UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

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

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA AS *AMICI CURIAE* OPPOSING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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STATEMENT OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with approximately two million members dedicated to defending the principles of liberty and equality embodied in the Constitution. The ACLU of Virginia is one of the ACLU's statewide affiliates with approximately 28,000 members. As organizations that advocate for First Amendment liberties as well as equal rights for lesbian, gay, bisexual, and transgender ("LGBT") people, the ACLU, the ACLU of Virginia, and their members have a strong interest in the application of proper standards when evaluating constitutional challenges to civil rights laws.

SUMMARY OF ARGUMENT

Plaintiffs Loudoun Multi-Images LLC and Robert Updegrove (together, "the Photography Studio") seek a constitutional right to operate a business open to the public that denies equal service to same-sex couples, in violation of the Virginia Human Rights Act ("Virginia's law" or "the law"). Va. Code Ann. § 2.2-3904(B) (West 2020). Like the public accommodation laws of nearly every state, Virginia's law bars businesses that are open to the public from refusing service to customers based on certain aspects of the customer's identity—including, in Virginia, their sexual orientation and gender identity. Such laws help ensure LGBT individuals have equal opportunity to participate in the "transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996).

Virginia unquestionably has the authority to prohibit businesses within its borders from discriminating against LGBT people in the sales of goods and services to the general public. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 572 (1995). The Photography Studio argues, however, that because the services it sells are "expressive" and because Mr. Updegrove objects to marriage for same-sex couples on religious grounds, the First

Amendment entitles the Photography Studio to discriminate based on sexual orientation. What is more, the Photography Studio seeks a right to post on its website, and distribute to prospective customers, a notice proclaiming that it will not provide the same services to same-sex couples in violation of Virginia law.

This is not the first time in our history when a business open to the public has sought to avoid a non-discrimination law by invoking the First Amendment. The Supreme Court has never accepted such arguments. *See Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968). Nor can a business evade generally applicable non-discrimination laws and trigger heightened scrutiny by characterizing its services as "expressive conduct." Virginia's law is content- and viewpoint-neutral; it does not restrain or alter the exchange of ideas; and it does not compel businesses to speak a state-selected message. The implications of the Photography Studio's arguments are far-reaching. If the Free Speech Clause were to bar a state from applying a non-discrimination law to the provision of wedding photography because it involves expression, then photography companies could refuse to serve interracial or interfaith couples, women, Muslims, Black people, or any other group the company's owner objects to serving. *Brush & Nib Studio, LC v. City of Phx.*, 448 P.3d 890, 938–39 (Ariz. 2019) (Timmer, J., dissenting). And under the Photography Studio's rule, because numerous sellers provide goods or services that involve expression (including stationers, printers, and other producers of custom products), a wide range of businesses could claim a First Amendment exemption from generally applicable regulations of commercial conduct.

The Photography Studio's free exercise claim fails for the same reasons as its free speech claim. Under, *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990), Virginia's law is a valid facially neutral and generally applicable

regulation. There is no indication that the law cannot or would not be applied neutrally to the Photography Studio. And Mr. Updegrove's "religious and philosophical objections" to the marriages of same-sex couples does not entitle his business "to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018). Granting such a religious-based exemption, even for sincere religious objections, would severely undermine the law's purpose of protecting equal opportunity to participate in the marketplace. *Id.*

Moreover, even if strict scrutiny applied to the Photography Studio's free speech and free exercise claims, applying Virginia's law to the Photography Studio's provision of commercial services would still be constitutional. Virginia's law furthers its compelling interest in eradicating invidious discrimination and is the least restrictive means of achieving that goal. As the Supreme Court of Nebraska explained in one of the earliest public accommodation decisions, a barber opening a shop to the public cannot say "You are a slave, or a son of a slave; therefore I will not shave you." *Messenger v. State*, 41 N.W. 638, 639 (Neb. 1889) (internal quotation marks omitted). To recognize either of the Photography Studio's asserted First Amendment objections would run counter to the basic principle, reflected in over a century of public accommodation laws, that all people should be able to receive equal service in American commercial life.

ARGUMENT

I. DISCRIMINATION BASED ON SEXUAL ORIENTATION IN THE PROVISION OF A RETAIL SERVICE VIOLATES VIRGINIA'S LAW.

Virginia's law applies to businesses open to the public. Its public accommodation provision of the statute regulates businesses' sale of goods and services by prohibiting them from refusing to serve a customer based on certain personal characteristics—specifically, race, color,

religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, sexual orientation, gender identity, marital status, disability, or status as a veteran. Va. Code Ann. § 2.2-3904(B) (West 2020). The statute also prohibits such businesses from displaying a notice that the "services of any such place shall be refused, withheld from, or denied to any individual on the basis of" a protected characteristic. *Id.* The Photography Studio plans to violate the statute by offering wedding photography services to the public at large but refusing them to same-sex couples, and by displaying and distributing a written policy stating that its wedding photography services will not be provided to same-sex couples.

Although framed as a constitutional challenge to the law, the Photography Studio's brief avows that its proposed course of conduct is not discriminatory. The Photography Studio argues its refusal is not based on sexual orientation because it will provide *other* services to same-sex couples, just not wedding photography. Pls.' Br. 17–18. But Virginia's law—like other public accommodation laws—does not merely prohibit a complete denial of *all* services to a customer. Rather, the statute prohibits businesses from denying "*any* of the accommodations, advantages, facilities, services, or privileges made available" to the general public. Va. Code Ann. § 2.2-3904(B) (West 2020) (emphasis added). As the Supreme Court of New Mexico explained in a virtually identical case that is noticeably absent from the Photography Studio's briefing, "[I]f a restaurant offers a full menu to male customers, it may not refuse to serve entrees to women, even if it will serve them appetizers." *Elane Photography, LLC v. Willock*, 309 P.3d 53, 62 (N.M. 2013).

The Photography Studio objects to providing a *service* to an entire class of customers: same-sex couples seeking photography services for their weddings. The Photography Studio asserts that it is denying services based on the message of a same-sex couples' wedding, but the

so-called message is just the identity of the couple being served. If a business needs to know *who* the service is for to decide whether it will provide those services, that is identity-based discrimination. A company refusing to provide wedding photography for interracial or Jewish couples would be discriminating based on race or religion, not making a decision about any "message" inherent in the product itself, even if the company said it did so because it disapproved of those unions. *See Telescope Media Group v. Lucero*, 936 F.3d 740, 769 (8th Cir. 2019) (Kelly, J., concurring in part and dissenting in part); *Brush & Nib*, 448 P.3d at 938 (Timmer, J., dissenting); *Elane Photography*, 309 P.3d at 78 (Bosson, J., concurring). "Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992).[1]

II. THE FREE SPEECH CLAUSE DOES NOT AUTHORIZE A BUSINESS TO ENGAGE IN DISCRIMINATION PROHIBITED BY A REGULATION OF CONDUCT THAT INCIDENTALLY AFFECTS EXPRESSION.

A. Virginia's Law Regulates Commercial Conduct and Affects Expression Only Incidentally.

When confronted with First Amendment challenges to neutral laws that regulate commercial conduct and affect speech only incidentally, the Supreme Court has applied minimal scrutiny and upheld the law.[2]

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[1] The Photography Studio resists this conclusion by comparing discrimination against gay people who marry to other (hypothetical) business interactions that do not actually implicate Virginia's law. Pls.' Br. 19. For example, it is not true that Virginia's law would compel a progressive bar association to publish statements supporting Israel if it would not publish such messages no matter the identity of the requester. Similarly, it could not be read to cover Democratic speechwriters writing speeches for Republican politicians, if they would refuse to publish such messages regardless of the requester's identity and since Virginia's law covers only public accommodations.

[2] Even outside the commercial context, the Supreme Court has applied the deferential test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), to determine whether regulation of

1. Generally applicable laws that regulate commercial conduct and do not target speech receive minimal First Amendment scrutiny.

"[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." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949); *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). The First Amendment is not infringed when the government enforces a generally applicable regulation of commercial conduct against an "expressive" business. Even newspaper publishers, whose very product is protected speech, can be subject "to generally applicable economic regulations" without implicating the First Amendment. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581 (1983). "The fact that the publisher handles news while others handle food does not . . . afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating . . . business practices." *Associated Press v. United States*, 326 U.S. 1, 7 (1945); *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937). In contrast, a law specifically requiring a newspaper to print particular content (or forbidding the same) directly intrudes on the First Amendment. *See, e.g., Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

Accordingly, the Supreme Court has uniformly rejected businesses' challenges to laws barring discrimination, even where those businesses dealt in expressive goods or services. *See Telescope Media*, 936 F.3d at 762–63 (Kelly, J., concurring in part and dissenting in part). For example, in *Hishon*, a law firm argued that applying Title VII to require it to consider a woman

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expressive conduct violates the Constitution. Whether Virginia's law is evaluated under the commercial conduct cases or *O'Brien*, the result is the same: The law is a permissible regulation of conduct that does not violate the First Amendment.

for partnership "would infringe [its] constitutional rights of expression or association." *Hishon*, 467 U.S. at 78. Although a law firm's work product is speech, *see, e.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001), the *Hishon* Court dismissed the law firm's First Amendment defense, holding that there is "no constitutional right . . . to discriminate." *Hishon*, 467 U.S. at 78. By contrast, a law specifically targeting a law firm's speech by, for example, preventing it from bringing cases that "challenge existing welfare laws," would "implicat[e] central First Amendment concerns." *See, e.g.*, *Velazquez*, 531 U.S. at 547–48.

The Photography Studio asserts that its photography and website are protected speech. Pls.' Br. 9–10. But Virginia's law does not tell the company how to frame its shots, edit its photographs, or which moments to capture; it regulates only the sale of its services to the public. Businesses that provide photography services to the public are just as subject to generally applicable regulations of their commercial conduct as newspapers and law firms. As the Supreme Court of New Mexico held, where "[a photography studio] is a public accommodation, its provision of services can be regulated" consistent with the First Amendment, "even though those services include artistic and creative work." *Elane Photography*, 309 P.3d at 66; *see also id.* at 59, 71 ("[T]here is no precedent to suggest that First Amendment protections allow such individuals or businesses to violate antidiscrimination laws."). A video game business, though producing artistic expressions, is not exempt from the Fair Labor Standards Act's prohibition against hiring child laborers. Nor is a tattoo parlor exempt from a health code regulation governing the disposal of needles. Such businesses are likewise not exempt from non-discrimination laws.

Thus, even though the Photography Studio's work product involves creativity, that "hardly means" that any regulation of its business operations "should be analyzed as one

regulating [its] speech rather than conduct." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.* ("*FAIR*"), 547 U.S. 47, 62 (2006). The relevant question is not the nature of a business's product, but whether Virginia's law targets expression or prohibits a course of conduct. Here, it prohibits conduct: discrimination in the provision of goods and services. *See id.* at 62 (internal quotation marks omitted) (finding no "abridgement of freedom of speech" when a law "make[s] a course of conduct illegal" even where "the conduct was in part initiated, evidenced, or carried out by means of language").

2. Virginia's law is content- and viewpoint-neutral, so there is no reason to apply strict scrutiny.

"[F]ederal and state anti-discrimination laws" are "an example of a permissible content-neutral regulation of conduct." *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993). Public accommodation laws do not "target speech or discriminate on the basis of its content, the focal point of [their] prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services." *Hurley*, 515 U.S. at 572. *See also Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 694–95 (2010) (non-discrimination policies are "textbook viewpoint neutral"); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987).

Seeking to avoid the minimal scrutiny the Supreme Court has applied to generally applicable regulations of commercial conduct, the Photography Studio argues that Virginia's law is content- and viewpoint-based because it tolerates only viewpoints that "celebrate" a same-sex couple's marriage. Pls.' Br. 11, 20–23. But Virginia's law would also prohibit a photography studio from selling wedding photography services to same-sex couples while denying those same services to heterosexual couples. Instead, Virginia's law prohibits businesses from refusing to provide goods and services on grounds of customers' sexual orientation, regardless of business'

views on marriage or any other subject. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623–24 (1984); *see also Madsen v. Women's Health Ctr.*, 512 U.S. 753, 763 (1994) (reasoning that "the fact that [an] injunction cover[s] people with a particular viewpoint does not . . . render the injunction content or viewpoint based").

The Photography Studio also argues that Virginia's law is content-based because it is triggered by the business's decision to offer wedding photography as opposed to photography for other purposes, such as "corporate events." Pls.' Br. 20–21. But the Photography Studio misunderstands how the law's equal-treatment requirement works. The law applies to all photography services, including "corporate events." A company may not refuse to photograph corporate events for a Black customer if the company would do the same photography for a white customer. That is, Virginia's law requires a company to provide a service only to the extent that it would provide the same service to similarly situated customers without regard to sexual orientation (or race or religion). The relevant inquiry is not whether *application* of the law would cause businesses to create products reflecting content to which they object. The question is whether the *law itself* draws distinctions based on content. Virginia's law does not "target speech or discriminate on [that] basis." *Hurley*, 515 U.S. at 572.

The Photography Studio ignores the unanimous decision in *Elane Photography*, 309 P.3d at 62–63, and relies on the sharply divided rulings in *Telescope Media*, 936 F.3d 740, and *Brush & Nib*, 448 P.3d 890, and a trial court ruling in *Chelsey Nelson Photography LLC v. Louisville/Jefferson City Metro Government*, No. 3:19-CV-851-JRW, 2020 WL 4745771 (W.D. Ky. Aug. 14, 2020). Pls.' Br. 12–14, 17–18. Those cases wrongly reasoned that non-discrimination laws applied to commercial wedding services were content-based because they required the creation of products related to the topic of same-sex weddings. But as the dissent

correctly notes in *Telescope Media*, 936 F.3d at 775–76, "[J]ust because the [videographers] want to sell services that are in some manner 'expressive' does not mean that [the State's] content-neutral regulation of those services suddenly becomes content based." Content-neutral regulations of even pure speech are common and uncontroversial. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 797–98 (1989).

B. Any "Compelled Expression" Is Incidental to the Law's Regulation of the Conduct of Sales and Does Not Alter the First Amendment Analysis.

The Photography Studio's objection that Virginia's law compels it to express a message with which it disagrees, Pls.' Br. 11–13, 15, does not alter the analysis. Virginia's law requires no state-mandated messages. Just as it would not impermissibly "compel speech" for a state to prohibit a photography studio that offers corporate headshots to the public from refusing to provide the same portraits for female employees that it provides for male employees, Virginia does not impermissibly "compel speech" by requiring that the Photography Studio offer same-sex couples the same services it offers heterosexual couples. Virginia's law does not compel the creation of any content, let alone content on a particular topic.[3]

The Photography Studio's reliance on *Hurley*, *id.* at 13–14, 18, is also misplaced. *Hurley* involved a "peculiar" application of a public accommodation law to a privately organized and "inherent[ly] expressive[]" parade. *Hurley*, 515 U.S. at 568, 572. The Court found this application impermissible because, instead of regulating conduct with only an incidental effect

[3] The Photography Studio mistakenly relies on cases where the challenged laws did not apply to public accommodations and/or compelled covered entities to post specific information. *Wash. Post v. McManus*, 944 F.3d 506, 513–14, 518 (4th Cir. 2019); *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 879 F.3d 101, 108–10 (4th Cir. 2018), *cert. denied*, 138 S. Ct. 2710 (2018). Virginia's law does not target particular kinds of speech, *McManus* (political speech), or particular businesses, *Greater Baltimore* (pregnancy centers), and does not require that any particular message be published. *See Melvin v. U.S.A. Today*, No. 3:14-CV-00439, 2015 WL 251590, at *2 (E.D. Va. Jan. 20, 2015).

on expression, it regulated nothing *but* expression—the content of the private parade sponsor's speech. *Id.* at 573. Here, the Photography Studio is a business providing services to the public, not a private expressive association. *Hurley* itself distinguished the standard application of public accommodation laws to such businesses as constitutional. *See id.* at 578.[4] To expand *Hurley*'s holding would put courts in the impossible "business of deciding which businesses are sufficiently artistic to warrant exemptions from non-discrimination laws." *Elane Photography*, 309 P.3d at 71. Such a result would be contrary to Supreme Court precedent and create an unworkable standard.[5]

This case is also dramatically different from cases in which the Supreme Court struck down content-based laws that required businesses to publish particular messages. In *Tornillo*, 418 U.S. 241, a statute required newspapers that published attacks on political candidates to allow the candidates free space for a written reply in the newspaper itself. And in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986), a state agency ordered a utility company to mail the newsletter of an environmental group to its customers.

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[4] The other compelled speech cases that the Photography Studio cites are not on point. Pls.' Br. 8, 13–14. *Wooley v. Maynard*, 430 U.S. 705 (1977), for example, involved a law requiring citizens to display the state-selected message "Live Free or Die" on their license plates. *Wooley*, 430 U.S. at 715. Virginia's law does not require expression of any state-chosen message.

The other four cases cited did not deal with applying non-discrimination laws to businesses acting as public accommodations. *See Kania v. Fordham*, 702 F.2d 475, 477 n.5 (4th Cir. 1983); *U.S.A. Today*, 2015 WL 251590; *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433 (S.D.N.Y. 2014); *Claybrooks v. Am. Broad. Cos.*, 898 F. Supp. 2d 986, 998–99 (M.D. Tenn. 2012).

[5] The decisions in *Telescope Media*, 936 F.3d 740, *Brush & Nib*, 448 P.3d 890, and *Nelson Photography*, 2020 WL 4745771, mistakenly invite courts to apply different First Amendment standards based on the nature of the services sold. Such a standard is neither consistent with precedent, nor susceptible to clear or uniform application. Indeed, advocates for treating custom wedding cakes as protected speech failed to articulate a workable test when questioned at oral argument, and the Supreme Court declined to grant them such an exemption. *See* Oral Arg. Tr. 11–19, *Masterpiece Cakeshop*, 138 S. Ct. 1719.

Both the challenged laws favored opposing speech in a content-based way: The right of reply was triggered by certain content, and the regulation imposed a content-based penalty. Here, Virginia's law requires just that businesses open to the public offer the same goods and services to heterosexual couples as they do to same-sex couples. Any effect on speech is entirely incidental and does not compel the creation of content. *See Telescope Media*, 936 F.3d at 772–73 (Kelly, J., concurring in part and dissenting in part); *Brush & Nib*, 448 P.3d at 932 (Bales, J., dissenting); *Elane Photography*, 309 P.3d at 63–70.

Even where, unlike here, a law requires entities to speak particular words or provide access for third-party speakers, the Supreme Court has rejected First Amendment challenges if the law regulates conduct and any compulsion to speak is incidental. In *FAIR*, a coalition of law schools argued that a law requiring them to provide equal access both to military and non-military recruiters compelled them to endorse military recruiters' message of discrimination embodied in the Don't Ask, Don't Tell policy; the schools particularly objected on First Amendment grounds that they would have to send e-mails and post bulletin board messages on those recruiters' behalf. *FAIR*, 547 U.S. at 52–54, 61–62. The Supreme Court rejected the claim, reasoning that "[a]s a general matter, the [law] regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." *Id.* at 60; *cf. Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1150–51 (2017). (explaining that a law requiring a restaurant to charge $10 for sandwiches would not unconstitutionally compel speech despite the fact that the restaurant will "have to put '$10' on its menus or have its employees tell customers that price").

C. The Free Speech Clause Does Not Protect a Public Accommodation's Right to Publish Its Unlawful Policy of Discrimination.

Just as there is no constitutional right to discriminate, there is no concomitant right to publish a policy of discrimination. The Supreme Court has explicitly disapproved of businesses posting signs saying "no goods or services will be sold if they will be used for gay marriages," as they would "impose a serious stigma on gay persons." *Masterpiece Cakeshop*, 138 S. Ct. at 1728–29. In *FAIR*, the Court explained that the government "can prohibit employers from discriminating in hiring on the basis of race. The fact that this 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. Otherwise, longstanding bans on discriminatory advertisements in employment, housing, and public accommodations would have to be struck down on free speech grounds. *See, e.g.*, 42 U.S.C. § 3604(c) (1988); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rel.*, 413 U.S. 376, 389 (1973) ("Any First Amendment interest . . . is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.").

III. VIRGINIA'S LAW IS FULLY CONSISTENT WITH THE RELIGION CLAUSES OF THE FIRST AMENDMENT.

The Photography Studio contends that Virginia's law violates the Establishment and Free Exercise Clauses by compelling it "to participate in and celebrate religious ceremonies [it] disagrees with." Pls.' Br. 23–24. But the law does no such thing. It does not require that Mr. Updegrove "participate in the ceremony by joyfully interacting with the couple and the couple's family, and act as a witness before God and before those attending by observing the exchange of vows and the pronouncement of the marriage." *Id*. at 24. It only requires that the Photography

Studio offer the same photography services to same-sex and heterosexual couples. As the Supreme Court explained in *Smith*, "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith*, 494 U.S. at 879 (internal quotations omitted). The Photography Studio is a commercial enterprise offering its services to the public and does not receive the same exemptions.

The Photography Studio's citation of *Masterpiece Cakeshop*, 138 S. Ct. at 1727, *see* Pls.' Br. 23–24—for the proposition that requiring clergy to perform the wedding of any couple, whether same-sex or heterosexual, violates the Free Exercise Clause—demonstrates this point. Virginia's law does not apply to clergy on its own terms, and neither Mr. Updegrove nor the Photography Studio is a member of the clergy performing a marriage ceremony. *Masterpiece Cakeshop*, 138 S. Ct. at 1727. Also, the Court in *Masterpiece Cakeshop* anticipated and rejected the argument that its reasoning applies beyond clergy: to hold that commercial services qualify as participation in the ceremony would raise a host of issues "that seem all but endless." *Id*. at 1723.

Adopting such a broad definition of "participation"—and extending the rules applicable to clergy to all businesses—would, as the Supreme Court has noted, mean that "a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." *Id*. at 1727. The Religion Clauses do not require that result.[6] Virginia's law

[6] Even if the "hybrid rights" claim asserted by the Photography Studio existed, Pls.' Br. 25–26, there is none here because the Photography Studio's free speech claim fails.

leaves the Photography Studio to decide "[t]he degree to which [photographers] voluntarily involve[] [themselves] in an event outside the scope of services [they] must provide to all customers on a non-discriminatory basis." *Washington v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1213 (Wash. 2019) (*petition for cert. filed*).

IV. VIRGINIA'S LAW SATISFIES EVEN STRICT SCRUTINY.

As shown above, application of Virginia's law fails to trigger strict scrutiny under the Free Speech or Free Exercise Clause. But even if strict scrutiny applied, the law's application would be constitutional.

A. Virginia Has a Compelling Interest in Eradicating Invidious Discrimination.

Non-discrimination laws ensure "society the benefits of wide participation in political, economic, and cultural life." *Roberts*, 468 U.S. at 625; *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733–34 (2014). In *Masterpiece Cakeshop*, the Supreme Court affirmed that it is "unexceptional" that the "law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Masterpiece Cakeshop*, 138 S. Ct. at 1728. And the Court has recognized repeatedly that the government has a compelling interest in "eliminating discrimination and assuring . . . citizens equal access to publicly available goods and services." *Roberts*, 468 U.S. at 624, 628.

Contrary to the Photography Studio's suggestion, Pls.' Br. 27, the harm of being refused service because of one's identity is not erased just because a customer might be able to obtain goods elsewhere. *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 250 (1964) (reasoning non-discrimination laws "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments" (internal quotation marks omitted)). "The

government views acts of discrimination as independent social evils even if the prospective [customers] ultimately find" the goods or services they sought. *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994).

Telescope Media, *Brush & Nib*, and *Nelson Photography*, relied on by the Photography Studio, all recognize that the eradication of discrimination in the provision of goods and services is a compelling government interest.[7] But by concluding that this interest does not apply in the context of businesses that provide services to create custom expressive products, those courts misunderstood the nature of the harm addressed by laws against discrimination. "The argument that victims of discrimination are free to go elsewhere carries little force. Antidiscrimination laws . . . were passed to guarantee equal access to *all* goods and services otherwise available to the public." *Telescope Media*, 936 F.3d at 777 (Kelly, J., concurring in part and dissenting in part). *See also Heckler v. Mathews*, 465 U.S. 728, 739 (1984) ("[D]iscrimination itself . . . can cause serious non-economic injuries."); *Heart of Atlanta Motel*, 379 U.S. at 292 (Goldberg, J., concurring) ("Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public . . ." (internal quotation marks omitted)).

That same compelling interest in ending discrimination remains even where the product at issue is expressive. *See Telescope Media*, 936 F.3d at 776–78 (Kelly, J., concurring in part and dissenting in part); *Brush & Nib*, 448 P.3d at 929–931 (Bales, J., dissenting). By contending that

[7] *See Telescope Media*, 936 F.3d at 754 ("ensuring . . . equal enjoyment of public accommodations. . . is compelling") (internal quotation marks omitted); *Nelson Photography*, 2020 WL 4745771 at *11 (ensuring same-sex couples "will not be turned away" is "unquestionably compelling" (internal quotation marks omitted)); *Brush & Nib*, 448 P.3d at 914 ("ensuring equal access to publicly available goods and services for all citizens, regardless of their status" is "compelling").

Virginia lacks a compelling interest in prohibiting refusal of wedding-related services to same-sex couples, the Photography Studio essentially disagrees that its conduct is discriminatory. Pls.' Br. 26. But refusing to offer services to same-sex couples on the same basis as it does other clients *is* discrimination. *See supra* Part I. Finally, Virginia's compelling interest in eradicating discrimination in the commercial marketplace is not negated by exemptions for religious beliefs in other non-discrimination laws.[8]

B. Uniform Enforcement of Virginia's Law Is the Least Restrictive Means for Furthering the State's Compelling Interest.

Because the most carefully tailored way to ensure equal treatment is to prohibit discrimination, Virginia's law is "precisely tailored" to achieve its interest. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988). Every instance of discrimination "causes grave harm to its victims." *United States v. Burke*, 504 U.S. 229, 238 (1992). Because of the harms associated with each instance of invidious discrimination, there is simply no "numerical cutoff below which the harm is insignificant." *Swanner*, 874 P.2d at 282.

The Photography Studio also contends that Virginia's law is not narrowly tailored because Virginia could choose, as it alleges other jurisdictions have done, to apply the law only to businesses that are "essential or non-expressive or non-internet businesses" or, alternatively, to *not* apply to "highly selective entities," or "individuals and small businesses that celebrate weddings." Pls.' Br. 28–29. But Virginia's law is tailored to *Virginia's* interest, which it achieves by applying the law to the extent that businesses offer goods and services to the general public.[9]

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[8] Contrary to the Photography Studio's assertion, even if Virginia contains exceptions for treatment of minors and small-scale employers, Pls.' Br. 27–28, that does not undermine the state's compelling interest. How the state tailors its laws does not call into question that its interest in ending discrimination is of the most compelling kind.

[9] The Photography Studio's claim that Virginia's law is not narrowly tailored because Title VII permits production studios to make classifications in casting decisions is meritless. Pls.'

Because it is narrowly tailored to serve a compelling interest in eradicating discrimination in the commercial market, Virginia's law satisfies any standard of review, including strict scrutiny.

CONCLUSION

The Photography Studio's motion for a preliminary injunction should be denied.

November 23, 2020

Respectfully submitted,

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*Motion to proceed *Pro Hac Vice* forthcoming

Br. 28–29. Title VII does not set the limit of non-discrimination law or narrow tailoring. *See Hurley*, 515 U.S. at 572; *Roberts*, 468 U.S. at 625–26.

CERTIFICATE OF SERVICE

I certify that on November 23, 2020, I electronically filed the foregoing with the Clerk of Court through the Court's CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished through the CM/ECF system.

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