No. 21-1506

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBERT UPDEGROVE, et al.,

Plaintiffs-Appellants,

v.

MARK R. HERRING,
in his official capacity as Virginia Attorney General, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF OF APPELLEES

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INTRODUCTION

"Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018). Last year, the Virginia General Assembly affirmed that basic principle by adopting the Virginia Values Act—a law that specifically prohibits discrimination based on sexual orientation. The Act also declares that all Virginians have a right to be free from discrimination in public accommodations and that no one may be turned away because of who they are or whom they love.

Here, Plaintiff-Appellant Robert Updegrove asks this Court to preemptively declare the Virginia Values Act unconstitutional so that he may offer photography services to some customers but not others. As the district court correctly concluded, plaintiff has not shown a credible threat of enforcement on that basis and therefore lacks standing to bring the claims alleged here. Because plaintiff failed to carry his burden as to jurisdiction, this Court should affirm for that reason alone.

Even if plaintiff had properly invoked federal jurisdiction, he and his photography studio are not entitled to a preliminary injunction before

this Court or any other. For one thing, the district court did not address the question below and should have the opportunity to do so in the first instance. Either way, plaintiff's free speech claim fails on the merits. State and federal anti-discrimination laws like the Virginia Values Act regulate conduct in the public marketplace—acts of discrimination—not what those in the business world must say or believe themselves. These laws also serve significant and compelling state interests that survive any level of constitutional scrutiny.

Like other anti-discrimination laws that have come before, the Virginia Values Act represents a legislative judgment about the importance of equality and inclusion in public life. That judgment does not infringe the right to free speech and should therefore be respected. At the very least, as a duly enacted law, the Virginia Values Act may not be invalidated or otherwise disturbed in the absence of a justiciable case or controversy. The order of the district court should be affirmed.

JURISDICTION

Because this action raises claims under 42 U.S.C. § 1983, the district court had original jurisdiction under 28 U.S.C. §§ 1331 and 1343. See JA 14. This Court has appellate jurisdiction under 28 U.S.C. § 1291

because the district court dismissed the complaint on March 30, 2021, JA 513, and plaintiff filed a timely notice of appeal on April 28, 2021, JA 514–15. See Fed. R. App. P. 4(a)(1)(A).

ISSUES PRESENTED

1. Whether the district court correctly held that the complaint does not present a justiciable case or controversy under Article III where plaintiff failed to establish a credible threat of enforcement.

2. Whether this Court should order preliminary injunctive relief in the first instance, where the district court did not reach the issue below and plaintiff's claim fails as a matter of law.

STATEMENT

A. The Virginia Values Act

1. Public accommodations laws have "a venerable history" that can be traced back to the common law. *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 571 (1995). In the decades following the Civil War, many States codified access to public accommodations regardless of race, particularly after the Supreme Court invalidated the federal prohibition on race discrimination adopted during Reconstruction. See *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984). "[U]ntil the Federal Government reentered the field in 1957,"

State laws "provided the primary means for protecting the civil rights of historically disadvantaged groups." *Id.* Even after Congress passed federal anti-discrimination laws, States remained at the forefront of the fight against unequal treatment based on immutable characteristics. By 1996, "most States ha[d] chosen to counter discrimination by enacting detailed statutory schemes." *Romer v. Evans*, 517 U.S. 620, 628 (1996).

Today, these State laws complement anti-discrimination protections that have been enacted at the federal level. Federal statutes—including the Civil Rights Act of 1964, the Americans with Disabilities Act, and Title IX of the Education Amendments of 1972—prohibit discrimination in different aspects of society such as employment (42 U.S.C. § 2000e-2), public accommodations (42 U.S.C. § 12182), education (20 U.S.C. § 1681), and housing (42 U.S.C. § 3604).

2. Virginia's primary anti-discrimination statute—the Virginia Human Rights Act, Va. Code Ann. § 2.2-3900 *et seq.*—dates back more than three decades. In 1987, the General Assembly declared that "[i]t is the policy of the Commonwealth . . . [t]o safeguard all individuals . . . from unlawful discrimination because of race, color, religion, national origin, sex, age, marital status or disability." 1987 Va. Acts 938.

a. More recently, Virginia revisited what it means for residents of the Commonwealth to be free from discrimination. Last year, the General Assembly significantly expanded the anti-discrimination protections available under state law by adopting the Virginia Values Act. See 2020 Va. Acts ch. 1140. The bill passed with bipartisan support, making Virginia the first southern State to adopt comprehensive legal protections against discrimination for the LGBTQ community.

As relevant here, the Virginia Values Act added a new section prohibiting discrimination in public accommodations, including on the basis of sexual orientation. Specifically, it is now "unlawful" to "refuse, withhold from, or deny any individual . . . any of the accommodations, advantages, facilities, services, or privileges made available in any place of public accommodation . . . 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." Va. Code Ann. § 2.2-3904(B). The statute defines "[p]lace of public accommodation" to mean "all places or businesses offering or holding out to the general public goods, services, privileges, facilities, advantages, or accommodations." *Id.* § 2.2-3904(A). The new law also

added "sexual orientation" to the list of protected characteristics in the statute's "declaration of policy." *Id.* § 2.2-3900.

b. As amended, the Virginia Human Rights Act (including the Virginia Values Act) is enforced by the Office of Civil Rights (Office) in the Office of the Attorney General. See Va. Code Ann. §§ 2.2-520, 2.2-3907. The Office investigates complaints alleging unlawful discrimination, makes determinations about whether there is reasonable cause to believe state or federal laws have been violated, and facilitates conciliation efforts among the parties to resolve disputes. *Id.* § 2.2-3907. A complaint alleging unlawful discrimination may be filed either by individuals "claiming to be aggrieved" or the Office itself. *Id.* § 2.2-3907(A). Once a complaint is filed, the Office conducts an investigation and prepares a report on the reasonable cause determination. *Id.* § 2.2-3907(D). The parties may also agree to participate in mediation. *Id.* § 2.2-3907(C).

Separate from the administrative process, the Attorney General may "commence a civil action" to seek "appropriate relief" in cases involving a "pattern or practice" of discrimination or "an issue of general public importance." Va. Code Ann. § 2.2-3906(A). The Attorney General

may also "intervene" in civil actions brought by private parties where "the case is of general public importance." *Id.* § 2.2-3908(C).

3. The General Assembly had ample reason to include sexual orientation as a protected characteristic under Virginia law. Many courts have noted that anti-LGBTQ discrimination has long been a feature of American society. For example, the Seventh Circuit has observed that members of the LGBTQ community "are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world." *Baskin v. Bogan*, 766 F.3d 648, 658 (7th Cir. 2014). And the Second Circuit recognized that "[i]t is easy to conclude that homosexuals have suffered a history of discrimination." *Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012), aff'd, 570 U.S. 744 (2013).

Despite progress in recent decades, this discrimination persists. In 2016, a national survey showed that 1 in 4 LGBT people had experienced discrimination based on sexual orientation or gender identity within the prior year, and 68.5% reported that it "negatively affected their psychological well-being." JA 372. Data for public accommodations show similar trends: in 2013, 23% of LGBT adults reported that they "received

poor service in a restaurant, hotel or other places of business" because of their sexual orientation or gender identity. JA 372–73.

Virginia's record is no exception. Although the Commonwealth has more than 300,000 LGBT residents, an analysis from January 2020—before the Virginia Values Act was enacted—concluded that Virginia ranked 24th in the nation in terms of "[s]ocial acceptance of LGB people" and that "historical anti-LGBT laws likely have lingering negative effects on the social climate for LGBT people." JA 373. A study from 2014 showed that opposite-sex couples seeking housing in Richmond were treated more favorably than same-sex couples 44% of the time. JA 373.

The Virginia Values Act was born out of the General Assembly's recognition of this persistent and unremitting discrimination. One of the sponsors of the bill explained that the legislation was "needed" and "urgent" because "discrimination is still happening in Virginia." JA 373. Upon signing the new law, the Governor remarked that "LGBTQ Virginians" would no longer "have to fear being . . . denied service in public places because of who they are." JA 373–74.[1]

[1] This public-record evidence is subject to judicial notice, see *United States v. Doe*, 962 F.3d 139, 147 n.6 (4th Cir. 2020), and plaintiff did not object to any of this information below.

B. This Litigation

1. Plaintiff-Appellant Robert Updegrove alleges that he is the sole owner of a "for-profit photography business that offers and provides photography services to the general public on a commission basis." JA 14, 16. Through his business, plaintiff "offers several kinds of photography services to the public, including services for religious organizations, corporations, non-profits, and other organizational events," as well as "engagement and wedding photography." JA 16–17. To identify business opportunities, plaintiff "solicits and receives inquiries for his photography from the general public through his business website" and also relies on "referrals from clients[] and referrals from his personal and professional network." JA 16.

According to plaintiff, he cannot accept requests to "create . . . wedding photography" for same-sex couples, because doing so "would promote activities contrary to his beliefs, express messages contradicting his beliefs, and express messages contradicting messages that [he] wants to and does promote elsewhere." JA 25. Plaintiff has never been approached by any potential customers seeking his photography services for a same-sex wedding. JA 506.

2. Plaintiff and his photography studio filed suit on September 28, 2020. JA 4. The complaint asserts three claims, all of which allege violations of the First Amendment to the United States Constitution: (a) freedom of speech, association, and press; (b) free exercise of religion; and (c) the establishment clause. JA 51–55. As relief, plaintiff sought a preliminary and permanent injunction against enforcement of the Virginia Values Act as applied to him and facially, as well as declarations that the law violates the First Amendment on an as-applied and facial basis. JA 56. Plaintiff also moved for a preliminary injunction, asking the court to enjoin defendants from enforcing the Act against plaintiff in any way that would (among other things): (a) require "offer[ing] or provid[ing] . . . wedding photography services . . . for same-sex weddings or engagements," and (b) prevent plaintiff "from asking prospective clients whether they seek photography services celebrating a same-sex wedding or engagement." JA 66.

Defendants opposed the preliminary injunction and moved to dismiss the complaint. JA 360–400. Under Rule 12(b)(1), defendants argued that the district court lacked jurisdiction because plaintiff had failed to establish standing to bring a pre-enforcement challenge. JA

376–80.[2] Under Rule 12(b)(6), defendants argued that all of plaintiff's claims failed as a matter of law because the complaint did not allege any infringement on First Amendment activity, and even if it did, the Virginia Values Act would satisfy strict scrutiny. JA 380–93. As to the preliminary injunction, defendants explained that plaintiff had not proven any of the four factors required for injunctive relief. JA 393–94.

3. After a hearing on both motions, JA 464–97, the district court issued a written opinion agreeing with defendants that plaintiff lacked standing. JA 499–511; *Updegrove v. Herring*, No. 1:20-CV-1141, 2021 WL 1206805 (E.D. Va. Mar. 30, 2021).

a. As to relevant enforcement activity, the district court correctly noted that the public accommodations provision of the Virginia Values Act had not yet "been enforced against anyone" at that point, and "[d]efendants[']' plan to enforce the statute *generally* does not mean that [p]laintiff *specifically* faces an imminent threat of enforcement." JA 504,

[2] In support of that motion, defendants submitted a declaration by Assistant Attorney General Mona Hafeez Siddiqui. That declaration recited several facts about the Office's anti-discrimination enforcement. JA 398–400. Defendants promptly filed updated declarations after counsel learned that certain statements in Ms. Siddiqui's declaration had not been accurate. JA 516–19.

506. Although complaints under the Virginia Values Act may "be filed by anyone," the district court concluded that the "impact" of that factor "is dulled because [p]laintiff has never actually acted in a way that would arguably violate the statute." JA 506. More specifically, "[p]laintiff has never been approached by anyone seeking his photography services for a same-sex wedding." JA 506.

b. The district court rejected plaintiff's "self-censorship" theory of harm for two primary reasons. First, plaintiff had "never previously engaged in the type of speech that he claims is currently being chilled," which meant he "never ceased any protected activity because he never started." JA 508–09. As the district court emphasized, accepting plaintiff's theory of justiciability would mean "anyone has standing to challenge any statute simply by alleging that they would like to make a future statement that the statute arguably prohibits." JA 509.

The second reason plaintiff's claim of self-censorship failed is that the consequences for violating the Virginia Values Act are civil, not criminal. JA 510–11. That distinction undermined plaintiff's reliance on pre-enforcement cases where the "only alternative is to risk criminal prosecution by violating the law." JA 510. Here, by contrast, the district

court noted that "[p]laintiff does not face imprisonment or the long-term penalty of a criminal record." JA 510. Because "the absence of criminal penalties decreases the severity of potential violations," that "decreases the potential chilling effect of the statute." JA 510–11. And although "[p]laintiff claim[ed] to be chilled by a potential civil fine," the district court held that "more" was required to "exercise jurisdiction." JA 511.

4. Having concluded that "[n]o case or controversy exists," the district court granted defendants' Rule 12(b)(1) motion and dismissed plaintiff's complaint without addressing the motion for a preliminary injunction. JA 10, 511, 513. At no point did plaintiff seek leave to amend the complaint, opting to file this appeal instead. JA 6–10.

SUMMARY OF ARGUMENT

The district court correctly concluded that plaintiff's complaint does not raise a justiciable case or controversy. Because plaintiff seeks to invalidate the Virginia Values Act based on a hypothetical set of future facts before that law has been enforced, Article III requires that he show a credible threat of enforcement in order to proceed. On the record presented below, plaintiff failed to do so here. As plaintiff himself admits, no one—be it a potential customer or any state official—has *ever*

approached him about photographing a same-sex wedding. And there is no suggestion that plaintiff may receive any such request now or in the future. Absent facts to support his theory of harm, plaintiff cannot meet the threshold requirements for standing. Waiting to adjudicate constitutional challenges like this one unless and until a cognizable injury-in-fact materializes guards against advisory opinions and properly limits the federal courts' review to genuine controversies.

To the extent this Court concludes otherwise, plaintiff still would not be entitled to a preliminary injunction, and this Court should decline to order injunctive relief in the first instance. The district court did not consider the motion and should have the opportunity to do so before the issue is reviewed on appeal. Either way, plaintiff's free speech claim is not likely to succeed on the merits because the Virginia Values Act does not regulate constitutionally protected speech and would survive strict scrutiny even if it did. Plaintiff's request that this Court be the first to issue a preliminary injunction should therefore be denied.

STANDARD OF REVIEW

"On appeal from a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), [this Court] review[s] the district court's 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) (quotation marks and citation omitted). "The burden of establishing standing falls on the party claiming subject-matter jurisdiction." *Cooksey v. Futrell*, 721 F.3d 226, 234 (4th Cir. 2013).

ARGUMENT

"Under Article III, federal courts do not adjudicate hypothetical or abstract disputes. Federal courts do not possess a roving commission to publicly opine on every legal question . . . . [or] issue advisory opinions." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). Consistent with these limitations, a litigant who wishes to bring a pre-enforcement challenge must show a credible threat of enforcement to proceed. But plaintiff has failed to do so here, and his arguments to the contrary misapply standing doctrine and the governing standard. See Part I, *infra*. In any event, plaintiff is not entitled to a preliminary injunction, and this Court should not be the first to conclude otherwise. See Part II, *infra*.

I. The district court correctly dismissed plaintiff's pre-enforcement challenge for lack of jurisdiction

Article III of the United States Constitution limits federal court jurisdiction to "Cases" and "Controversies." U.S. Const. art. III, § 2.

Whether viewed through the lens of standing or ripeness, that "bedrock" jurisdictional requirement has not been met here. *Raines v. Byrd*, 521 U.S. 811, 818 (1997).

The doctrines of standing and ripeness are closely related, both "originat[ing] in Article III's 'case' or 'controversy' language." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Whereas standing "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong," *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), ripeness "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements," *National Park Hosp. Ass'n v. Department of Interior*, 538 U.S. 803, 807 (2003). Carefully scrutinizing the nature and timing of a plaintiff's alleged injury in this way ensures that federal courts are "confine[d] . . . to a properly judicial role." *Spokeo*, 136 S. Ct. at 1547.

Where, as here, a plaintiff seeks to invalidate a duly enacted law before it has ever been enforced against him, the standing and ripeness requirements "boil down to the same question." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 n.5 (2014) (*SBA List*); see also *Miller v. City*

of Wickliffe, Ohio, 852 F.3d 497, 506 (6th Cir. 2017) ("In the pre-enforcement First Amendment context, the line between Article III standing and ripeness has evaporated."). Specifically, to satisfy Article III, the plaintiff must show "a credible threat of prosecution" under the challenged law that makes "threatened enforcement sufficiently imminent." *SBA List*, 573 U.S. at 159. Absent such a showing, a pre-enforcement challenge is not justiciable in federal court. *Id.*

A. Plaintiff has failed to establish any constitutionally cognizable harm

As the district court correctly concluded, plaintiff has failed to show a credible threat of enforcement sufficient for federal jurisdiction.

1. The most significant problem with plaintiff's standing theory is that the underlying factual predicate is entirely missing. As plaintiff admits, he has never actually been approached by potential clients seeking photography services for a same-sex wedding, see Updegrove Br. 43–44, and there is no reason to think that he may receive such a request any time soon. See JA 506. Nor does plaintiff claim that he has ever been contacted—much less sued, charged, or investigated—by the Office of Civil Rights or anyone else at the Office of the Attorney General in connection with his wedding photography business. The public

statements and *amici curiae* briefs on which plaintiff relies, see Updegrove Br. 2, 7, 26, are generalized statements that have nothing to do with whether any particular "threatened enforcement" under the Virginia Values Act is "sufficiently imminent" to satisfy Article III. *SBA List*, 573 U.S. at 159.

Without any evidence specific to him or his business, plaintiff must look elsewhere to substantiate the "credible threat of enforcement" on which he relies. *Abbott v. Pastides*, 900 F.3d 160, 176 (4th Cir. 2018). But plaintiff's evidence comes up short there as well. Plaintiff has not identified any other wedding vendors or "creative professionals" in the Commonwealth who have faced civil suits or administrative charges under the Virginia Values Act. See JA 399–400, 516. The handful of examples plaintiff cites all come from out-of-State, where other agencies were enforcing different laws in specific factual circumstances. See Updegrove Br. 6–8 (describing enforcement actions and affirmative lawsuits in Colorado, Washington, Kentucky, and New Mexico). And, as the district court observed, the lack of a "criminal penalty" in this matter distinguishes it from "almost every case where standing was found" based on an alleged chilling effect. JA 511 (citing Va. Code Ann. § 2.2-

3906). In the absence of any "evidence of the law having been enforced as [he] fear[s]"—or any reason to think such enforcement would be imminent here—plaintiff has failed to carry his burden on standing. *Maryland Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 218 (4th Cir. 2020).

2. Beyond failing to support plaintiff's standing, the record also shows why a concrete dispute may never arise. Based on the evidence before the district court, it is not clear that plaintiff will *ever* receive a request to photograph a same-sex wedding, and any inference that such a request is imminent would be entirely speculative. Even where plaintiff did receive a request and decline per his stated intent, the potential customer may never file a complaint or otherwise involve the Office of Civil Rights. And once a complaint is filed, the outcome is by no means a foregone conclusion—the Office of Civil Rights will review the complaint, issue notice to both parties, conduct an investigation, review any statements and evidence, consider mediation, and ultimately determine whether there is reasonable cause to believe the law has been violated. See Va. Code Ann. § 2.2-3907; 1 Va. Admin. Code § 45-20; JA 399, 516. Complaints may be dismissed for various reasons throughout the administrative process, and parties may be able to reach an agreed

resolution through mediation or conciliation. Responding parties are also free to raise constitutional arguments at any time, both before the Office of Civil Rights and of course in any civil suit that may be filed.

The many steps in this chain highlight the importance of the case or controversy requirement to establish federal court jurisdiction. To consider plaintiff's claim, the court would need to know (among other things) who had been turned away, on what basis, what services had been requested, and whether plaintiff provides those services to other customers.[3] Without knowing how any of these situations will play out, the court is left to speculate about the underlying facts in order to proceed. Accord *Beck v. McDonald*, 848 F.3d 262, 275 (4th Cir. 2017) (holding that an "attenuated chain of possibilities . . . cannot confer standing").

For these reasons, any "threat of future enforcement" is too "speculative" and "conjectural" to allow plaintiff's pre-enforcement challenge to proceed. *Kenny v. Wilson*, 885 F.3d 280, 288 (4th Cir. 2018). On the record presented below, the district court did not clearly err in

[3] Even a claim under the so-called "Publication Clause" would require knowing exactly what was said (either verbally or in writing) and whether it had been found to violate the law.

finding that, as a matter of fact, plaintiff does not face a credible threat of enforcement. See *Sanders v. United States*, 937 F.3d 316, 329 (4th Cir. 2019) (reviewing "factual findings" in connection with Rule 12(b)(1) dismissal "only for clear error"). And the district court correctly applied the law in concluding that "[p]laintiff must provide more before [a federal] [c]ourt may exercise jurisdiction." JA 511.

3. The circumstances here present a sharp contrast to cases where courts have allowed pre-enforcement challenges to proceed. For example, in *Cooksey v. Futrell*, 721 F.3d 226 (4th Cir. 2013), this Court held that the plaintiff had standing where he had been contacted by state officials on multiple occasions. Specifically, the plaintiff had "received a telephone call from the highest executive official of a state agency" who noted the agency's authority to "seek an injunction against him" and directed the plaintiff to make specific changes to his website. *Id.* at 232, 236. The agency later sent the plaintiff "a red-pen mark-up" of the site directing him to make additional changes. *Id.* Even after he did so, the plaintiff "remain[ed] under the watchful eye of the State Board" based on a letter from the agency that "'reserve[d] the right to continue to monitor th[e] situation.'" *Id.* at 236–37; see also *id.* at 231–32.

The facts in *Telescope Media Group v. Lucero*, 936 F.3d 740 (8th Cir. 2019), also paint a different picture than what has been alleged here. That case involved a wedding vendor who challenged a state public accommodations law that—unlike the Virginia Values Act—included "criminal penalties for certain violations." *Id.* at 750; *supra* at 18–19. Moreover, at the time of that suit, Minnesota had "employed 'testers' to target noncompliant businesses" and "already pursued a successful enforcement action against a wedding vendor who refused to rent a venue for a same-sex wedding." *Id.* at 750. Without any similar showing on this record, plaintiff's claimed injury falls outside the bounds of Article III.[4]

B. Plaintiff's arguments to the contrary misapply standing doctrine

Plaintiff's attempts to revive his claims on appeal misconstrue the governing law—both as a general matter, and as it applies here.

1. It is well settled that the burden to establish standing rests squarely with plaintiff as "[t]he party invoking federal jurisdiction." *SBA*

[4] In *303 Creative LLC v. Elenis*, No. 19-1413, 2021 WL 3157635 (10th Cir. July 26, 2021), the Tenth Circuit's holding that plaintiffs had standing to challenge a similar law in Colorado is not binding here, and is distinguishable in any event based on the state's "history of past enforcement against nearly identical conduct" in that case. *Id.* at *5.

List, 573 U.S. at 158. But plaintiff's arguments turn that standard on its head by suggesting that it is *defendants* who must "defeat standing."[5] Updegrove Br. 27. It is likewise not enough for a plaintiff to establish standing by filing suit and then demanding that the government "disavow[] enforcing" the challenged law, as plaintiff seeks to do here. Updegrove Br. 26. To hold otherwise would allow litigants across the board to manufacture standing any time the government "plan[s] to enforce [a] statute generally"—as is often their duty. JA 506 (emphasis omitted). Even if claims under the First Amendment "may warrant some relaxation" of certain doctrinal requirements, a plaintiff "must nevertheless satisfy the injury-in-fact requirement grounded in Article III." *Benham v. City of Charlotte, N.C.*, 635 F.3d 129, 135 (4th Cir. 2011).

2. More substantively, under plaintiff's view, any conduct that may arguably violate the law would automatically result in a "presumption" that a credible threat of enforcement exists. Updegrove Br. 28. But the Supreme Court and this Court have both held otherwise.

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[5] Plaintiff is also wrong to suggest that defendants "did not dispute any of [plaintiff]'s facts." Updegrove Br. 20. To the contrary, defendants offered evidence below to dispute the factual assertion that plaintiff "faces a credible threat and substantial risk that he will be investigated or prosecuted." JA 35 (allegation in verified complaint).

As early as 1979, the Supreme Court emphasized that a plaintiff bringing a pre-enforcement challenge must establish *both* that his intended conduct is "proscribed by a statute, *and* [that] there exists a credible threat of prosecution thereunder." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) (emphasis added). That Court repeated the same language 35 years later, confirming there are two requirements, not one. See *SBA List*, 573 U.S. at 159. The Fourth Circuit has also emphasized that "a credible threat of enforcement is critical" to the standing analysis, even in the First Amendment context where a litigant asserts "self-censoring" or some kind of "chilling effect." *Abbott*, 900 F.3d at 176; accord *Maryland Shall Issue*, 971 F.3d at 218 (rejecting pre-enforcement challenge where plaintiffs "offered no evidence to support a credible threat of prosecution").

There is a good reason why statutory coverage *and* a credible threat of enforcement are separate requirements for establishing a justiciable pre-enforcement challenge. Accepting plaintiff's suggestion to ignore the threatened enforcement prong would mean that anyone who has a colorable claim that a statute might apply to them would be permitted to bring suit, eviscerating Article III's strict limits on federal court

authority. See Updegrove Br. 23–25. As the district court rightly explained, "[p]laintiff's theory of standing would collapse the credible threat and arguable violation prongs into one," and every litigant could prove standing "simply by alleging that they would like to make a future statement that the statute arguably prohibits." JA 506, 509.

But that is not the law. See *supra* at 16–17. "Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021) (quotation marks and citation omitted). "Were the federal courts merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of 'standing' would be quite unnecessary." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982). These principles are fundamentally inconsistent with plaintiff's view that a credible threat of enforcement "must" be "presume[d]" in any circumstances, let alone here. Updegrove Br. 18.

3. Plaintiff also misstates how standing requirements apply to individual claims. Although plaintiff insists that he only needs standing

on one claim to have "standing to raise both," Updegrove Br. 38, that is not the case. "[S]tanding is not dispensed in gross," *Town of Chester, N.Y. v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1650 (2017), and accordingly a plaintiff must satisfy "[t]he standing requirement" as to "each claim" he "seeks to press," *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014). As the Supreme Court has emphasized, "allow[ing] standing as to one claim to suffice for all claims arising from the same nucleus of operative fact would have remarkable implications" and "amount to a significant revision of [the Court's] precedent interpreting Article III." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

Under this rule, plaintiff may not use standing on one claim to save the others. That the merits of the claims may rise or fall together, Updegrove Br. 39, does not free plaintiff of Article III's requirements. To be sure, this Court has stated that "the presence of one *party* with standing is sufficient to satisfy Article III" as to other parties, but it has never suggested that standing for one *claim* is sufficient to confer standing for all others. *Maryland Shall Issue*, 971 F.3d at 209 (emphasis added); see also *id.* ("at least one plaintiff must demonstrate standing for each claim and form of requested relief").

Contrary to plaintiff's argument, the Supreme Court's decision in *Gratz v. Bollinger*, 539 U.S. 244 (2003), in no way undermines this well-settled precedent. See Updegrove Br. 38. Although the named plaintiff there challenged two separate policies, he did so on behalf of a class and satisfied Article III by showing that he had standing in his own right as to both policies independently. *Gratz*, 539 U.S. at 262–63. Even setting that aside, to the extent plaintiff here had standing under the "Publication Clause"—which he does not, for the reasons outlined above—the only question properly before the court would be whether a state may lawfully prohibit an individual from announcing an intent to violate the law, *not* whether the underlying prohibition on conduct passes constitutional muster. As discussed below, the answer to that question is a resounding "yes." See *infra* at 42–43.

4. Requiring a plaintiff in a pre-enforcement challenge to separately establish a credible threat of enforcement is more than a pleading technicality. Waiting to resolve a pre-enforcement challenge until a credible threat of enforcement materializes—if it ever does—ensures that any controversy will be "presented in clean-cut and concrete form." *Doe v. Virginia Dep't of State Police*, 713 F.3d 745, 758 (4th Cir.

2013) (quotation marks and citation omitted). Otherwise, "courts would soon be overwhelmed with requests for what essentially would be advisory opinions" about how the law may apply in the future, *National Park Hosp. Ass'n*, 538 U.S. at 811, which would be plainly inconsistent with the judiciary's role under Article III, see *Trustgard Ins. Co. v. Collins*, 942 F.3d 195, 200 (4th Cir. 2019) ("That courts may not issue advisory opinions is one of the most long-standing and well-settled jurisdictional rules[.]"). Adhering to these jurisdictional prerequisites takes on even greater importance in cases like this one that raise hotly contested issues at the core of ongoing political debates and therefore run the risk of coming to the courts as part of a contrived litigation strategy rather than a genuine case or controversy.[6]

[6] A district court recently dismissed a similar case brought by the same national advocacy organization after concluding that the lawsuit "has likely been a smoke and mirrors case or controversy from the beginning, likely conjured up by Plaintiffs to establish binding First Amendment precedent rather than to allow them to craft wedding videos." *Telescope Media Grp. v. Lucero*, No. CV 16-4094, 2021 WL 2525412, at *3 (D. Minn. Apr. 21, 2021). And a state court here in Virginia has dismissed a parallel challenge to the Virginia Values Act for lack of standing. See *Calvary Road Baptist Church v. Herring*, No. CL 20006499 (Loudoun Cty. Cir. Ct. Aug. 11, 2021).

C. No intervening changes in the facts or the law compel a different result

Having failed to show any error in the district court's decision on its own terms, plaintiff seeks to overturn the ruling based on purported changes in the factual record and legal doctrine. See Updegrove Br. 17, 31. Neither challenge has merit.

1. On the facts, plaintiff has failed to identify any reversible error in the district court's findings. The corrected declaration that defendants filed addressed only one representation from the prior submission, regarding the number of complaints that had been "received" alleging "unlawful discrimination on the basis of sexual orientation or gender identity." JA 516. When it came to counsel's attention that the prior statement had not been accurate, defendants promptly alerted the court and corrected the record. See JA 516–19.

The fact that two non-employment complaints (rather than zero) had been received does not undermine the district court's conclusion that "[p]laintiff *specifically* [does not] face[] an imminent threat of enforcement." JA 506. Neither complaint involved plaintiff or his photography studio, and both were determined to fall outside of the jurisdiction of the Office of Civil Rights. JA 516–17. Even if that were not

the case, the filing of a complaint does not automatically trigger enforcement activity or penalties under Virginia law. Instead, a complaint initiates the administrative process at the Office of Civil Rights—which may or may not result in a reasonable cause finding, much less any civil suit or court-ordered penalties. See Va. Code Ann. § 2.2-3907. Complaints may be declined for any number of reasons, including referral to another agency, and even complaints that make their way through the process may be resolved through mediation or other private agreement. *Id.*; see also JA 399. Plaintiff is therefore wrong that this detail is dispositive—the existence of two unrelated complaints has no material impact on the district court's analysis and certainly does not render its conclusion "clearly erroneous." Updegrove Br. 31.

Plaintiff is also wrong to assert that the district court had some obligation to re-investigate the parties' factual submissions during the time that elapsed before the court issued its opinion. See Updegrove Br. 31. For one thing, it directly contradicts plaintiff's own claim that standing "centers on whether the party invoking jurisdiction *had* the requisite stake in the outcome *when the suit was filed*." Updegrove Br. 21 (emphasis added). And at no point has plaintiff ever suggested that

any intervening change in facts could or would bolster his claim to standing. To the contrary, plaintiff never once sought leave to amend the complaint or introduce additional evidence below.[7]

2. As for intervening legal developments, this Court's recent decisions do not cast doubt on the district court's dismissal.

In *Bryant v. Woodall*, 1 F.4th 280 (4th Cir. 2021), the Court concluded that abortion providers in North Carolina had standing to bring a pre-enforcement challenge because they faced a sufficiently credible threat of prosecution. But the circumstances in *Bryant* were materially different in at least two material respects. First, the law challenged in *Bryant* was criminal, and violations were punishable as a felony offense. See 1 F.4th at 284. Here, the only possible penalties under the Virginia Values Act are civil, see Va. Code Ann. § 2.2-3906, and as the district court noted, that distinction is important, see JA 510–11. Second, there does not appear to have been any dispute in *Bryant* about the factual predicate of the providers' claims—that women seek abortions

[7] Nor did the district court abuse its discretion in declining to order "jurisdictional discovery." Updegrove Br. 31. Plaintiff referenced that possibility to the district court only in passing in a single footnote, see JA 419 n.5, and did not request any such discovery at the hearing.

not permitted under the challenged law. See 1 F.4th at 285–86. But plaintiff here has never been asked to photograph a same-sex wedding, and there is no reason to think he will in the foreseeable future. Unlike in *Bryant*, plaintiff may never be faced with the opportunity to violate the law he seeks to overturn—which necessarily undermines any imminent threat that the law will be enforced against him.[8]

In contrast to *Bryant*, another recent decision by this Court emphasized the limits on federal jurisdiction that apply here. In *American Federation of Government Employees v. Office of Special Counsel*, 1 F.4th 180 (4th Cir. 2021), this Court reiterated that the judiciary "has no authority to write an advisory opinion" without "the slightest indication that any enforcement action has, or will ever, occur." *Id.* at 183. In that case, federal employees attempted to challenge agency opinions about the applicability of the Hatch Act before the agency had "provided any individualized notice" or "initiated an investigation." *Id.* at 188–89. To adjudicate plaintiff's claims would "force [the] [C]ourt into just the kind of premature adjudication that the Supreme Court has

[8] This Court's decision in *Edgar v. Haines*, 2 F.4th 298 (4th Cir. 2021), is of no help to plaintiff because the brief analysis there did not involve a pre-enforcement challenge. *Id.* at 310–11.

warned against." *Id.* at 189 (quotation marks omitted). That concern is particularly acute "in the administrative context," where judicial rulings would "interfere[]" with "further development through established agency channels." *Id.* at 190. The same is true here: ruling on the merits would short-circuit the administrative process that otherwise applies.

II. Plaintiff is not entitled to a preliminary injunction on the free speech claim

Plaintiff does not simply ask this Court to reverse the dismissal of his complaint. Instead, plaintiff asks that the case be "remand[ed] with instructions . . . to enter a preliminary injunction" on the free speech claim, Updegrove Br. 2, even though the district court never reached the question below. That request should be denied.

A. This Court should decline to consider a preliminary injunction in the first instance

Should this Court reverse the dismissal of plaintiff's complaint, the proper avenue would be to remand for the district court to weigh the preliminary injunction factors in the first instance.

Because a request for injunctive relief "is directed to the sound discretion of the district judge," an appellate court's "function in reviewing the grant or denial of a preliminary injunction is a limited one." *Joshua Meier Co. v. Albany Novelty Mfg. Co.*, 236 F.2d 144, 146 (2d Cir.

1956). In light of their institutional expertise, district courts may have "superior familiarity with the underlying facts of [a] case," which often puts the lower courts "in a far better position . . . to weigh the equities and fashion a proper remedy" where necessary. *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 22 (7th Cir. 1992).

Here, the district court did not "fail[] to analyze" or "l[eave] unresolved" any of the relevant factors, as plaintiff contends. Updegrove Br. 45–46. Instead, the court concluded that it lacked jurisdiction over plaintiff's claims and accordingly dismissed the complaint—as it was required to do—without considering plaintiff's request for a preliminary injunction. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (instructing that a court may not "pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction"). As a result, to reach plaintiff's request for an injunction, this Court would be required to assess both the facts and the law for the first time.

By contrast, a remand for further proceedings would allow the district court to consider the parties' arguments, weigh the factual record, and issue a decision for this Court to review. At a minimum, this Court should not hold that the district court abused its discretion where that

court did not have an opportunity to consider the motion. See *United States ex rel. Carson v. Manor Care, Inc.*, 851 F.3d 293, 307 (4th Cir. 2017) ("declin[ing] to consider" issues that "were never addressed by the district court, which should have that opportunity in the first instance"). Plaintiff has not identified any urgency that would justify departing from the usual practice here, particularly where plaintiff waited until the law had been in effect for nearly three months to file suit and never sought to expedite proceedings below. See JA 4–10; see also Doc. No. 14 (denying motion to expedite). And in a case such as this—which raises significant constitutional questions that are the subject of lively debate across the country—there may be good reason to wait for the benefit of a reasoned lower court decision rather than forging ahead without one.

B. Plaintiff has failed to satisfy any of the requirements for injunctive relief

In the event the Court considers plaintiff's request for injunctive relief in the first instance, that request should be denied. The cursory treatment of the matter in the opening brief—spanning fewer than ten pages—makes clear that plaintiff has failed to carry his burden. See Updegrove Br. 45–54. That burden is especially heavy here, where plaintiff seeks to overturn a state statute by way of a facial challenge.

Even in First Amendment cases, "[t]he Supreme Court has cautioned that [federal courts] not casually invalidate state legislation on facial grounds" because "such challenges often rest on speculation and run contrary to the fundamental principle of judicial restraint." *West Virginia Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 294 (4th Cir. 2009) (citation and quotation marks omitted).

The injunction plaintiff seeks from this Court is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). A party seeking a preliminary injunction must establish that: (a) they are likely to succeed on the merits; (b) they are likely to suffer irreparable harm without preliminary relief; (c) the balance of equities tips in their favor; and (d) an injunction is in the public interest. *Id.* Plaintiff has not made any of these showings with respect to the free speech claim for which he seeks preliminary relief. [9]

[9] Because the opening brief seeks a preliminary injunction based on the free speech claim alone, see Updegrove Br. 3, 19, 52, none of plaintiff's other claims are properly before this Court. See *Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n.6 (4th Cir. 1999) (claims not raised in opening brief are deemed abandoned).

1. Likelihood of success on the merits

On the merits, plaintiff's First Amendment claim fails as a matter of law for several independent reasons.

First, the Virginia Values Act regulates *conduct*, not *speech*. Like other anti-discrimination laws that have been in place for decades, the Virginia Values Act prohibits specific discriminatory acts but has nothing to say about any particular message or expression. The only legal requirement the Act imposes on businesses (like plaintiff's photography studio) that offer their "services" to "the general public" is that those services not be "refuse[d]" or "den[ied]" to "any individual . . . on the basis of" certain protected characteristics, including "race," "religion," "sex," and "sexual orientation." Va. Code Ann. § 2.2-3904.

As the statutory text makes clear, "the only choice regulated" by the Virginia Values Act is plaintiff's "choice of clients," not his "editorial judgment" or system of beliefs. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 67 (N.M. 2013). Under well-established precedent, that sort of regulation does not implicate—much less violate—the First Amendment. See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1728 (2018) ("It is unexceptional that Colorado law can protect

gay persons . . . in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."); accord *Roberts v. United States Jaycees*, 468 U.S. 609, 634 (1984) (*Jaycees*) (O'Connor, J., concurring) ("A shopkeeper has no constitutional right to deal only with persons of one sex.").

The critical distinction between speech and conduct shows why plaintiff is wrong that the Virginia Values Act "compels [him] to speak." Updegrove Br. 47. Unlike direct regulations of expression, the Act does not "dictate the content of . . . speech at all" or announce "a Government-mandated pledge or motto that [plaintiff] must endorse." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (*FAIR*). Instead, the act requires only that businesses open to the general public—like plaintiff's photography studio—offer their services equally to all customers regardless of race, sexual orientation, or any other protected characteristic. For that reason, the Act affects what plaintiff "must *do*," not what he "may or may not *say*," *FAIR*, 547 U.S. at 60, and nothing about the Act forces anyone "to mouth support" for particular "views," Updegrove Br. 49. Plaintiff's argument to the contrary cannot be squared with the Supreme Court's holding in *FAIR* that an equal access

requirement—even one with an "expressive component"—is "simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die.'" *Id.* at 62, 66.[10]

The line separating speech and conduct also shows why *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), does not apply in the way plaintiff claims. See Updegrove Br. 47–48. *Hurley* itself acknowledged that public accommodations laws "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination," and accordingly those laws "do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley*, 515 U.S. at 572. Under the facts of that case, however, Massachusetts' law had "been applied in a peculiar way" that "essentially require[ed]" the sponsors of a parade to "alter the expressive content of their parade." *Id.* at 572–73. Several years later, the Supreme Court declined to extend the holding in *Hurley* beyond the

[10] Plaintiff's arguments that that the Act regulates speech based on content or viewpoint fails for the same reason. See Updegrove Br. 51. As with the Minnesota law upheld in *Jaycees*, the Virginia Values Act "[o]n its face . . . does not distinguish between prohibited and permitted activity on the basis of viewpoint," nor does it "license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria." 468 U.S. at 623.

facts of that case, emphasizing that "[t]he expressive nature of a parade" was "central" to the analysis there. See *FAIR*, 547 U.S. at 63. Here, by contrast, the Virginia Values Act has not been applied to plaintiff's conduct *at all*, see *supra* at 17–18, much less in any kind of "peculiar way" that has the effect of regulating plaintiff's own speech or expression. Accord *Hurley*, 515 U.S. at 573 (noting that "the [parade] sponsors' speech itself" was "declar[ed] . . . to be the public accommodation").

Second, to the extent the Virginia Values Act could be properly understood as regulating speech, any "message" conveyed would be that of the customers, not plaintiff. As the Supreme Court explained in *FAIR*, the First Amendment only comes into play when "the complaining speaker's own message [i]s affected by the speech [he is] forced to accommodate." 547 U.S. at 63. But that is not the case here.

Even assuming photographs may constitute speech as a general matter, a particular couple's "message" is not attributable to plaintiff any more than it would be to a caterer or lighting designer. Wedding vendors—like any other service professional—serve many clients in many different contexts, and no one reasonably associates the views of every one of those clients with the vendor itself. Accord *Matal v. Tam*,

137 S.Ct. 1744, 1760 (2017) (noting in government speech case "there is no evidence that the public associates the contents of trademarks with the Federal Government"). Providing wedding photography services does not "suggest[] that [plaintiff] agree[s] with any speech" by the couples he serves, and nothing in the Virginia Values Act "restricts what [plaintiff] may say"—in conversations, editorials, billboards, or otherwise—about same-sex marriage. *FAIR*, 547 U.S. at 65.[11] Nor does the requirement to provide those services regulate plaintiff's editorial discretion, his choice to "actively participate[] in the weddings he photographs," how he "interact[s]" with the couple, or whether he posts or publicizes the pictures he takes. JA 24–26. Because there is no significant risk of "interference with [plaintiff]'s desired message," the Act does not infringe plaintiff's free speech rights. *FAIR*, 547 U.S. at 64.

The impact of a regulation on a speaker's own message also explains the outcomes in the editorial cases. On the one hand, the Supreme Court has struck down policies that "alter[ed] the message" a

[11] See Bob Updegrove, *A New Virginia Law is Censoring Artists Like Me*, Wash. Post (Oct. 30, 2020), https://www.washingtonpost.com/opinions/local-opinions/a-new-virginia-law-is-censoring-artists-like-me/2020/10/27/bb2fe248-117d-11eb-ba42-ec6a580836ed_story.html.

newspaper "wished to express," or "interfered with [a] utility's ability to communicate its own message." *FAIR*, 575 U.S. at 64 (discussing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974), and *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Ca.*, 475 U.S. 1 (1986)). By contrast, that Court upheld a rule barring a newspaper from publishing help-wanted ads in sex-specific columns as a valid limitation on "illegal commercial activity"—namely, employment discrimination—that did not affect the newspaper's own message or its "editorial judgment." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rel.*, 413 U.S. 376 (1973).[12]

Third, it is well settled that that "restrictions directed at commerce or conduct" are constitutional even if they "impos[e] incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). "[W]hen [a] commercial activity itself is illegal," the First Amendment permits restrictions of speech that are "incidental to a valid limitation on

[12] Plaintiff's theory also rests on the deeply flawed assumption that same-sex weddings inherently celebrate anything other than the legal union of two people. Just as photographs of a wedding between a man and a woman do not make a political statement in favor of opposite-sex marriage, so too for same-sex weddings. See *Masterpiece Cakeshop*, 138 S. Ct. at 1750 (Ginsburg, J., dissenting) ("When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating *their* wedding—not a cake celebrating heterosexual weddings or same-sex weddings.").

economic activity." *Pittsburgh Press*, 413 U.S. at 389. The fact that a law prohibiting discrimination in employment "will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *FAIR*, 547 U.S. at 62; see also *Sorrell*, 564 U.S. at 567 (noting that "an ordinance against outdoor fires might forbid burning a flag," and "antitrust laws can prohibit agreements in restraint of trade").

That established rule defeats any separate challenge to the Act's "Publication Clause." See Updegrove Br. 51. No one disputes that employment discrimination laws may prohibit an employer from announcing its intent to hire based on race. By the same logic, a public accommodations law may prohibit a vendor from announcing that it will withhold services based on sexual orientation. Any incidental burden on speech in connection with that regulation of unlawful conduct does not infringe constitutional rights. Accord *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.").

Finally, to the extent the Virginia Values Act did infringe protected speech, the law would survive strict scrutiny. Earlier this summer, the Tenth Circuit upheld Colorado's public accommodations law on the same basis. *303 Creative LLC v. Elenis*, No. 19-1413, 2021 WL 3157635, at *9–12 (10th Cir. July 26, 2021). In that case, the Tenth Circuit agreed that "Colorado has a compelling interest in protecting both the dignity interests of members of marginalized groups and their material interests in accessing the commercial marketplace." *Id.* at *9. The court further concluded that the public accommodations law Colorado enacted to further its significant public interest satisfied strict scrutiny because it was "narrowly tailored to Colorado's interest in ensuring equal access to publicly available good and services." *Id.* at 10.

So too here. The Supreme Court has squarely held that a State's interest in "eliminating discrimination and assuring its citizens equal access to publicly available goods and services . . . serves compelling state interests of the highest order," *Jaycees*, 468 U.S. at 624, and plaintiff does not argue otherwise. See Updegrove Br. 52. By adopting the Virginia Values Act, the people of the Commonwealth sought to ensure that no one would feel the "humiliation, frustration, and embarrassment" that

comes from being told you are "unacceptable as a member of the public" because of your identity. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring). As the Supreme Court recently reiterated, that public interest is no less compelling when it comes to discrimination based on sexual orientation. See *Masterpiece Cakeshop*, 138 S. Ct. at 1727 (noting that our laws "can, and in some instances must, protect [LGBTQ individuals] in the exercise of their civil rights . . . on terms equal to others"); accord *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (noting "long history of disapproval of [same-sex couples'] relationships" that "works a grave and continuing harm").

The Virginia Values Act is also narrowly tailored to serve that indisputably compelling interest. The one statutory exception on which plaintiff relies—regarding small employers with fewer than five or fifteen employees—is located in a separate provision regarding employment that has nothing to do with the tailoring of Virginia's policy on public accommodations. See Updegrove Br. 52; Va. Code Ann. § 2.2-3905. And although plaintiff insists "effective alternatives" are "available," Updegrove Br. 53, that argument ignores the goal at the heart of the anti-discrimination project: equality. "[C]arv[ing] out a patchwork of

exceptions for ostensibly justified discrimination"—such as businesses that are not "essential," as plaintiff suggests, Updegrove Br. 53—would "fatally undermine[]" the compelling interest that justifies the law in the first place. *State v. Arlene's Flowers*, 441 P.3d 1203, 1235 (Wash. 2019); see also *State by McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 853 (Minn. 1985) (noting that "state's overriding interest" in prohibiting discrimination "permits of no exemption"); *supra* at 7–8. Re-writing the statute as plaintiff proposes is not "narrow tailoring," it is "legislating by judicial fiat." *United States v. Hopkins*, 427 U.S. 123, 125 (1976).

2. Other preliminary injunction factors

Plaintiff has also failed to show any of the non-merits factors—all of which must be satisfied for the Court to enter a preliminary injunction. Although plaintiff insists that likelihood of success on the merits is dispositive, see Updegrove Br. 53, the Supreme Court has expressly held otherwise. Because "[a]n injunction is a matter of equitable discretion," the Supreme Court has instructed that injunctive relief "does not follow from success on the merits as a matter of course." *Winter*, 555 U.S. at 32.

Turning to the other factors, the same reasons why this pre-enforcement challenge is not ripe and plaintiff currently lacks standing

to bring it defeat any notion that plaintiff has shown he is "*likely* to suffer irreparable harm in the absence of preliminary relief." *Dewhurst*, 649 F.3d at 290 (emphasis added); see *supra* at 17–20. Plaintiff has likewise failed to establish that the balance of equities tips in his favor or that an injunction is in the public interest. The General Assembly has expressly declared that "[i]t is the policy of the Commonwealth to . . . [s]afeguard all individuals . . . from unlawful discrimination . . . in places of public accommodation." Va. Code Ann. § 2.2-3900(B)(1). Enjoining any part of the public accommodations law while this litigation proceeds would frustrate public policy as adopted by the state legislature and leave at least some Virginians more vulnerable to discrimination. For all of these reasons, to the extent this Court reaches plaintiff's request for a preliminary injunction, that request should be denied.

CONCLUSION

The order of the district court should be affirmed. If this Court concludes otherwise, plaintiff's request for a preliminary injunction should be denied, and the case should be remanded for the district court to consider the requested injunction in the first instance.

Respectfully submitted,

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August 20, 2021

STATEMENT REGARDING ORAL ARGUMENT

Appellees agree that oral argument may aid in the decisional process in this case.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 11,159 words, excluding the parts exempted by Rule 32(f), according to the count of Microsoft Word.

/s/ Jessica Merry Samuels

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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2021, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Jessica Merry Samuels

Jessica Merry Samuels

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-1506 Caption: Robert Updegrove v. Mark Herring

Pursuant to FRAP 26.1 and Local Rule 26.1,

MARK R. HERRING, in his official capacity as Virginia Attorney General; R. THOMAS PAYNE, II, in his
(name of party/amicus)

official capacity as Director of the Virginia Division of Human Rights and Fair House,

who is Appellees, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

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? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Jessica Merry Samuels Date: 06/01/2021

Counsel for: Defendants-Appellees

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