential encroachment on religious liberty widened with the enactment of statutory rights against private acts of discrimination.

Anti-discrimination laws initially limited "public accommodations" to transient lodging, theaters, restaurants, entertainment, and similar public places. *Just Shoot Me*, 64 Vand. L. Rev. 961 at 966. But gradually the "places" expanded beyond inns and trains to commercial entities and even membership associations—escalating the potential collision with First Amendment rights. *Boy Scouts v. Dale*, 530 U.S. 640, 657 (2000). The trend is to broadly sweep in *any* establishment that offers *any* goods or services to the public.

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 based on 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 enacted to eradicate racial discrimination that interfered with travel. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). But it is hardly arbitrary to avoid promoting a

cause that violates individual 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 provisions exhibit hostility toward religion by classifying Bob's policies 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.

Non-discrimination principles should never be applied in a manner that squelches First Amendment rights. The Constitution protects the liberty, religion, and viewpoint of all within its realm. "[It] does not require a choice between gay rights and freedom of speech. It demands both." *CNP*, 479 F.Supp.3d at 549. Every American's liberty suffers irreparable harm if the government coerces creative services to 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. Ironically, the Act creates an intolerable danger of *exclusion* for artistic expression. The state can easily weaponize 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 Constitution protects a broad spectrum of expression, popular or not. Indeed, the increasing popularity of an idea makes it even 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). Freedom "must be accorded to the ideas we hate or sooner or later [it] will be denied to the ideas we cherish." *Communist Party v. SACB,* 367 U.S. 1, 137 (1961) (Black, J., dissenting).

LGBT advocates have accomplished dramatic social transformation by exercising their rights to speech, press, association, and the political process. 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*, 479 F.Supp.3d at 564. 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 everyone suffers.

Although LGBT citizens "cannot be treated as social outcasts or as inferior in dignity and worth" (*Masterpiece*, 138 S.Ct. at 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*, 479 F.Supp.3d at 548-549 (citations omitted).

Prior creative professional cases recognize the irony and implications. In *Masterpiece*, 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*, 138 S.Ct. at 1728. Properly applied, anti-discrimination law cannot 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 are particularly striking where political affiliation is (or is not) a protected category.[6] 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 contradicted their principles.[7] In New York, bars are allowed to throw out Trump supporters because the law does not protect against political discrimination[8] and renters seeking roommates can advertise they do not want Trump supporters.[9] But in Seattle, where political beliefs are protected, a gym may not lawfully ban a white supremacist.[10] The Eighth Circuit observed that

---

[6] *See, e.g.*, a District of Columbia statute that prohibits discrimination based on a multitude of categories. 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. https://ohr.dc.gov/protectedtraits.

[7] *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."

[8] https://nypost.com/2018/04/25/judge-bars-are-allowed-to-throw-out-trump-supporters/

[9] https://www.nytimes.com/2017/02/10/us/politics/roommates-trump-supporters.html

[10] https://crosscut.com/2018/02/a-gym-banned-a-white-nationalist-but-seattle-law-is-on-his-side

Minnesota's interpretation of its law would "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.

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

A law 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*, 479 F.Supp.3d at 563, citing *Obergefell*, 135 S. Ct. at 2605; *United States v. Windsor*, 570 U.S. 774, 775 (2013); *Masterpiece*, 138 S. Ct. at 1727.

In *TMG*, Minnesota alleged an "important governmental interest—preventing discrimination" by ensuring that all 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*, 479 F.Supp.3d at

564. 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. The government has no compelling interest in requiring speakers to modify their expression to align with a preferred message. *CNP*, 479 F.Supp.3d at 559.

The state's interest in preventing discrimination does not trump the Constitution. The Arizona Supreme Court found that the state's interest in ensuring equal access to goods and services did not "justify . . . commandeering **[**Plaintiffs'] 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. The law "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, "it might still lose" in cases "where it is attempting to compel religious speech at the core of the First Amendment." *CNP*, 479 F.Supp.3d at 559.

No one escapes offense in a free society. 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. The Supreme Court flatly rejected the argument that "[t]he Government has an interest in preventing speech

expressing ideas that offend." *Matal*, 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.

CONCLUSION

Amici urge this Court to reverse the District Court decision.

Dated: July 21, 2021

/s/Deborah J. Dewart

Deborah J. Dewart
Attorney at Law
111 Magnolia Lane
Hubert, NC 28539
Telephone: (910) 326-4554
lawyerdeborah@outlook.com
Counsel for *Amici Curiae*
North Carolina Values Coalition
Institute for Faith & Family

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because the brief contains 6,484 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word-counting function of Microsoft Office 2010.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Office Word in 14-point Times New Roman.

Dated: July 21, 2021

/s/Deborah J. Dewart

Deborah J. Dewart
Attorney at Law
111 Magnolia Lane
Hubert, NC 28539
Telephone: (910) 326-4554
lawyerdeborah@outlook.com

Counsel for *Amici Curiae*
North Carolina Values Coalition
Institute for Faith & Family

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2021, I electronically filed the foregoing *amici curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 21, 2021

/s/Deborah J. Dewart
Deborah J. Dewart
Attorney at Law
111 Magnolia Lane
Hubert, NC 28539
Telephone: (910) 326-4554
lawyerdeborah@outlook.com

Counsel for *Amici Curiae*
North Carolina Values Coalition
Institute for Faith & Family

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

BAR ADMISSION & ECF REGISTRATION: If you have not been admitted to practice before the Fourth Circuit, you must complete and return an Application for Admission before filing this form. If you were admitted to practice under a different name than you are now using, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at Register for eFiling.

THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO. 21-1506 as

☑ Retained ☐ Court-appointed(CJA) ☐ CJA associate ☐ Court-assigned(non-CJA) ☐ Federal Defender

☐ Pro Bono ☐ Government

COUNSEL FOR: Institute for Faith & Family and North Carolina Values Coalition

_____ as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

/s/ Deborah J. Dewart
(signature)

Please compare your information below with your information on PACER. Any updates or changes must be made through PACER's Manage My Account.

Deborah J. Dewart Name (printed or typed)	(910) 326-4554 Voice Phone
_____ Firm Name (if applicable)	_____ Fax Number
111 Magnolia Lane	
Hubert, NC 28539 Address	lawyerdeborah@outlook.com E-mail address (print or type)

CERTIFICATE OF SERVICE *(required for parties served outside CM/ECF)*: I certify that this document was served on _____ by ☐ personal delivery; ☐ mail; ☐ third-party commercial carrier; or ☐ email (with written consent) on the following persons at the addresses or email addresses shown:

_____ _____
Signature Date