NO. 21-1506

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)
The Honorable Claude M. Hilton
Case No. 1:20-cv-01141-CMH-JFA

OPENING BRIEF OF APPELLANTS ROBERT UPDEGROVE AND BOB UPDEGROVE PHOTOGRAPHY

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CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Plaintiffs-Appellants Robert Updegrove and Loudoun Multi-Images LLC, d/b/a Bob Updegrove Photography make these disclosures:

1. Is party a publicly held corporation or other publicly held entity? No.

2. Does party have any parent corporations? No.

3. Is 10% or more of the stock of a party owned by a publicly held corporation or other publicly held entity? No.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? No.

5. Is party a trade association? No.

6. Does this case arise out of a bankruptcy proceeding? No.

7. Is this a criminal case in which there was an organizational victim? No.

Dated: July 14, 2021

/s/ Jonathan A. Scruggs
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INTRODUCTION

Bob Updegrove is a Virginia photographer who serves all clients regardless of sexual orientation—but can express only those messages consistent with his belief that marriage is a sacred union between one man and one woman. Updegrove wants to explain his beliefs and editorial choices on his website. But he has been forced to refrain because the recent Virginia Values Act threatens him with lawsuits, injunctions, $100,000 fines, and unlimited punitive damages.

For standing to challenge this Act, Updegrove need only show that the Act arguably prohibits his speech and that he reasonably fears its enforcement. Virginia admits as much: it refuses to disavow enforcement against Updegrove, actively defends its ability to prosecute him, and affirmatively proclaims his messages about marriage to be "discriminat[ion] against same-sex couples" and "exactly what the Virginia Values Act is designed to prevent." J.A. 393, J.A. 450. Despite all this, the district court dismissed Updegrove's challenge, calling his enforcement fears too "hypothetical." J.A. 509. But that's wrong.

A plaintiff need not "first expose himself to actual . . . prosecution" before challenging a law that "deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). And plaintiffs need not "fly as a canary into a coal mine" to have their claims heard. *Bryant v. Woodall*, __ F.4th __, 2021 WL 2446942, at *3 (4th Cir. 2021). *Bryant* controls the outcome here.

Updegrove needs this Court's protection now. Artists across the country have faced fines, financial ruin, and even jail time for operating and speaking as Updegrove intends. Officials across the country have interpreted laws like Virginia's to punish these artists. And Attorney General Herring backed these efforts, joining amicus briefs saying that these laws—laws like the Act—do and should force artists to celebrate same-sex ceremonies. *E.g.*, Br. of Amici Curiae Mass. et al. in Supp. of Defs. at 8–12, *Emilee Carpenter, LLC v. James*, No. 6:21-cv-6303 (W.D.N.Y. July 6, 2021).

But public-accommodation laws cannot interfere with a speaker's right "to choose the content of his own message." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995). Using the *Hurley* decision, the Eighth Circuit, the Arizona Supreme Court, and a federal district court have all forbid officials from forcing artists to celebrate same-sex ceremonies. This Court should do the same.

Protecting Updegrove protects all speakers. A Muslim painter should be free to create mosaics for a mosque without being forced to create Easter banners for a church. A filmmaker should be free to promote Democratic fundraisers without being forced to promote Trump rallies. If the First Amendment protects these creative professionals—and it does—then it protects Updegrove too.

This Court should reverse the decision below and remand with instructions for the district court to enter a preliminary injunction.

JURISDICTIONAL STATEMENT

The district court has jurisdiction to hear this case under 28 U.S.C. §§ 1331 and 1343 because Updegrove raises First and Fourteenth Amendment claims. J.A. 51–55. This Court has jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 1292 because the district court entered its final order dismissing Updegrove's complaint on March 30, 2021, thereby denying his motion for a preliminary injunction. Updegrove timely filed his notice of appeal on April 28, 2021.

STATEMENT OF THE ISSUES

Standing: This Court's standing caselaw assumes that recently enacted laws will be enforced. And a plaintiff has standing if he is part of a class of speakers regulated by a recently enacted law. Updegrove intends to offer wedding photography celebrating only opposite-sex weddings, and he wants to publicly explain that policy. Both these acts arguably violate the recently enacted Virginia Values Act. Does Updegrove have standing to challenge this Act?

Free Speech: Anti-discrimination laws violate the First Amendment if they alter the content of a speaker's desired message unless they can survive strict scrutiny. Virginia interprets the Virginia Values Act to require Updegrove to use his photography to convey messages about marriage he does not believe while self-censoring messages he does. Does this application of the Act violate Updegrove's freedom of speech and entitle him to a preliminary injunction?

PERTINENT STATUTES AND REGULATIONS

Pertinent federal constitutional provisions and state laws are attached as an addendum to this brief.

STATEMENT OF THE CASE[1]

A. Updegrove conveys messages through his photography.

Bob Updegrove owns Bob Updegrove Photography located in Leesburg, Virginia. J.A. 14. His studio offers several kinds of photography to the public—including photography for schools, events, and weddings. J.A. 16–17. Updegrove does all the work himself: he creates the photography, edits it, and posts the finished product on his website to display his artistic work to the public and to attract new customers. J.A. 16–17, J.A. 19–24.

Updegrove is a Christian, and his faith influences every aspect of his life, work included. J.A. 17. He strives to create "unique art, in a photojournalistic fashion, to promote messages consistent with [his] Christian values." J.A. 18. He "retains complete editorial control" over his photography so he can "freely express [his] creativity according to [his] religious beliefs." J.A. 19, J.A. 318. And the first thing prospective customers see when they visit his website is a verse from Psalm 107: "Oh, that men would give thanks to the Lord for His goodness." J.A. 87.

[1] Because Updegrove appeals the dismissal of his claims, this Statement mainly cites his complaint. J.A. 12–64. But because he also appeals the implied denial of his preliminary-injunction motion, this Statement also cites his declaration in support of that motion. J.A. 307–59.

When he evaluates a photography request, Updegrove always considers the messages he's being asked to convey—not the identity of the person requesting it. J.A. 27–29. He will "work with any person—regardless of race, color, religion, national origin, sex, or sexual orientation—when the services they request promote messages, causes, and platforms that are consistent with [his] guiding principles." J.A. 61. But he will turn down requests to express messages that conflict with his beliefs. J.A. 24–25, J.A. 61–62. For example, Updegrove believes in free markets, so he would not use his photography to promote messages that advocate for socialism. J.A. 25, J.A. 62. He also believes in religious freedom, so he would not use his photography to promote messages that oppose religious expression. *Id.*

Updegrove also believes God created marriage to be an exclusive union between one man and one woman that points people to Jesus's sacrificial covenant relationship with the Church. J.A. 18–19. Through his wedding photography, he strives to "communicate the love, intimacy, and sacrifice of God's design for marriage." J.A. 20. As a result, Updegrove will not create wedding photography celebrating sacrilegious themes or negatively portraying marriage. J.A. 25. And he only creates photography celebrating weddings between one man and one woman. *Id.* So he does not create photography to celebrate same-sex, polygamous, or open relationships. *Id.* He always tries to refer such requests to another photographer who can fulfill them. J.A. 27.

B. Creative professionals confront changing laws.

"State public accommodations laws were originally enacted to prevent discrimination in traditional places of public accommodation—like inns and trains." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000). Over time though, these laws "have expanded to cover more places," with some states and courts applying them to "private entit[ies] without even attempting to tie the term 'place' to a physical location." *Id.* at 656–57. As that has occurred, "the potential for conflict" between these laws and the First Amendment "has increased." *Id.* at 657. This in turn has left creative professionals in a bind, facing lawsuits and severe liability for exercising their editorial freedom consistent with their beliefs. And as Updegrove explained, some have used these laws to target creative professionals because of their religious beliefs. J.A. 409.

The Colorado Civil Rights Commission first pursued legal action against cake artist Jack Phillips for not designing a cake celebrating a same-sex ceremony. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1724–26 (2018). It pursued him a second time for not designing a cake celebrating a gender transition for a private activist. Compl., *Scardina v. Masterpiece Cakeshop Inc.*, No. CP2018011310 (Colo. Civil Rights Comm'n Oct. 9, 2018), perma.cc/38JU-JR3C. Now, Phillips is in court a third time after the same private activist filed a new lawsuit against him. Compl., *Scardina v. Masterpiece Cakeshop Inc.*, 19-cv-32214 (Colo. Dist. Ct., June 5, 2019), perma.cc/Y74J-5AR9.

In Washington, the Attorney General sued a florist after she declined to design a custom floral arrangement for a same-sex ceremony. *See Washington v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1210–12 (Wash. 2019). In Kentucky, a print shop owner was sued after declining to print T-shirts celebrating a pride festival. *See Lexington-Fayette Urban Cnty. Hum. Rts. Comm'n v. Hands On Originals*, 592 S.W.3d 291, 295 (Ky. 2019). And in New Mexico, a court said that a photographer violated the New Mexico Human Rights Act because she declined to photograph a same-sex ceremony. *See Elane Photography, LLC v. Willock*, 309 P.3d 53, 59–60 (N.M. 2013). And as Updegrove pointed out in his complaint, Virginia's Attorney General, Mark Herring, has joined amicus briefs in similar cases brought against religious creative professionals, arguing they violate anti-discrimination laws by offering expressive services celebrating opposite-sex ceremonies but not same-sex ceremonies. J.A. 36–38.

Non-religious artists and organizations have also been targeted. In New York, an Israeli organization sued "a progressive bar association" for refusing to publish the Israeli group's ad in a program. *See Athenaeum v. Nat'l Lawyers Guild, Inc.*, No. 653668/16, 2018 WL 1172597, at *1–3 (N.Y. Sup. Ct. Mar. 06, 2018). And in Detroit a lesbian-owned cakeshop received a request for a cake that said, "Homosexual acts are gravely evil." Sue Selasky, *Lesbian baker in Detroit got homophobic cake order: Why she made it anyway*, Detroit

Free Press (Aug. 13, 2020), perma.cc/JS53-APD3. Citing a concern she would be accused of "reverse discrimination," that artist made the requested cake—but without the offensive message. *Id.*

C. Virginia enacts new law prohibiting discrimination in places of public accommodation.

On July 1, 2020, Virginia's recently enacted Virginia Values Act took effect. J.A. 499. The Act amends the Virginia Human Rights Act to prohibit discrimination in "places of public accommodation." Va. Code § 2.2-3904(A). The new law applies to "all places or businesses offering or holding out to the general public goods, services, privileges, facilities, advantages, or accommodations." *Id.* The Act contains two provisions that define "an unlawful discriminatory practice." Va. Code § 2.2-3904(B). The first states, in relevant part, that public accommodations cannot "refuse, withhold from, or deny any individual, . . . directly or indirectly, any of the . . . services . . . made available" on the basis of, among other things, "sexual orientation." *Id.* (hereinafter "the accommodations clause"). The second states that public accommodations cannot "publish, circulate, issue, display, post, or mail, either directly or indirectly, any communication" indicating "that any . . . services . . . shall be refused, withheld from, or denied to any individual on the basis of [among other things] sexual orientation." *Id.* (hereinafter "the publication clause").

The Act can be enforced in several ways.

First, the Attorney General can civilly prosecute anyone he has "reasonable cause to believe . . . is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted" by the Act, or anyone the Attorney General has "reasonable cause to believe" has denied "any person or group of persons . . . any of the rights granted" by the Act if "such denial raises an issue of general public importance." Va. Code § 2.2-3906(A). And any "aggrieved person" can intervene in a lawsuit filed by the Attorney General. Va. Code § 2.2-3906(D).

Second, any "person claiming to be aggrieved by an unlawful discriminatory practice" can file a complaint with the newly formed Office of Civil Rights (formerly the Division of Human Rights) within the Attorney General's Office. Va. Code § 2.2-3907(A); J.A. 516.

Third, the Office, the Attorney General, or "any person, agency or organization," can file a complaint on an aggrieved person's behalf. 1 Va. Admin. Code § 45-20-30(B). *See also* Va. Code § 2.2-3907(A).

If the Office receives a complaint, it must issue a charge to the accused and conduct an investigation. Va. Code §§ 2.2-3907(B), 2.2-3907(D); 1 Va. Admin. Code § 45-20-20. The investigation gives the Office the right to request position statements, compel production of documents or information, receive evidence, and hold hearings. Va. Code §§ 2.2-520(C)(1), 2.2-521, 2.2-4019(A), 2.2-4020(C)–(D); 1 Va. Admin. Code § 45-20-80(A)–(D).

If the Office cannot resolve a complaint informally—or finds no reasonable cause for the complaint—it gives the complainant a right-to-sue notice, which allows the complainant to sue the accused in court. Va. Code §§ 2.2-3907(E)–(F), 2.2-3908(A). The Attorney General can also intervene in that lawsuit. Va. Code § 2.2-3908(C).

In a lawsuit filed by the Attorney General, a court can issue injunctive relief or other preventive relief as necessary. Va. Code § 2.2-3906(B)(1). It can also impose civil penalties up to $50,000 for the first violation and up to $100,000 for each subsequent violation. Va. Code § 2.2-3906(B)(2). The court or jury can award compensatory damages, punitive damages, and "other relief to the aggrieved person" deemed "appropriate." Va. Code § 2.2-3906(C). And the court can also award attorney fees and costs. Va. Code § 2.2-3906(B)(3). A complainant who intervenes in a lawsuit filed by the Attorney General can ask for the same penalties. Va. Code § 2.2-3906(D).

Similarly, complainants who file their own lawsuits can seek injunctive relief, an order mandating "such affirmative action as may be appropriate," compensatory and punitive damages, and attorney fees and costs. Va. Code § 2.2-3908(B). If the Attorney General intervenes in a complainant's case, he can seek any of the same remedies. Va. Code § 2.2-3908(C).

D. Updegrove self-censors to avoid violating the new law.

Soon after Virginia passed the Act, another wedding photographer sued to enjoin the Act's enforcement against him. J.A. 37. In response, the Attorney General issued a statement indicating that he intends to enforce the Act against artists who cannot in good conscience photograph same-sex ceremonies. *Id.* Stating his belief that "every Virginian has the right to be safe and free from discrimination no matter . . . who they love," the Attorney General promised that he "looks forward to defending the Virginia Values Act in court against these attacks." *Id.*

After Updegrove learned about the new law and the Attorney General's intent to prosecute individuals and businesses who cannot celebrate same-sex ceremonies, Updegrove decided he wants to take steps "to be more vigilante about the photography requests" he agrees to. J.A. 336. He fears operating his business consistent with his beliefs and receiving requests that violate his faith, "despite [his] openly expressed Christian beliefs, because of Virginia's law." *Id.* So he wants to ask prospective clients whether they are seeking photography services celebrating same-sex ceremonies "so that he can be transparent with them and let them know he does not create these photographs." J.A. 33.

Updegrove also wants to adopt and distribute a written policy to be more transparent about his editorial process. J.A. 27, J.A. 32, J.A. 61. His draft policy (attached as an exhibit to his complaint) explains his guiding principles and binds his company to not photograph anything that violates those principles, including same-sex ceremonies. J.A. 32, J.A. 61–62. Updegrove also wants to publish a statement on his website explaining his beliefs about marriage and why he cannot celebrate same-sex ceremonies. J.A. 27, J.A. 34, J.A. 64.

Updegrove wants to make and publish all these statements immediately, but he has refrained from stating or publishing any of them for fear of violating the law. J.A. 32–35.

E. Updegrove sues to prevent enforcement against him.

After the Virginia Values Act became law, Updegrove filed this lawsuit on September 28, 2020, seeking a declaratory judgment that the Act unlawfully infringes his First Amendment rights because it prohibits him from (1) adopting or distributing his editorial policy, (2) explaining his editorial policy on his website, (3) asking prospective clients what type of services they are requesting, and (4) having a policy and practice of only offering wedding photography celebrating opposite-sex weddings. J.A. 30–32, J.A. 55–57, J.A. 501–02. Updegrove also moved for a preliminary injunction. J.A. 65.

On November 16, 2020, Virginia moved to dismiss Updegrove's complaint and opposed his motion for a preliminary injunction—defending the Act on the merits while conceding that it applies to Updegrove. *E.g.*, J.A. 380–85, J.A. 450–51. For example, Virginia argued the Act does not implicate Updegrove's First Amendment rights because, by creating wedding photography only for opposite-sex ceremonies, Virginia believes he "discriminates based on *status*" against "same-sex couples." J.A. 450. Similarly, Virginia argued that the Act does not force Updegrove to speak messages he disagrees with because "all the Act requires is that businesses offer their services—in this case, wedding photography—to all customers on an equal basis." J.A. 451.

With its motion to dismiss, Virginia also submitted a declaration by Assistant Attorney General Mona Siddiqui. J.A. 398–400. In it, Siddiqui affirmed that the Attorney General's Office had not received any complaints of sexual-orientation or gender-identity discrimination under the new law, nor had they received any other complaints of discrimination by public accommodations. J.A. 399–400.

F. District court finds no specific threat and dismisses.

The district court dismissed Updegrove's complaint for lack of standing—thereby summarily denying his requested preliminary injunction. J.A. 499–513. In its opinion, the court applied the Supreme Court's three-part test for determining whether plaintiffs have standing

to bring a pre-enforcement challenge. J.A. 502–03.[2] The court first held that Updegrove met the first two prongs because he intended to engage in expressive activities that (1) "arguably fall under the First Amendment" and (2) "arguably fall under the [Act's] text," which "could be interpreted to require [him] to provide wedding photography for same-sex weddings." J.A. 503. That left only the third prong: whether a "credible threat" exists that the Act will be enforced. J.A. 503.

To answer that question, the court began with the "presumption that the statute will be enforced" given that "states will presumably enforce recently enacted statutes," and Virginia "has refused to disavow enforcement of the law." J.A. 504–05. "Even with [that] presumption," though, the court held that Updegrove failed to show "that he personally faces a threat of enforcement." J.A. 505. To the district court, Virginia's "plan to enforce the statute *generally* does not mean that [Updegrove] *specifically* faces an imminent threat of enforcement." J.A. 506. Without a specific threat, it was not enough that his conduct "arguably violates an actively enforced statute." *Id*. So the court held that he lacked standing and dismissed. J.A. 511.

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[2] *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) ("[A] plaintiff satisfies the injury-in-fact requirement where he alleges 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.") (cleaned up).

To support its conclusion that Updegrove had failed to show a credible threat that the Act would be enforced against him, the district court considered three factors: (1) "the history of past enforcement," (2) "who has the authority to file a complaint," and (3) "how often complaints are filed or threatened." J.A. 503. According to the court, "the factors weigh against" Updegrove. J.A. 504. First, the court observed that the Act had "never been enforced against anyone." *Id.* And second, the court noted that, "[i]n the almost nine months since the statute became effective, no complaint [had] been filed under the statute." *Id.* That finding was based on Virginia's claim it had not yet "received, filed, or investigated any complaints of unlawful discrimination" under the Act. J.A. 399–400. "Since enforcement [had] been non-existent," the court thought "the potential threat against [Updegrove was] diminished." J.A. 505.

Third, the court acknowledged that the Act "allows for complaints to be filed by anyone," making "the likelihood of enforcement . . . much greater." J.A. 506. "This factor weighs in [Updegrove's] favor," the court allowed, before adding that "its impact is dulled because [Updegrove] has never actually acted in a way that would arguably violate the statute." *Id.* He had never had to deny a request to photograph a same-sex ceremony. *Id*. And *because he was self-censoring*, he had never tried to publish his proposed statements, nor had he sought to publish similar statements before the Act's passage. J.A. 506–09.

Finally, the court distinguished cases "where standing was found based on a chilling effect" because, in those cases, "the plaintiff faced the threat of criminal penalty." J.A. 510–11. Here, Updegrove "does not face the risk of criminal prosecution." J.A. 510. "The potential fine for violations" of the Act, "up to $50,000," is "not a trivial sum." *Id.*[3] But violators do "not face imprisonment" or a criminal record. *Id.* And the court thought that distinguished "almost every case where standing was found based on a chilling effect." J.A. 511.

G. Virginia belatedly moves to correct the record.

Virginia's declaration claiming it had not yet "received, filed, or investigated any complaints of unlawful discrimination" was executed November 16, 2020. J.A. 399–400. To confirm this declaration, Updegrove's counsel submitted a Freedom of Information Act (FOIA) request to the Virginia Attorney General's Office. One month later, counsel received documents showing the Office of Civil Rights *had* received and investigated complaints of discrimination—including several received before November 16, 2020. Counsel promptly brought this information to the attention of Virginia's counsel.

[3] The court failed to mention that the penalty for each subsequent violation is up to $100,000. Va. Code § 2.2-3906(B)(2). The court also ignored the availability of compensatory and punitive damages, costs, and attorney fees. Va. Code §§ 2.2-3906(C), 2.2-3908(B).

One month after Updegrove noticed his appeal, Virginia filed additional declarations in the district court. J.A. 516, J.A. 518. The first states that "certain statements in [the earlier] declaration were not accurate at the time they were made." J.A. 516. Specifically, the prior representation that the Office of Civil Rights had not received any complaints alleging discrimination based on sexual orientation or gender identity was "inaccurate" because "from July 1, 2020, through November 16, 2020, [the Office] received eight complaints" alleging discrimination based on sexual orientation, gender identity, or both. JA 516–17. The new declarations offered no explanation for the earlier misstatement of fact.

SUMMARY OF ARGUMENT

Less than three months after the district court dismissed Updegrove's case for lack of standing, this Court decided *Bryant v. Woodall*, __ F.4th __, 2021 WL 2446942 (4th Cir. 2021). In *Bryant*, the Court held that abortion providers had standing to challenge an abortion law that had not been enforced "against any abortion provider *in nearly fifty years*." *Id.* at *3 (emphasis added). That lack of prior enforcement did not negate the threat of future enforcement—especially since there was no evidence of past violations for the state to enforce against. *Id.* *Bryant* is controlling and dispositive. If the abortion providers had standing in *Bryant*—and this Court held they did—then Updegrove has standing here.

Indeed, Updegrove's standing is much stronger because *Bryant* was not a First Amendment case. In First Amendment cases, standing requirements are "somewhat relaxed . . . given that even the *risk* of punishment could chill speech." *Edgar v. Haines*, __ F.4th __, 2021 WL 2557893, at *6 (4th Cir. 2021) (cleaned up). In *Edgar*—decided one week after *Bryant*—this Court held that five former security-agency employees had standing to challenge their agencies' "prepublication review" requirements. *Id.* at *1, *7. Some of the employees alleged they had self-censored because of the policies. *Id.* at *7. And this Court held that "[s]uch self-censorship is enough for an injury-in-fact to lie." *Id.* (cleaned up). It is enough here, too.

"As to whether a First Amendment plaintiff faces a credible threat of prosecution, the evidentiary bar that must be met is extremely low." *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003). Because the Act "facially restricts" Updegrove's desired speech and editorial policy, this Court must presume that he faces a "credible threat" of enforcement under the Act's publication clause "in the absence of compelling evidence to the contrary." *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999) (cleaned up). No such evidence exists here. Quite the opposite. Many factors support the conclusion that Updegrove faces a credible threat of enforcement. And the district court erred by discounting that evidence while relying on evidence that turned out to be wrong.

Updegrove's standing to challenge the publication clause gives him standing to challenge the accommodations clause because the merits of both are closely intertwined, implicating the "same set of concerns." *Gratz v. Bollinger*, 539 U.S. 244, 267 (2003). And Updegrove's injury under the accommodations clause is imminent because the Act could be enforced against him at any time—even if he never receives a request to photograph a same-sex ceremony. The Attorney General can prosecute businesses engaged in a "practice of resistance" to the Act even without a complaint. Va. Code § 2.2-3906(A). Updegrove also risks receiving requests to photograph same-sex ceremonies at any time. This Court should reverse the district court's dismissal of Updegrove's claims.

The Court also should order the district court to enter a preliminary injunction on remand. The Act compels Updegrove's speech by forcing him to create photography expressing Virginia's preferred viewpoints about marriage. And the Act restricts his speech based on content and viewpoint, both facially and as applied. Each of these infringements triggers and fails strict scrutiny.

Compelling and banning Updegrove's speech causes him irreparable harm. It also harms the public interest and equity. Everyone wins when speakers can choose the messages they promote. Protecting Updegrove protects speakers of all ideologies, all faiths, and those with no faith at all.

ARGUMENT

I. Updegrove has standing to challenge the Act.

This Court reviews "factual findings with respect to jurisdiction for clear error and the legal conclusion that flows therefrom de novo." *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 333 (4th Cir. 2014). When a court dismisses a complaint for failure to allege enough facts to support jurisdiction, on appeal "all the facts alleged in the complaint [must be] assumed to be true." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). If in the district court the defendant "contend[s] that the jurisdictional allegations of the complaint [are] not true," the trial court is free to go beyond the complaint and weigh the evidence "in an evidentiary hearing." *Id.*

Here, Virginia proffered evidence outside the complaint in the form of a three-page declaration. J.A. 398–400. But it did not dispute any of Updegrove's facts. So the allegations in Updegrove's verified complaint are uncontroverted and must be "assumed to be true," affording him "the same procedural protection as he would receive under a Rule 12(b)(6) consideration." *Adams*, 697 F.2d at 1219. *See also Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993) (in considering factual challenge to court's jurisdiction, "uncontroverted factual allegations are accepted as true"); *accord Fountain v. Karim*, 838 F.3d 129, 134 (2d Cir. 2016) ("In resolving a motion to dismiss under Rule 12(b)(1), the district court must take all uncontroverted

facts in the complaint (or petition) as true."). Only when "the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law" should the court grant a motion to dismiss for lack of standing. *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991).

"Article III's standing requirement centers on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed." *Edgar*, 2021 WL 2557893, at *6 (cleaned up). "At this stage, a party has such a stake when it is able to plausibly allege '(1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision.'" *Id.* (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014)). The only dispute here is whether Updegrove has suffered an injury in fact. And this requirement is "somewhat relaxed in First Amendment cases, given that even the *risk* of punishment could chill speech." *Id.* (cleaned up).

Updegrove has met his burden to show that he suffered an Article III injury because (A) the Act's objectively reasonable chilling effect has caused him to self-censor, (B) his self-censorship gives him standing to challenge the parts of the Act that force him to photograph same-sex ceremonies because the issues are so closely intertwined, and (C) he faces a credible threat the Act can be enforced against him at any time.

A. Updegrove's self-censorship gives him standing to challenge the Act's publication clause.

"In First Amendment cases, the injury-in-fact element is commonly satisfied by a sufficient showing of self-censorship, which occurs when a claimant is chilled from exercising his right to free expression." *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) (cleaned up). A sufficient showing means the "chilling effect must be objectively reasonable," meaning the cause of the chill must be "likely to deter a person of ordinary firmness from the exercise of First Amendment rights." *Edgar*, 2021 WL 2557893, at *6 (cleaned up). Put another way, Updegrove must show he faces a credible threat of enforcement. *Abbott v. Pastides*, 900 F.3d 160, 176 (4th Cir. 2018).

Updegrove made that showing here. The Act's recent passage creates a presumption that it will be enforced. The evidence only confirms that presumption. And enforcement carries with it the prospect of forcing Updegrove to pay $50,000 and $100,000 penalties, compensatory damages, punitive damages, and attorney fees and court costs—all for refusing to express messages he disagrees with and for making and publishing statements explaining his beliefs. Considering those consequences, Updegrove's decision to self-censor is objectively reasonable and he faces a credible enforcement threat. And that is enough to give him standing.

1. *Bryant* proves that Updegrove faces a credible threat of enforcement based on the presumption that Virginia will enforce the Act.

"When a plaintiff faces a credible threat" that a statute will be enforced, "he has standing to mount a pre-enforcement challenge." *Bartlett*, 168 F.3d at 710. "A non-moribund statute that facially restricts expressive activity by the class to which the plaintiff belongs presents such a credible threat, and a case or controversy thus exists in the absence of compelling evidence to the contrary." *Id.* (cleaned up). This Court has regularly affirmed this presumption. *E.g. Abbott*, 900 F.3d at 178 n.9; *Kenny v. Wilson*, 885 F.3d 280, 288 (4th Cir. 2018); *Preston v. Leake*, 660 F.3d 726, 735 (4th Cir. 2011).

And in *Bryant*, this Court applied that presumption again, holding that an abortion regulation created a credible enforcement threat even though it not been enforced "against any abortion provider in nearly fifty years." 2021 WL 2446942, at *3. The Court reached that conclusion for three reasons. And all three reasons apply here.

i. Lack of past violations

First, the *Bryant* Court observed that there was "no evidence of open and notorious violations of the challenged statutes." *Id.* (cleaned up. Specifically, there was "no evidence that the Providers [had] performed illegal abortions." *Id.* So the Court could not "assume the State's acquiescence in violations of the law." *Id.* And that distinguished *Bryant* from prior cases where, "given the persistent and open violations" of the

laws at issue, the state's "non-enforcement [had] reduced the dead words of the written text to harmless, empty shadows," thereby removing any "credible threat of future enforcement." *Id.* (cleaned up).

Like the abortion providers in *Bryant*, Updegrove has not openly violated the law in the past by publishing any statements the Act forbids. And that bolsters Updegrove's standing. Because Updegrove (and others) have not violated the Act in this way, Virginia has never refused to enforce the law against this speech—it just hasn't had the opportunity to enforce it yet. So this Court should continue to apply its normal enforcement presumption and assume that Virginia will enforce the Act when given the opportunity, just as the Court did in *Bryant* for another (much older) non-moribund law.

Instead, the district court thought Updegrove's self-censorship left him with "no reason to suspect that [Virginia] might attempt to penalize him." J.A. 506. But that's backwards. "Public policy should encourage a person aggrieved by laws he considers unconstitutional" to challenge the law in court, "all the while complying with [it], rather than to deliberately break the law and take his chances in the ensuing suit or prosecution." *Mobil Oil Corp. v. Att'y Gen. of the Commonwealth of Va.*, 940 F.2d 73, 75 (4th Cir. 1991). "Establishing standing does not require that a litigant fly as a canary into a coal mine before [he] may enforce [his] rights." *Bryant*, 2021 WL 2446942, at *3. And that's just as true for wedding photographers as it is for abortion providers.

ii. Recent amendments

Second, this Court in *Bryant* concluded that recent amendments to the statute "cast doubt on whether" the state was "truly disinterested in enforcing its abortion laws." *Id.* While it makes sense "to discount moth-eaten statutes, laws that are recent and not moribund typically do present a credible threat." *Id.* (cleaned up). "This is because a court presumes that a legislature enacts a statute with the intent that it be enforced." *Id.* "So too with amendments." *Id.* at *4. "And although the core of the [challenged] twenty-week exception remained unchanged" after the amendments in *Bryant*, "the legislature did modify the text of the exception," and the Court thought it "difficult to explain why the legislature would have altered the text of the twenty-week ban if it did not expect for those words to ever be given effect." *Id.* Instead, the amendments suggested "a renewed interest in regulating abortion." *Id.*

The same reasoning applies here with even greater force. Unlike in *Bryant*, the Act has not lain dormant for nearly 50 years without the state enforcing it against anyone. It was passed just last year. J.A. 499. And "[i]t would be unreasonable to assume that the General Assembly adopted [it] without intending that it be enforced." *Bryant*, 2021 WL 2446942, at *4 (quoting *Am. Booksellers Ass'n, Inc. v. Virginia*, 802 F.2d 691, 694 n.4 (4th Cir. 1986)).

Importantly, *Bryant* found standing even though "two of the defendants [had] made informal statements indicating they [had] no present intent to enforce the challenged provisions." *Id.* at *4 n.1. Those statements were "not binding," and the other defendants had said nothing about their intent either way. *Id.*

Here, neither defendant has disavowed enforcing the Act. To the contrary, when another photographer challenged the Act, the Attorney General "confirmed that he would enforce the law against artists who cannot in good conscience photograph same-sex weddings," issuing a press release to that effect. J.A. 37. Since Updegrove began his case, the Attorney General has refused to disavow that intent.[4] So even absent any active enforcement actions, the "threat to [Updegrove's] continued livelihood" is real. *Joseph v. Blair*, 482 F.2d 575, 579 (4th Cir. 1973).

For its part, the district court admitted the Attorney General's statements "lend support to the argument that the statute is 'non-moribund.'" J.A. 505. But the court thought "they do not decide the issue," as if that were even in question for such a new statute. *Id.* It is not. And *Bryant* proves that the court erred by concluding otherwise.

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[4] Indeed, earlier this year, he celebrated the new Office of Civil Rights, which he said will "enhance [his] ability to protect Virginians from discrimination in . . . public life, as well as allow [him] to tackle new responsibilities, like 'pattern and practice' investigations [to] root out and end unconstitutional . . . discrimination [against] LGBTQ Virginians." *Herring Launches Office of Civil Rights Within Attorney General's Office* (January 5, 2021), perma.cc/4GEZ-GSQL.

iii. Current cultural divide

Third, the Court in *Bryant* cited the broader reality that "[a]bortion access remains a subject of lively debate in this country." 2021 WL 2446942, at *4. Other states have recently considered and passed similar laws. *Id.* at *4–5. And when the providers filed suit, the "political salience of the abortion debate was palpable." *Id.* at *5. "As a nation we remain deeply embroiled in debate over the legal status of abortion." *Id.* "While this conversation rages around us," this Court could not "say that the threat of prosecution to abortion providers who violate the law is not credible." *Id.*

So too here. "As a nation, we remain deeply embroiled in debate over the legal status" of forced celebration of same-sex ceremonies. *Id.* This conversation also "rages around us," often right alongside the debate over abortion. *Id.* Here too then, this Court cannot say that the threat of enforcement against artists like Updegrove is not credible. *Id.* Virginia's "continued interest in regulating [alleged discrimination] remains vividly apparent." *Id.* This Court "cannot dismiss the threat of prosecution as 'not remotely possible,'" as would be required to defeat standing. *Id.* (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 299 (1979)). And this Court should reverse.

2. *Edgar* bolsters the conclusion that Updegrove's self-censorship creates an injury in fact.

The presumption that state officials will enforce a recently enacted law "is particularly appropriate when the presence of [the] statute tends to chill the exercise of First Amendment rights." *Bartlett*, 168 F.3d at 710. Standing requirements are "somewhat relaxed" in First Amendment cases because "even the *risk* of punishment could chill speech." *Edgar*, 2021 WL 2557893, at *6 (cleaned up). *Bryant* was not a First Amendment case, and this Court still found standing under normal standing requirements. This case *is* a First Amendment case. And that makes Updegrove's standing even stronger.

Edgar proves that point. There, this Court held that five former security-agency employees had standing to challenge "prepublication review" requirements that allegedly had "caused them to write some pieces differently" and had "dissuaded them from writing" others. 2021 WL 2557893, at *6 (cleaned up). One of them had never submitted anything to the review process and "ha[d] no plans to submit any future work." *Id.* at *5. She was merely "concerned" her former government employer "might sanction her for failing to submit [a prior] work for review." *Id.* Still, it was enough that "some" plaintiffs alleged that they had "decided not to write about certain topics because of the prepublication review policies." *Id.* at *7. "Such self-censorship is enough for an injury-in-fact to lie." *Id.* (cleaned up). So the plaintiffs had standing. *Id.*

Standing requirements are even easier to meet in response to a motion to dismiss. *See Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 553 (4th Cir. 2013). In *Clatterbuck*, this Court held that plaintiffs had sufficiently alleged an injury-in-fact to challenge panhandling restrictions even though they had failed to allege (i) that they had ever begged within the restricted zones they were challenging, or even (ii) that they "plan[ned] to beg specifically within" those zones in the future. *Id.* at 553–54. This Court held that their more "general factual allegations" were enough and declined to "rigidly impose [a more] precise level of specificity at the pleadings stage." *Id.* (cleaned up).

Unlike the plaintiffs in *Edgar*, Updegrove has submitted concrete examples of the speech he wants to publish. J.A. 61–62, J.A. 64. And unlike the plaintiffs in *Clatterbuck*, he has explicitly alleged that he would publish them *but for the publication clause*. J.A. 32–35. By itself, *Bryant* establishes that Updegrove has standing to challenge the Act's publication clause. Adding in the more relaxed standing requirements for First Amendment cases—especially at the motion-to-dismiss stage—makes Updegrove's standing practically unassailable.

3. The district court erred by discounting all the evidence showing a credible threat of enforcement while citing evidence that turned out to be wrong.

Courts presume a credible enforcement threat when a recently enacted or "non-moribund statute . . . facially restricts expressive activity by the class to which the plaintiff belongs," unless there is "compelling evidence to the contrary." *Bartlett*, 168 F.3d at 710 (cleaned up). No such "compelling evidence to the contrary" exists here. *Id.*

Updegrove wants to distribute his editorial policy to prospective clients, explain his editorial policy on his website, and ask prospective clients whether they are seeking his services to celebrate anything other than a wedding between one man and one woman. J.A. 27, 31–32, 61–62, 64. The district court agreed that these activities "arguably fall under the text of the [Act]." J.A. 503. As does Virginia. J.A. 36–38, J.A. 380–87, J.A. 393. And other jurisdictions have read similar laws the same way.[5]

[5] *See Telescope Media Grp. v. Lucero* (*TMG*), 936 F.3d 740, 757 n.5 (8th Cir. 2019) (explaining that Minnesota Attorney General interpreted similar statute to forbid a film studio from publishing statement declining to create films celebrating same-sex ceremonies); *Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't*, 479 F. Supp. 3d 543, 550–51 (W.D. Ky. 2020) (reading similar statute the same way); Mem. of Law in Opp'n to Pls.' Prelim. Inj. Mot. at 6, *Emilee Carpenter*, No. 6:21-cv-6303 (June 16, 2021) (New York Attorney General taking same position on its law); *Arlene's Flowers*, 441 P.3d at 1222 (same); *Elane Photography*, 309 P.3d at 61–63 (same).

Because the Act facially covers Updegrove's speech, his "challenge to [the Act's] constitutionality is entirely appropriate unless the state can convincingly demonstrate that the statute is moribund or that it simply will not be enforced." *N.H. Right to Life Pol. Action Comm. v. Gardner*, 99 F.3d 8, 16 (1st Cir. 1996) (cited approvingly in *Bartlett*, 168 F.3d at 710). Virginia failed to make either showing.

i. Virginia's misstatement of fact

The district court relied on only one piece of evidence allegedly indicating Virginia officials might not enforce the Act. J.A. 504. And that evidence was wrong. J.A. 516–18. Virginia initially said it had not received any complaints. J.A. 399–400. But after the district court ruled, Updegrove discovered through FOIA that was wrong: Virginia had received *eight* requests when it made its earlier representation. J.A. 516–17. So the court's reliance on Virginia's "inaccurate" statement was clearly erroneous, J.A. 516, as was its denial of Updegrove's jurisdictional discovery request. J.A. 419 n.5.

Even Virginia's erroneous statement did not support the district court's finding that there were no complaints for "nine months" after the Act's enactment. J.A. 504. Virginia claimed it had not received complaints through November 16, 2020. J.A. 399–400. So the court assumed—with no evidence—that Virginia *still* had not received any complaints when the court issued its opinion four months later. J.A. 504. This too was clearly erroneous.

ii. Criminal versus civil penalties

The district court also erred by discounting the evidence showing a credible threat of enforcement. Most egregiously, it wrongly thought "the absence of criminal penalties . . . decreases the potential chilling effect." J.A. 510–11. Not so. "[T]hreatened governmental action need not . . . be a criminal prosecution." *Cooksey*, 721 F.3d at 238 n.5. The "fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277–78 (1964). Even a private lawsuit can be "every bit as coercive as the modest penalties" for misdemeanor crimes. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 134 n.12 (2007). And no plaintiff should have to "bet the farm" just to have standing. *Id.* at 129.

Updegrove faces fines of up to $50,000 for a first-time violation—$100,000 after that—in addition to attorney fees, costs and compensatory and punitive damages that could easily bankrupt him. Va. Code §§ 2.2-3906(B)–(C), 2.2-3908(B). This Court has found far smaller civil penalties to be sufficiently threatening. In *Edgar*, other than the possibility of a constructive trust on their profits, it does not appear there were *any* penalties for failing to comply with the pre-publication review process. *See* Br. for Appellees, 2020 WL 6269394, at *22 (Oct. 23, 2020) ("[E]ven if plaintiffs did intend to defy their review obligations, no prosecution, or even a civil penalty action could be brought against them merely for that reason.") (cleaned up).

This Court had "no trouble concluding" that "stiff civil remedies" were sufficient to confer standing in *People for the Ethical Treatment of Animals, Inc. v. Stein*, 737 F. App'x 122, 131 n.4 (4th Cir. 2018) (unpublished) (rejecting district court's conclusion that "only civil and no criminal penalties" precluded standing based up self-censorship). The Court said the same thing in *Mobil Oil* about a "stiff civil remedy" of "$2,500 [in] liquidated damages, plus actual damages and attorney's fees." 940 F.2d at 75 (cleaned up). Those pale in comparison to the penalties Updegrove faces. But the plaintiff in *Mobil Oil* still had standing because it "alleged an actual and well-founded fear that the law [would] be enforced," and it had "self-censored itself by complying with the statute." *Id.* at 76 (cleaned up). So too here.

Finally, even threatened administrative action can "give rise to harm sufficient to justify pre-enforcement review." *SBA List*, 573 U.S. at 165. Anyone "aggrieved" under the Act can file a complaint, and "any person" can file a complaint on someone else's behalf. Va. Code § 2.2-3907(A); 1 Va. Admin. Code § 45-20-30(B). The resulting process imposes serious burdens on the accused, J.A. 39–40, who "may be forced to divert significant time and resources to hire legal counsel and respond to discovery requests," *SBA List*, 573 U.S. at 165. This creates a "real risk of complaints from, for example, political opponents," and religious artists are "easy targets" for private activists. *SBA List*, 573 U.S. at 164. *See*, *e.g.*, *Scardina*, No. 19-cv-32214, *discussed supra* p. 6.

iii. No individualized threat required

The court also erred by requiring Updegrove to show a specific threat the Act would be enforced against him personally. J.A. 505–06. "A non-moribund statute that facially restricts expressive activity by *the class to which the plaintiff* belongs" presents a credible threat to prove the plaintiff's standing. *Bartlett*, 168 F.3d at 710 (emphasis added) (cleaned up). A plaintiff does not have to prove the government made a specific threat against him personally. "Where a plaintiff alleges an intention to engage in a course of conduct that is clearly proscribed by statute, . . . courts have found standing to challenge the statute, even absent a specific threat of enforcement." *Iowa Right To Life Comm., Inc. v. Tooker*, 717 F.3d 576, 604 (8th Cir. 2013) (cleaned up).[6]

That explains the results in *Bryant*, *Edgar*, and *Mobil Oil*. This Court did not require specific threats in any of those cases. It also explains *Doe v. Bolton*, where a group of physicians had standing to challenge an abortion statute even though no one had "been prosecuted, or threatened with prosecution." 410 U.S. 179, 188 (1973). This principle applies even more where, as here, the plaintiff has censored himself and thus has "eliminated the imminent threat of harm by simply not doing what he claimed the right to do." *MedImmune*, 549 U.S. at 129.

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[6] *See also Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1015 n.5 (9th Cir. 2013) ("[W]e have never held that a specific threat is necessary to demonstrate standing."); *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) ("a pre-enforcement challenge" need not show specific threat because that "threat is latent in the existence of the statute").

This also explains why Updegrove does not need to show that future enforcement under the publication clause is "imminent." Updegrove is censoring his speech *right now*—so his injury is ongoing. And the Supreme Court "has always described and treated the two concepts—actual, ongoing injury vs. imminent injury—as disjunctive." *Deal v. Mercer Cnty. Bd. of Educ.*, 911 F.3d 183, 188–89 (4th Cir. 2018). Thus, the district court incorrectly "import[ed] the imminence requirement into" its analysis of Updegrove's "ongoing injuries" under the publication clause. *Id.* at 188.

iv. Updegrove's right to speak for the first time

The district court conceded the Act's enforcement mechanism "weighs in [Updegrove's] favor," but thought that "its impact [was] dulled because [Updegrove] has never actually acted in a way that would arguably violate the statute." J.A. 506. That was wrong for several reasons.

First, Updegrove has self-censored *to avoid violating* the Act. "His own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction because the threat-eliminating behavior was effectively coerced." *MedImmune*, 549 U.S. at 119. This Court "cannot ignore such harms just because there has been no need for the iron fist to slip its velvet glove." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006).

Second, if the district court meant to question whether Updegrove truly wants to the publish the statements attached to his complaint, that too is error because the court already found that Updegrove intends to publish those statements. J.A. 503. So questioning whether he "*really* . . . intended to" publish them "directly conflicts" with the district court's own finding that he did. *See Gratz*, 539 U.S. at 261.

More important, Updegrove's intent to publish his statements was plausibly alleged and undisputed. So it would have been wrong to discredit those allegations and undisputed facts at the motion-to-dismiss stage anyway. *Adams*, 697 F.2d at 1219.

The Supreme Court has repeatedly found such an intent sufficient to prove standing. In *SBA List*, an advocacy group could challenge a law criminalizing false statements about political candidates because the group had "previously intended to disseminate" certain statements—even though it never had. 573 U.S. at 161–62 (holding plaintiffs' "intended future conduct" enough for standing). In *Epperson v. State of Arkansas*, a teacher could challenge a law against teaching evolution even though she had never taught evolution before. 393 U.S. 97, 100, 101–02 (1968). And in *Gratz v. Bollinger*, an aspiring transfer student could challenge a school's race-based admissions policy even though he had never tried to transfer to the school. 539 U.S. at 260–61.

Third, to the extent the district court questioned Updegrove's *motives* rather than his intent, Updegrove's motives were reasonable. Same-sex marriage only became legal in Virginia in 2014. And until last year, Updegrove could operate his business consistent with his religious beliefs. That changed with the Act's passage. Adding to this, attorneys general and private activists have recently targeted creative professionals across the country. And Attorney General Herring has defended the Act publicly and promised to enforce it against people like Updegrove. Against the backdrop of this changing legal and cultural context, Updegrove reasonably decided to clarify his business practices when he did and to take steps to protect himself and his business.

At the end of the day though, a plaintiff's motives for speaking do not matter. The Supreme Court has said that ministers could enter a "bus terminal for the sole purpose of testing their rights to unsegregated public accommodations." *Pierson v. Ray*, 386 U.S. 547, 558 (1967). And a black citizen could board a segregated bus he had never ridden "for the purpose of instituting" a civil rights lawsuit. *Evers v. Dwyer*, 358 U.S. 202, 204 (1958) (per curiam). Civil-rights litigants regularly challenge unjust laws, and courts do not question their motives. Otherwise, unjust laws would stay on the books hurting everyone. If Updegrove intends to speak (and he does) and the Act arguably forbids him from speaking (and it does), he has standing.

B. Deciding Updegrove's first claim requires deciding his second claim, so he has standing to raise both.

Because Updegrove has standing to challenge the publication clause, he has standing to challenge the accommodations clause because the merits of both claims are so closely intertwined. Deciding whether Updegrove can publish his editorial policy explaining his decision to photograph only opposite-sex weddings will require the Court to decide the underlying question: whether he can *have* a policy and practice of photographing only opposite-sex weddings. And because Updegrove has standing to raise the first question, he has standing to raise the second.

Gratz proves this point. There, the Court considered whether the aspiring transfer student had standing to challenge a freshman admissions policy for which he was no longer eligible. 539 U.S. at 261–67.[7] The Court held that he did. *Id.* at 263. In dissent, Justice Stevens argued that the criteria for freshman admissions were "significantly" different than for transfer students. *Id.* at 286 (Stevens, J., dissenting). But the Court found that both policies considered race to enhance diversity, which was exactly what the plaintiff argued was never justified. *Id.* at 267. So the two policies implicated "the same set of concerns," and this was enough to create standing to challenge both. *Id.*

[7] *Gratz*'s posture as "a class action adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 n.6 (2016) (cleaned up).

Updegrove's claims are even more intertwined than the claims in *Gratz*. Updegrove has standing to challenge the Act's publication clause. But to decide whether he can *talk* about his policy, the Court must also decide whether he can constitutionally *have* that policy—whether he can decline to celebrate same-sex ceremonies. Updegrove's ability to publish his statements turns on the constitutionality of the underlying activity he wants to speak about. So Updegrove's claims do not just implicate "the same set of concerns." *Gratz*, 539 U.S. at 267. The Court cannot decide one claim without deciding the other. Virginia even agrees that Updegrove's claims "rise and fall together." JA 494.[8]

The Eighth Circuit recently affirmed this in *Telescope Media Group v. Lucero* (*TMG*), upholding a film studio's challenge to a similar statute that forced filmmakers to celebrate same-sex ceremonies. 936 F.3d 740, 750 (8th Cir. 2019). "If creating videos were conduct [the state] could regulate, then [it] could invoke the incidental-burden doctrine to forbid the [plaintiffs] from advertising their intent to engage in discriminatory conduct." *Id.* at 757 n.5. But the state could not "compel [them] to speak," so it could not "force them to remain silent either." *Id.*

[8] *Cf. Scott v. Fam. Dollar Stores, Inc.*, 733 F.3d 105, 111 (4th Cir. 2013) (court may exercise "[p]endent appellate jurisdiction . . . when an issue is 'inextricably intertwined' with a question that is the proper subject of an immediate appeal"); *Adams,* 697 F.2d at 1219 ("[W]here the jurisdictional facts are intertwined with the facts central to the merits of the dispute . . . the better view . . . [is that] the entire factual dispute is appropriately resolved only by a proceeding on the merits.").

Bartlett illustrates the same point. There, a pro-life advocacy group challenged campaign-finance regulations that prohibited contributions to politicians and certain solicitations by politicians. 168 F.3d at 715. Defendants argued that the group lacked standing to challenge the solicitation restrictions because they were not political candidates. *Id.* at 715 n.2. But the Court brushed that argument aside because the "solicitation restriction [was] inextricably intertwined with [the] contribution limitation." *Id.* "Indeed, the two [were] the mirror reflection of one another." *Id.*

Here too, Updegrove's claims are inextricably intertwined. They "rise and fall together." JA 494. And they implicate "the same set of concerns." *Gratz*, 539 U.S. at 267. So standing to bring one claim gives Updegrove standing to bring the other.

C. Updegrove's practice of only photographing opposite-sex weddings independently gives him standing to challenge the Act's accommodations clause.

Updegrove also suffers an imminent injury that gives him standing to challenge the Act's accommodations clause because he faces a credible threat that the Act can be enforced against him at any time, and the district court erred by imposing additional hurdles with no basis in law.

1. Updegrove faces a credible threat that the Act can be enforced against him at any time.

Updegrove also faces an imminent future injury because he intends to engage in speech "arguably protected by the First Amendment but also proscribed by the [Act]," and he faces a "credible threat that the [Act] will be enforced against" him for doing so. *Abbott*, 900 F.3d at 176. This too gives him standing.

First, Updegrove intends to offer and create wedding photography celebrating marriages between one man and one woman while declining to celebrate same-sex ceremonies. The First Amendment protects photography because it "communicate[s] ideas." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011). It also protects Updegrove's act of creating and distributing his photographs, *id.* at 792 n.1, as well as his decision not to create certain photographs. *See infra*, § II.A.2.

Second, the Act prohibits Updegrove from offering only those expressive services that he would like to create and to sell. So long as Updegrove offers photography celebrating opposite-sex weddings, the accommodations clause requires him to offer photography celebrating same-sex ceremonies, too. Va. Code § 2.2-3904(B) (making it illegal "to refuse, withhold from, or deny any individual, or to attempt to refuse, withhold from, or deny any individual, directly or indirectly, any" service, "or to segregate or discriminate against any . . . on the basis of . . . sexual orientation").

The district court agreed that "the law could be interpreted to require [Updegrove] to provide wedding photography for same-sex weddings." J.A. 503. Virginia agrees, too, *e.g.* J.A. 450, and other jurisdictions have interpreted similar laws the same way, *e.g. TMG*, 936 F.3d at 748–49 (explaining how similar law required film studio to offer to create films celebrating same-sex ceremonies).

Third, Updegrove faces a credible threat of enforcement. *Abbott*, 900 F.3d at 176. The same presumption described above applies here. *See supra* § I.A.1. And none of the arguments refuted above detract from the presumption here either. *See supra* § I.A.3. So Updegrove has standing to challenge the accommodations clause.

2. The district court erred by imposing other hurdles unnecessary to prove standing.

The district court insisted that Updegrove "has no reason to suspect that [Virginia] might attempt to penalize him using a statute he has never violated." J.A. 506. This is wrong because (1) the Attorney General could investigate Updegrove right now, and (2) Updegrove may receive objectionable requests at any time.

First, the Act allows the Attorney General to sue anyone engaged in a "pattern or practice of resistance to the full enjoyment of any of the rights granted" by the law. Va. Code § 2.2-3906(A). This type of violation at least "arguably" doesn't require Virginia to prove that a service was denied for enforcement. *SBA List*, 573 U.S. at 162.

In the related employment context, the government's "burden under the pattern-or-practice method requires the plaintiff to prove only the existence of a discriminatory policy rather than all elements of a prima facie case of discrimination." *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 149 (2d Cir. 2012) (cleaned up); *see also United States v. Gregory*, 871 F.2d 1239, 1242 (4th Cir. 1989) ("[W]hen an employer's discriminatory policy is known, subjecting oneself to the humiliation of explicit and certain rejection is not required to make out a case of discrimination."). That is how the Department of Justice has historically interpreted its authority under statutes with similar language. *E.g.*, United States' Mot. for Partial Summ. J. on Liability at *28–30, *Valencia v. City of Springfield, Ill.*, No. 3:17-cv-03278, 2019 WL 4386551 (C.D. Ill. July 31, 2019) (stating it "need not introduce specific instances of discrimination").

This means Updegrove's policy of offering wedding photography celebrating only opposite-sex weddings could be interpreted as a "practice of resistance" to the Act, allowing the Attorney General to sue at any time. Va. Code § 2.2-3906(A). The Office of Civil Rights also can investigate "pattern and practice" complaints. Va. Code § 2.2-520(C)(1). So receiving and declining a request to photograph a same-sex ceremony isn't necessary before Virginia can investigate and even prosecute Updegrove. And at this stage, Updegrove need only show that his desired activities "arguably" violate the Act. *SBA List*, 573 U.S. at 162.

In other words, Updegrove's policy puts him in the government's crosshairs right now. Virginia can file its own complaints at any time. Va. Code § 2.2-3907(A). And the Act makes his entire "business model" illegal. *See TMG*, 936 F.3d at 768–69 (Kelly, J., concurring in part and dissenting in part) (agreeing that similar law forbids film studio's "business model" of offering films for only opposite-sex weddings).

Second, Updegrove faces a substantial risk that he could receive a request to celebrate a same-sex ceremony at any point. He operates in the wedding industry and advertises his services on the internet. J.A. 24, J.A. 29. Other artists around the country have been sued for declining similar requests—even artists who openly advertise their Christian faith. *E.g. Scardina*, No. 19-cv-32214, *discussed supra* p. 6. Against that backdrop, Updegrove's threatened injury is sufficiently imminent to give him standing to challenge the Act's accommodations clause. *See TMG*, 936 F.3d at 750 (granting standing to videographers who had not received an objectionable request); *Brush & Nib Studios, LC v. City of Phoenix* (*B&N*), 448 P.3d 890, 900–02 (Ariz. 2019) (same as to calligraphers); *Chelsey Nelson Photography LLC v. Louisville/ Jefferson Cnty. Metro Gov't* (*CNP*), 479 F. Supp. 3d 543, 551–52 (W.D. Ky. 2020) (same as to photographer).

II. Updegrove is entitled to a preliminary injunction.

This Court reviews a preliminary injunction denial for abuse of discretion, "reviewing the district court's factual findings for clear error and its legal conclusions de novo." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 235 (4th Cir. 2014) (cleaned up). "A district court abuses its discretion by applying an incorrect preliminary injunction standard, by resting its decision on a clearly erroneous finding of a material fact, or by misapprehending the law with respect to underlying issues in litigation." *N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 302 (4th Cir. 2020) (cleaned up).

For injunctive relief, Updegrove must show a likelihood of success, irreparable harm, and that both the balance of equities and public interest favor an injunction. *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 188 (4th Cir. 2013). Where the injury is to First Amendment rights though, the inquiry hinges on the likelihood of success because the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality)).

"If the district court fails to analyze the factors necessary to justify a preliminary injunction," a reviewing "court may do so in the first instance if the record is sufficiently developed." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) (en banc) (cleaned

up). So in cases like this one where "the government nowhere contest[s] the *factual* adequacy or accuracy" of the allegations, the reviewing court can resolve the preliminary injunction factors the district court left unresolved. *Id.* at 1146. When a First Amendment injury "was both threatened and occurring at the time" of filing and the plaintiff on appeal "demonstrate[s] a probability of success," the reviewing court may direct the district court to issue a preliminary injunction on remand. *Elrod*, 427 U.S. at 373–74 (plurality).

A. The accommodations clause compels Updegrove to speak messages with which he disagrees.

The First Amendment protects "the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). This means speakers have editorial discretion to choose the messages they promote. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (First Amendment protects "the function of editors" in their "exercise of editorial control and judgment").

A compelled speech claim has three elements: 1) speech, 2) that the government compels, 3) and the speaker objects to. *See Hurley*, 515 U.S. at 572–73 (applying elements); *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015) (identifying elements). Updegrove satisfies each element, and that triggers strict scrutiny. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.* (*PG&E*), 475 U.S. 1, 19 (1986) (plurality) (applying strict scrutiny to law compelling speech).

1. Updegrove's photography and statements are protected speech.

Updegrove's photography and policy statements are pure speech, protected by the First Amendment. *See supra* § I.C.1. And the First Amendment protects his speech even though he creates it for a fee. "[S]peaker's rights are not lost merely because compensation is received." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988); *Billups v. City of Charleston*, 961 F.3d 673, 683 (4th Cir. 2020) (protecting paid tour-guide services).

2. The accommodations clause compels Updegrove to speak.

Compelled speech occurs when the government infringes on a speaker's "autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 572–73. The "general rule" is that speakers have a "right to tailor [their] speech" to express messages they want. *Washington Post v. McManus*, 944 F.3d 506, 519 (4th Cir. 2019) (cleaned-up).

Hurley demonstrates this principle. In that case, an LGBT group tried to use a public accommodations law to gain access to a privately organized St. Patrick's Day parade. 515 U.S. at 572–73. The Supreme Court ruled that the parade organizers could exclude the LGBT group because the parade was expressive. *Id.* So forcing the organizers to admit the LGBT group would "alter the expressive content of their parade." *Id.* at 573.

Here, Virginia seeks to do exactly that by requiring Updegrove to offer photography celebrating same-sex ceremonies, so long as he offers photography celebrating opposite-sex ceremonies. *See supra* § I.C.1. In other words, the Act forces Updegrove to create wedding photography "in a way [he] would not otherwise." *McManus*, 944 F.3d at 518. That is compelled speech.

It doesn't matter that the accommodations clause does not facially target speech. Neither did the law in *Hurley*. Its "focal point" was stopping "the act of discriminating." *Id.* at 572. But when "applied to expressive activity," the law in Hurley still "require[d] speakers to modify the content of their expression to whatever extent beneficiaries of the law [chose] to alter it with messages of their own." *Id.* at 578. Here too, this Court must look beyond the Act's text or purpose to evaluate its effect as applied to Updegrove's speech.

Other courts agree. In *TMG*, the Eighth Circuit found that the Minnesota Human Rights Act compelled speech as applied to a film studio that declined to celebrate same-sex ceremonies. 936 F.3d at 753. And in *B&N*, the Arizona Supreme Court held that Phoenix could not use its public accommodation law to force an art studio to create invitations celebrating same-sex ceremonies. 448 P.3d at 898–900; *see also CNP*, 479 F. Supp. 3d at 558 (same conclusion for photographer who declined to celebrate same-sex ceremonies).

3. Updegrove objects to the messages the accommodations clause forces him to speak.

"Compelling individuals to mouth support for views they find objectionable violates [a] cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018).

It should be condemned here, too. Updegrove believes that God created marriage as the exclusive union between one man and one woman. He celebrates this view through his photography. Yet the Act forces him to create photography celebrating same-sex ceremonies, undermining the messages that he wants to convey.

Photographs positively portraying same-sex ceremonies necessarily communicate a different message than those celebrating ceremonies between one man and one woman. Many photographers post same-sex wedding photographs on their website for that very reason—to communicate their support for, and willingness to celebrate, same-sex weddings. "The First Amendment" protects both "those who oppose same-sex marriage" and "those who believe allowing same-sex marriage is proper or indeed essential." *Obergefell v. Hodges*, 576 U.S. 644, 679–80 (2015). So both sides have a right to promote their preferred message, including Updegrove.

"Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning." *Janus*, 138 S. Ct. at 2464. Thus, the Eighth Circuit held in *TMG* that forcing the Christian-owned film studio "to convey the same 'positive' message in their videos about same-sex marriage as they do for opposite-sex marriage," altered their desired message. 936 F.3d at 753. And in *B&N*, the Arizona Supreme Court similarly held that where an art studio wanted to celebrate opposite-sex weddings, "writing the names of two men or two women . . . clearly *does* alter the overall expressive content of their wedding invitations." 448 P.3d at 909.

Updegrove does not object to working with LGBT clients. He serves everyone no matter who they are or how they identify. He just cannot promote certain messages for anyone, regardless of their status. The Supreme Court in *Hurley* drew the same distinction. The parade organizers there did not "exclude homosexuals as such." 515 U.S. at 572. Instead, they objected to admitting an LGBT group "as its own parade unit carrying its own banner" because that would have affected the parade's message. *Id.* And the Supreme Court agreed. *Id.*

Updegrove has done nothing more here: serve people regardless of status and decline to speak certain messages. He deserves to exercise this editorial freedom just as other speakers exercise their editorial freedom on different subjects.

B. The publication clause prevents Updegrove from speaking certain messages based on content and viewpoint.

Reed v. Town of Gilbert specifies a two-part test for evaluating speech restrictions. 576 U.S. 155, 163–64 (2015). First, a speech restriction is content-based if "on its face [it] draws distinctions based on the message a speaker conveys." *Id.* at 163 (cleaned up). Second, a facially content-neutral law may still regulate content as applied if it cannot be justified without reference to the speech's content, or if the government adopted it because it disagrees with the speaker's message. *Id.* at 164.

The publication clause fails that test on its face. It prohibits any statement "to the effect that" Updegrove will decline to provide a service "on the basis of . . . sexual orientation." Va. Code § 2.2-3904(B). "That is about as content-based as it gets" because it favors some speech over others based on content. *Barr v. Am. Ass'n of Pol. Consultants, Inc*, 140 S. Ct. 2335, 2346 (2020) (robocall statute content-based because law's application turned on content of calls).

The publication clause also restricts Updegrove's speech based on his viewpoint. It allows speakers to say that they celebrate same-sex ceremonies. But it forbids Updegrove from saying that he can only celebrate opposite-sex ceremonies. "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

C. The Act fails strict scrutiny.

Because the Act compels Updegrove to speak and regulates his speech based on content and viewpoint, Virginia must prove that these applications are narrowly tailored to serve a compelling state interest. *Reed*, 576 U.S. at 163. It can't.

First, ending discrimination does not justify compelling Updegrove's speech because Updegrove does not discriminate based on status. He merely declines to promote certain messages, like everyone has the right to do.

Second, stopping discrimination does not justify compelling Updegrove's speech. *Hurley*, 515 U.S. at 579 (using public accommodations law to compel speech was "fatal objective"); *TMG*, 936 F.3d at 755 ("regulating speech because it is discriminatory or offensive is not a compelling state interest"); *B&N*, 448 P.3d at 914–15 (same).

Third, the Act is underinclusive, raising "serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown*, 564 U.S. at 802. For example, employers with fewer than fifteen employees can discriminate in some ways, while those with fewer than five can discriminate in *any* way. Va. Code § 2.2-3905(A). Allowing even some rank status discrimination "undermines [Virginia's] contention that its non-discrimination policies can brook no departures." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021).

Finally, the Act also is not narrowly tailored because Virginia cannot prove that regulating Updegrove is "the least restrictive means among available, effective alternatives." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). For example, Virgina could apply the Act to actual status-based discrimination instead of message-based objections like Updegrove's. It could create a "bona fide relationship" exception when classifications are integral to expressive services. *See* Colo. Rev. Stat. § 24-34-601(3). Or it could exempt individuals and small businesses that celebrate weddings. *See* Miss. Code § 11-62-5(5)(a). Finally, it could define public accommodations narrowly to apply only to essential or non-expressive businesses like restaurants, hotels, and stadiums. *See* 42 U.S.C. § 2000a(b); Fla. Stat. § 760.02(11); S.C. Code. Ann. § 45-9-10(B). Virginia has done none of these. So the act fails narrow tailoring.

D. The remaining preliminary injunction factors favor an injunction.

When a plaintiff alleges a First Amendment violation, the remaining preliminary injunction factors fall into place. As already explained, "irreparable harm is inseparably linked to the likelihood of success on the merits of [Updegrove's] First Amendment claim." *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (cleaned up). And Virginia cannot claim to be harmed because it cannot enforce its statute against Updegrove in a way that is likely unconstitutional. *Legend Night Club v. Miller*, 637

F.3d 291, 302–03 (4th Cir. 2011); *Newsom*, 354 F.3d at 261. Finally, "upholding constitutional rights is in the public interest." *Legend Night Club*, 637 F.3d at 303; *Newsom*, 354 F.3d at 261.

This Court has authority to remand with instructions to enter a preliminary injunction. *League of Women Voters*, 769 F.3d at 248 ("Appellate courts have the power to vacate and remand a denial of a preliminary injunction with specific instructions for the district court to enter an injunction."). This is still the case when it reviews the merits in the first instance. *See ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589–90, 608 (7th Cir. 2012) (reversing dismissal and remanding with instructions to enter preliminary injunction). And the Court should do so here.

CONCLUSION

Updegrove wants to operate his business consistent with his religious beliefs about marriage by creating photography celebrating weddings between one man and one woman, adopting an editorial policy formalizing his editorial choices, and explaining his editorial policy to the public. He wants to do these things right now. But he has refrained from doing so for fear of violating the Act.

Updegrove faces a credible threat of enforcement that chills his speech and creates an imminent risk of harm. This harm gives him standing to bring this case. Further, forcing Updegrove to celebrate ceremonies he disagrees with violates the First Amendment and ultimately threatens everyone's free-speech rights.

Updegrove asks this Court to reverse the dismissal of his case and to remand with instructions to enter his requested injunction.

Dated: July 14, 2021

By: */s/ Jonathan A. Scruggs*

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REQUEST FOR ORAL ARGUMENT

Updegrove respectfully requests oral argument to aid the Court in resolving the important Article III and First Amendment issues raised in this appeal.

Dated: July 14, 2021

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,624 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Office 365.

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 it has been prepared in a proportionally spaced typeface using 14-point Century Schoolbook.

Dated: July 14, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

Dated: July 14, 2021

/s/ Jonathan A. Scruggs
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ADDENDUM

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Constitutional Provisions

Statutes and Regulations

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Va. Code § 2.2-520

Office of Civil Rights created; duties

A. It is the policy of the Commonwealth of Virginia to provide for equal opportunities throughout the Commonwealth to all its citizens, regardless of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, sexual orientation, gender identity, disability, familial status, marital status, or status as a veteran and, to that end, to prohibit discriminatory practices with respect to employment, places of public accommodation, including educational institutions, and real estate transactions by any person or group of persons, including state and local law-enforcement agencies, in order that the peace, health, safety, prosperity, and general welfare of all the inhabitants of the Commonwealth be protected and ensured.

B. To carry out this policy, there is created in the Department of Law an Office of Civil Rights (the Office) to assist in the prevention of and relief from alleged unlawful discriminatory practices. The Office exists to investigate and bring actions to combat discrimination based on the protected classes listed in subsection A.

C. The powers and duties of the Office shall be to:

1. Receive, investigate, seek to conciliate, refer to another agency, hold hearings pursuant to the Virginia Administrative Process Act (§ 2.2-4000 et seq.), and make findings and recommendations upon complaints alleging unlawful discriminatory practices, including complaints alleging a pattern and practice of unlawful discriminatory practices, pursuant to the Virginia Human Rights Act (§ 2.2-3900 et seq.);

2. Adopt, promulgate, amend, and rescind regulations consistent with this article and the provisions of the Virginia Human Rights Act (§ 2.2-3900 et seq.) pursuant to the Virginia Administrative Process Act (§ 2.2-4000 et seq.). However, the Office shall not have the authority to adopt regulations on a substantive matter when another state agency is authorized to adopt such regulations;

3. Inquire into incidents that may constitute unlawful acts of discrimination or unfounded charges of unlawful discrimination under state or federal law and take such action within the Office's authority designed to prevent such acts;

4. Seek through appropriate enforcement authorities, prevention of or relief from an alleged unlawful discriminatory practice;

5. Appoint and compensate qualified hearing officers from the list of hearing officers maintained by the Executive Secretary of the Supreme Court of Virginia;

6. Promote creation of local commissions to aid in effectuating the policies of this article and to enter into cooperative worksharing or other agreements with federal agencies or local commissions, including the deferral of complaints of discrimination to federal agencies or local commissions;

7. Make studies and appoint advisory councils to effectuate the purposes and policies of the article and to make the results thereof available to the public;

8. Accept public grants or private gifts, bequests, or other payments, as appropriate;

9. Receive complaints, seek to conciliate, and inquire into incidents that may constitute an unlawful pattern or practice of conduct by law-enforcement officers that deprives persons of rights, privileges, or immunities secured or protected by the laws of the United States and the Commonwealth and take such action within the Office's authority, including requesting the Attorney General to issue a civil investigative demand pursuant to subsection D of § 2.2-511.1, designed to prevent such conduct; and

10. Furnish technical assistance upon request of persons subject to this article to further comply with the article or an order issued thereunder.

Va. Code § 2.2-521
Procedure for issuance of subpoena duces tecum

Whenever the Attorney General has reasonable cause to believe that any person has engaged in or is engaging in any unlawful discriminatory practice, he may apply to the judge of the circuit court of the jurisdiction in which the respondent resides or is doing business for a subpoena duces tecum against any person refusing to produce such data and information. The judge of the court, upon good cause shown, may cause the subpoena to be issued. Any person failing to comply with such subpoena shall be subject to punishment for contempt by the court issuing the subpoena. For purposes of this section, "person" includes any individual, partnership, corporation, association, legal representative, mutual company, joint stock company, trust, unincorporated organization, employee, employer, employment agency, labor organization, joint labor-management committee, or an agent thereof.

Va. Code § 2.2-3902
Construction of chapter; other programs to aid persons with disabilities, minors, and the elderly

The provisions of this chapter shall be construed liberally for the accomplishment of its policies.

Conduct that violates any Virginia or federal statute or regulation governing discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions including lactation, age, military status, disability, or national origin is an unlawful discriminatory practice under this chapter.

Nothing in this chapter shall prohibit or alter any program, service, facility, school, or privilege that is afforded, oriented, or restricted to a person because of disability or age from continuing to habilitate, rehabilitate, or accommodate that person.

In addition, nothing in this chapter shall be construed to affect any governmental program, law or activity differentiating between persons on the basis of age over the age of 18 years (i) where the differentiation is reasonably necessary to normal operation or the activity is based upon reasonable factors other than age or (ii) where the program, law or activity constitutes a legitimate exercise of powers of the Commonwealth for the general health, safety and welfare of the population at large.

Complaints filed with the Office of Civil Rights of the Department of Law (the Office) in accordance with § 2.2-520 alleging unlawful discriminatory practice under a Virginia statute that is enforced by a Virginia agency shall be referred to that agency. The Office may investigate complaints alleging an unlawful discriminatory practice under a federal statute or regulation and attempt to resolve it through conciliation. Unsolved complaints shall thereafter be referred to the federal agency with jurisdiction over the complaint. Upon such referral, the Office shall have no further jurisdiction over the complaint. The Office shall have no jurisdiction over any complaint filed under a local ordinance adopted pursuant to § 15.2-965.

Va. Code § 2.2-3904
Nondiscrimination in places of public accommodation; definitions

A. As used in this section:

“Age” means being an individual who is at least 18 years of age.

“Place of public accommodation” means all places or businesses offering or holding out to the general public goods, services, privileges, facilities, advantages, or accommodations.

B. It is an unlawful discriminatory practice for any person, including the owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodation, to refuse, withhold from, or deny any individual, or to attempt to refuse, withhold from, or deny any individual, directly or indirectly, any of the accommodations, advantages, facilities, services, or privileges made available in any place of public accommodation, or to segregate or discriminate against any such person in the use thereof, or to publish, circulate, issue, display, post, or mail, either directly or indirectly, any communication, notice, or advertisement to the effect that any of the accommodations, advantages, facilities, privileges, or services of any such place shall be refused, withheld from, or denied to any individual on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, sexual orientation, gender identity, marital status, disability, or military status.

C. The provisions of this section shall not apply to a private club, a place of accommodation owned by or operated on behalf of a religious corporation, association, or society that is not in fact open to the public, or any other establishment that is not in fact open to the public.

D. The provisions of this section shall not prohibit (i) discrimination against individuals who are less than 18 years of age or (ii) the provision of special benefits, incentives, discounts, or promotions by public or private programs to assist persons who are 50 years of age or older.

E. The provisions of this section shall not supersede or interfere with any state law or local ordinance that prohibits a person under the age of 21 from entering a place of public accommodation.

Va. Code § 2.2-3905
Nondiscrimination in employment; definitions; exceptions

A. As used in this section:

"Age" means being an individual who is at least 40 years of age.

"Domestic worker" means an individual who is compensated directly or indirectly for the performance of services of a household nature performed in or about a private home, including services performed by individuals such as companions, babysitters, cooks, waiters, butlers, valets, maids, housekeepers, nannies, nurses, janitors, laundresses, caretakers, handymen, gardeners, home health aides, personal care aides, and chauffeurs of automobiles for family use. "Domestic worker" does not include (i) a family member, friend, or neighbor of a child, or a parent of a child, who provides child care in the child's home; (ii) any child day program as defined in § 22.1-289.02 or an individual who is an employee of a child day program; or (iii) any employee employed on a casual basis in domestic service employment to provide companionship services for individuals who, because of age or infirmity, are unable to care for themselves.

"Employee" means an individual employed by an employer.

"Employer" means a person employing (i) 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person or (ii) one or more domestic workers. However, (a) for purposes of unlawful discharge under subdivision B 1 on the basis of race, color, religion, national origin, military status, sex, sexual orientation, gender identity, marital status, disability, pregnancy, or childbirth or related medical conditions including lactation, "employer" means any person employing more than five persons or one or more domestic workers and (b) for purposes of unlawful discharge under subdivision B 1 on the basis of age, "employer" means any employer employing more than five but fewer than 20 persons.

"Employment agency" means any person, or an agent of such person, regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer.

"Joint apprenticeship committee" means the same as that term is defined in § 40.1-120.

"Labor organization" means an organization engaged in an industry, or an agent of such organization, that exists for the purpose, in whole or in part, of dealing with employers on behalf of employees concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment. "Labor organization" includes employee representation committees, groups, or associations in which employees participate.

"Lactation" means a condition that may result in the feeding of a child directly from the breast or the expressing of milk from the breast.

B. It is an unlawful discriminatory practice for:

1. An employer to:

a. Fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to such individual's compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions including lactation, age, military status, disability, or national origin; or

b. Limit, segregate, or classify employees or applicants for employment in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect an individual's status as an employee, because of such individual's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions including lactation, age, military status, disability, or national origin.

2. An employment agency to:

a. Fail or refuse to refer for employment, or otherwise discriminate against, any individual because of such individual's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, military status, disability, or national origin; or

b. Classify or refer for employment any individual on the basis of such individual's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, military status, disability, or national origin.

3. A labor organization to:

a. Exclude or expel from its membership, or otherwise discriminate against, any individual because of such individual's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, military status, disability, or national origin;

b. Limit, segregate, or classify its membership or applicants for membership, or classify or fail to or refuse to refer for employment any individual, in any way that would deprive or tend to deprive such individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect an individual's status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, military status, disability, or national origin; or

c. Cause or attempt to cause an employer to discriminate against an individual in violation of subdivisions a or b.

4. An employer, labor organization, or joint apprenticeship committee to discriminate against any individual in any program to provide apprenticeship or other training program on the basis of such individual's race, color, religion, sex, sexual orientation, gender identity, pregnancy, childbirth or related medical conditions, age, military status, disability, or national origin.

5. An employer, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of employment-related tests on the basis of race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, military status, disability, or national origin.

6. Except as otherwise provided in this chapter, an employer to use race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, military status, disability, or national origin as a motivating factor for any employment practice, even though other factors also motivate the practice.

7. (i) An employer to discriminate against any employees or applicants for employment, (ii) an employment agency or a joint apprenticeship committee controlling an apprenticeship or other training program to discriminate against any individual, or (iii) a labor organization to discriminate against any member thereof or applicant for membership because such individual has opposed any practice made an unlawful discriminatory practice by this chapter or because such individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

8. An employer, labor organization, employment agency, or joint apprenticeship committee controlling an apprenticeship or other training program to print or publish, or cause to be printed or published, any notice or advertisement relating to (i) employment by such an employer, (ii) membership in or any classification or referral for employment by such a labor organization, (iii) any classification or referral for employment by such an employment agency, or (iv) admission to, or employment in, any program established to provide apprenticeship or other training by such a joint apprenticeship committee that indicates any preference, limitation, specification, or discrimination based on race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, military status, disability, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, age, or national origin when religion, sex, age, or national origin is a bona fide occupational qualification for employment.

C. Notwithstanding any other provision of this chapter, it is not an unlawful discriminatory practice:

1. For (i) an employer to hire and employ employees; (ii) an employment agency to classify, or refer for employment, any individual; (iii) a labor organization to classify its membership or to classify or refer for employment any individual; or (iv) an employer, labor organization, or joint apprenticeship committee to admit or employ any individual in any apprenticeship or other training program on the basis of such individual's religion, sex, or age in those certain instances where religion, sex, or age is a bona fide occupational qualification reasonably necessary to the normal operation of that particular employer, employment agency, labor organization, or joint apprenticeship committee;

2. For an elementary or secondary school or institution of higher education to hire and employ employees of a particular religion if such elementary or secondary school or institution of higher education is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society or if the curriculum of such elementary or secondary school or institution of higher education is directed toward the propagation of a particular religion;

3. For an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment, pursuant to a bona fide seniority or merit system, or a system that measures earnings by quantity or quality of production, or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, military status, disability, or national origin;

4. For an employer to give and to act upon the results of any professionally developed ability test, provided that such test, its administration, or an action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, military status, disability, or national origin;

5. For an employer to provide reasonable accommodations related to disability, pregnancy, childbirth or related medical conditions, and lactation, when such accommodations are requested by the employee; or

6. For an employer to condition employment or premises access based upon citizenship where the employer is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute or regulation of the federal government or any executive order of the President of the United States.

D. Nothing in this chapter shall be construed to require any employer, employment agency, labor organization, or joint apprenticeship committee to grant preferential treatment to any individual or to any group because of such individual's or group's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, military status, disability, or national origin on account of an imbalance that may exist with respect to the total number or percentage of persons of any race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, military status, disability, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to or employed in any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, military status, disability, or national origin in any community.

E. The provisions of this section shall not apply to the employment of individuals of a particular religion by a religious corporation, association, educational institution, or society to perform work associated with its activities.

Va. Code § 2.2-3906
Civil action by Attorney General

A. Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this chapter, or that any person or group of persons has been denied any of the rights granted by this chapter and such denial raises an issue of general public importance, the Attorney General may commence a civil action in the appropriate circuit court for appropriate relief.

B. In such civil action, the court may:

1. Award such preventive relief, including a permanent or temporary injunction, restraining order, or other order against the person responsible for a violation of this chapter, as is necessary to assure the full enjoyment of the rights granted by this chapter.

2. Assess a civil penalty against the respondent (i) in an amount not exceeding $50,000 for a first violation and (ii) in an amount not exceeding $100,000 for any subsequent violation. Such civil penalties are payable to the Literary Fund.

3. Award a prevailing plaintiff reasonable attorney fees and costs.

C. The court or jury may award such other relief to the aggrieved person as the court deems appropriate, including compensatory damages and punitive damages.

D. Upon timely application, any person may intervene in a civil action commenced by the Attorney General under subsection A that involves an alleged discriminatory practice pursuant to this chapter with respect to which such person is an aggrieved person. The court may grant such appropriate relief to any such intervening party as is authorized to be granted to a plaintiff in a civil action under § 2.2-3908.

Va. Code § 2.2-3907
Procedures for a charge of unlawful discrimination; notice; investigation; report; conciliation; notice of the right to file a civil action; temporary relief

A. Any person claiming to be aggrieved by an unlawful discriminatory practice may file a complaint in writing under oath or affirmation with the Office of Civil Rights of the Department of Law (the Office). The Office itself or the Attorney General may in a like manner file such a complaint. The complaint shall be in such detail as to substantially apprise any party properly concerned as to the time, place, and facts surrounding the alleged unlawful discrimination.

B. Upon perfection of a complaint filed pursuant to subsection A, the Office shall timely serve a charge on the respondent and provide all parties with a notice informing the parties of the complainant's rights, including the right to commence a civil action, and the dates within which the complainant may exercise such rights. In the notice, the Office shall notify the complainant that the charge of unlawful discrimination will be dismissed with prejudice and with no right to further proceed if a written complaint is not timely filed with the appropriate general district or circuit court.

C. The complainant and respondent may agree to voluntarily submit the charge to mediation without waiving any rights that are otherwise available to either party pursuant to this chapter and without incurring any obligation to accept the result of the mediation process. Nothing occurring in mediation shall be disclosed by the Office or admissible in evidence in any subsequent proceeding unless the complainant and the respondent agree in writing that such disclosure be made.

D. Once a charge has been issued, the Office shall conduct an investigation sufficient to determine whether there is reasonable cause to believe the alleged discrimination occurred. Such charge shall be the subject of a report made by the Office. The report shall be a confidential document subject to review by the Attorney General, authorized Office employees, and the parties. The review shall state whether there is reasonable cause to believe the alleged unlawful discrimination has been committed.

E. If the report on a charge of discrimination concludes that there is no reasonable cause to believe the alleged unlawful discrimination has been committed, the charge shall be dismissed and the complainant shall be given notice of his right to commence a civil action.

F. If the report on a charge of discrimination concludes that there is reasonable cause to believe the alleged unlawful discrimination has been committed, the complainant and respondent shall be notified of such determination and the Office shall immediately endeavor to eliminate any alleged unlawful discriminatory practice by informal methods such as conference, conciliation, and persuasion. When the Office determines that further endeavor to settle a complaint by conference, conciliation, and persuasion is unworkable and should be bypassed, the Office shall issue a notice that the case has been closed and the complainant shall be given notice of his right to commence a civil action.

G. At any time after a notice of charge of discrimination is issued, the Office or complainant may petition the appropriate court for temporary relief, pending final determination of the proceedings under this section, including an order or judgment restraining the respondent from doing or causing any act that would render ineffectual an order that a court may enter with respect to the complainant. Whether it is brought by the Office or by the complainant, the petition shall contain a certification by the Office that the particular matter presents exceptional circumstances in which irreparable injury will result from unlawful discrimination in the absence of temporary relief.

H. Upon receipt of a written request from the complainant, the Office shall promptly issue a notice of the right to file a civil action to the complainant after (i) 180 days have passed from the date the complaint was filed or (ii) the Office determines that it will be unable to complete its investigation within 180 days from the date the complaint was filed.

Va. Code § 2.2-3908
Civil actions by private parties

A. An aggrieved person who has been provided a notice of his right to file a civil action pursuant to § 2.2-3907 may commence a timely civil action in an appropriate general district or circuit court having jurisdiction over the person who allegedly unlawfully discriminated against such person in violation of this chapter.

B. If the court or jury finds that unlawful discrimination has occurred, the court or jury may award to the plaintiff, as the prevailing party, compensatory and punitive damages and the court may award reasonable attorney fees and costs and may grant as relief any permanent or temporary injunction, temporary restraining order, or other order, including an order enjoining the defendant from engaging in such practice, or order such affirmative action as may be appropriate.

C. Upon timely application, the Attorney General may intervene in such civil action if the Attorney General certifies that the case is of general public importance. Upon intervention, the Attorney General may obtain such relief as would be available to a private party under subsection B.

Va. Code § 2.2-4019
Informal fact finding proceedings

A. Agencies shall ascertain the fact basis for their decisions of cases through informal conference or consultation proceedings unless the named party and the agency consent to waive such a conference or proceeding to go directly to a formal hearing. Such conference-consultation procedures shall include rights of parties to the case to (i) have reasonable notice thereof, which notice shall include contact information consisting of the name, telephone number, and government email address of the person designated by the agency to answer questions or otherwise assist a named party; (ii) appear in person or by counsel or other qualified representative before the agency or its subordinates, or before a hearing officer for the informal presentation of factual data, argument, or proof in connection with any case; (iii) have notice of any contrary fact basis or information in the possession of the agency that can be relied upon in making an adverse decision;

(iv) receive a prompt decision of any application for a license, benefit, or renewal thereof; and (v) be informed, briefly and generally in writing, of the factual or procedural basis for an adverse decision in any case.

B. Agencies may, in their case decisions, rely upon public data, documents or information only when the agencies have provided all parties with advance notice of an intent to consider such public data, documents or information. This requirement shall not apply to an agency's reliance on case law and administrative precedent.

Va. Code § 2.2-4020
Formal hearings; litigated issues

A. The agency shall afford opportunity for the formal taking of evidence upon relevant fact issues in any case in which the basic laws provide expressly for decisions upon or after hearing and may do so in any case to the extent that informal procedures under § 2.2-4019 have not been had or have failed to dispose of a case by consent.

B. Parties to formal proceedings shall be given reasonable notice of the (i) time, place, and nature thereof; (ii) basic law under which the agency contemplates its possible exercise of authority; (iii) matters of fact and law asserted or questioned by the agency; and (iv) contact information consisting of the name, telephone number, and government email address of the person designated by the agency to respond to questions or otherwise assist a named party. Applicants for licenses, rights, benefits, or renewals thereof have the burden of approaching the agency concerned without such prior notice but they shall be similarly informed thereafter in the further course of the proceedings whether pursuant to this section or to § 2.2-4019.

C. In all such formal proceedings the parties shall be entitled to be accompanied by and represented by counsel, to submit oral and documentary evidence and rebuttal proofs, to conduct such cross-examination as may elicit a full and fair disclosure of the facts, and to have the proceedings completed and a decision made with dispatch. The burden of proof shall be upon the proponent or applicant. The presiding officers at the proceedings may (i) administer oaths and affirmations, (ii) receive probative evidence, exclude irrelevant, immaterial,

insubstantial, privileged, or repetitive proofs, rebuttal, or cross-examination, rule upon offers of proof, and oversee a verbatim recording of the evidence, (iii) hold conferences for the settlement or simplification of issues by consent, (iv) dispose of procedural requests, and (v) regulate and expedite the course of the hearing. Where a hearing officer presides, or where a subordinate designated for that purpose presides in hearings specified in subsection F of § 2.2-4024, he shall recommend findings and a decision unless the agency shall by its procedural regulations provide for the making of findings and an initial decision by the presiding officers subject to review and reconsideration by the agency on appeal to it as of right or on its own motion. The agency shall give deference to findings by the presiding officer explicitly based on the demeanor of witnesses.

D. Prior to the recommendations or decisions of subordinates, the parties concerned shall be given opportunity, on request, to submit in writing for the record (i) proposed findings and conclusions and (ii) statements of reasons therefor. In all cases, on request, opportunity shall be afforded for oral argument (a) to hearing officers or subordinate presiding officers, as the case may be, in all cases in which they make such recommendations or decisions or (b) to the agency in cases in which it makes the original decision without such prior recommendation and otherwise as it may permit in its discretion or provide by general rule. Where hearing officers or subordinate presiding officers, as the case may be, make recommendations, the agency shall receive and act on exceptions thereto.

E. All decisions or recommended decisions shall be served upon the parties, become a part of the record, and briefly state or recommend the findings, conclusions, reasons, or basis therefor upon the evidence presented by the record and relevant to the basic law under which the agency is operating together with the appropriate order, license, grant of benefits, sanction, relief, or denial thereof.

1 Va. Admin. Code § 45-20-20
Definitions

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Act" means the Virginia Human Rights Act, Chapter 39 (§ 2.2-3900 et seq.) of Title 2.2 of the Code of Virginia.

"Charge of discrimination" or "charge" means a complaint that has been perfected by the division and served on the parties to provide notice that the division has accepted and will investigate a complaint.

"Complaint" means a written statement by a person or by the division alleging an act of discrimination prohibited by the Act.

"Complainant" or "charging party" means a person who claims to have been injured by a discriminatory practice.

"Designee" means an individual designated by the director to act in his stead pursuant to this chapter.

"Determination" means the final written report detailing the division's findings of fact and analysis of whether or not there is reasonable cause to believe the Act was violated.

"Director" means an individual designated by the Attorney General to oversee the division and perform the duties and responsibilities outlined in the Act.

"Discharge" means an actual or constructive termination or separation of an employee from employment.

"Division" means the Division of Human Rights of the Department of Law.

"Hearing officer" means a person qualified from the list of hearing officers maintained by the Executive Secretary of the Supreme Court of Virginia.

"Person" means, consistent with § 1-230 of the Code of Virginia, any individual, corporation, partnership, association, cooperative, limited liability company, trust, joint venture, government, political subdivision, or any other legal or commercial entity and any successor, representative, agent, agency, or instrumentality thereof.

"Respondent" means a person against whom a complaint of violation of the Act is filed. In addition, those terms and any other referring to people will be considered masculine or feminine.

1 Va. Admin. Code § 45-20-30
Complaints by or on behalf of persons claiming to be aggrieved

A. The division shall receive information concerning alleged violations of the Act from any person. Where the information discloses that a person is entitled to file a complaint with the division, the division shall render assistance in the filing and perfecting of a complaint.

B. A complaint on behalf of a person claiming to be aggrieved may be made by any person, agency, or organization; however, the complaint shall be made in writing and shall be verified. The written complaint need not identify by name the person on whose behalf it is made. The person making the complaint, however, shall provide the division orally with the name, address, and telephone number of the person on whose behalf the complaint is made. During the division's investigation, the director shall verify the complaint with the person on whose behalf the complaint is made. The division may reveal the identity of complainants to federal, state, or local agencies that have agreed to keep such information confidential.

C. The complainant shall provide the division with notice of any change in address and with notice of any prolonged absence from his current address.

D. A complaint shall be filed with the division not later than 180 days from the day upon which the alleged discriminatory practice occurred.

E. A complaint alleging a violation of federal statutes governing discrimination in employment that also falls under the jurisdiction of the Act shall be filed with the division not later than 300 days from the day upon which the alleged discriminatory practice occurred.

1 Va. Admin. Code § 45-20-80
Investigations by the director or the director's designee

A. During the investigation of a complaint, the director may utilize the information gathered by other government agencies. The director shall accept a statement of position or evidence submitted by the complainant, the person making the complaint on behalf of complainant, any witnesses identified by the parties, or the respondent. The director may submit a request for a position statement to the respondent that, in addition to specific questions, may request a response to the allegations contained in the complaint.

B. The request for information by the director or the director's designee shall be mailed within 30 business days of receipt of the charge of discrimination. A response to the request for information shall be submitted within 21 business days from the date the request is postmarked.

C. The complainant and respondent shall provide such additional information deemed necessary by the director or his designee to conduct an investigation.

D. The authority of the director or the director's designee to investigate a complaint is not limited to the procedures outlined in subsections A, B, and C of this section.