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

ROBERT UPDEGROVE and LOUDOUN MULTI-IMAGES LLC *doing business as* BOB UPDEGROVE PHOTOGRAPHY, *Plaintiffs,* v. MARK R. HERRING, *in his official capacity as Virginia Attorney General*, and R. THOMAS PAYNE, II, *in his official capacity as Director of the Virginia Division of Human Rights and Fair Housing*, *Defendants.*	Case No. 1:20-cv-01141-CMH-JFA

BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amici are religious and civil-rights organizations that are united in respecting the important but distinct roles of religion and government in our Nation. While *amici* represent diverse faiths and beliefs, they share a commitment to ensuring that LGBTQ persons, and all people, remain free from officially sanctioned discrimination. When government grants religion-based exemptions from antidiscrimination laws, it favors the benefited religious beliefs over the religious beliefs, core values, and fundamental rights of others. The exemptions thus convey not only governmental favor for the benefited religion, but also official disfavor and disregard toward other faiths and beliefs—including disfavor for the deep commitment of *amici* and their members to equal respect for and equal treatment of all people. The *amici* are:

- Americans United for Separation of Church and State.
- ADL (Anti-Defamation League).
- Bend the Arc: A Jewish Partnership for Justice.
- Central Atlantic Conference of the United Church of Christ.
- Covenant Network of Presbyterians.
- Disciples Justice Action Network.
- Equal Partners in Faith.
- Global Justice Institute, Metropolitan Community Churches.
- Hindu American Foundation.
- Methodist Federation for Social Action.
- Muslim Advocates.
- National Council of Jewish Women.
- Reconstructionist Rabbinical Association.
- Rev. Dr. J. Herbert Nelson, II, Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.).[1]
- Sikh Coalition.

[1] The General Assembly does not claim to speak for all Presbyterians, nor are its policies binding on the membership of the Presbyterian Church. However, the General Assembly is the highest legislative and interpretive body for the denomination, and it is the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 2.2-3904 of the Virginia Human Rights Act requires that public accommodations serve all comers regardless of their sexual orientation. The law thus ensures that LGBTQ people do not suffer the stigma and degradation of discrimination when they seek to buy goods and services on the same terms as everyone else.

Because we live in a Nation that is defined by its great respect for religious pluralism, the many and varied beliefs among the citizenry make it inevitable that secular laws—including Virginia's antidiscrimination law—will at times offend some people's religious sensibilities. The Supreme Court's Religion Clause jurisprudence specifically addresses this inevitability.

First of all, while no religion or religious practice may be specially disfavored, there is no Free Exercise Clause violation when a law that regulates conduct for valid secular purposes and in a nondiscriminatory manner incidentally burdens some religious exercise. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993). Section 2.2-3904 is just such a law. To protect the equal rights and equal dignity of all people, including people of all faiths, Virginia prohibits discrimination in places 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 status as a veteran," regardless of the motivation for the discrimination. To make good on that guarantee, which includes protecting all Virginians against religious discrimination, however, the incidental burden of requiring Updegrove to provide equal service to members of those protected classes simply cannot amount to a free-exercise violation.

Not only is there no free-exercise right to discriminate in the operation of a public accommodation, but the Establishment Clause forbids it. For when government makes third parties bear the costs, burdens, or other harms associated with exempting religious exercise from a law, it

impermissibly favors the benefited religion and its adherents over the beliefs, rights, and interests of nonbeneficiaries. *See, e.g.*, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985). The religious exemption that Updegrove seeks would do exactly that, by elevating the business's religious views over the religious beliefs and equal civil rights of LGBTQ people.

While Updegrove presents its legal challenge as a matter of preserving religious liberty, granting it an exemption here would have quite the opposite effect. As noted, § 2.2-3904 prohibits not just sexual-orientation discrimination but also religious, racial, and other forms of invidious discrimination in public accommodations. The sweeping exemption for religiously motivated discrimination that Updegrove seeks, so that it may deny equal service to same-sex couples, would necessarily also permit businesses to deny service to people of the "wrong" religion—or race, or sex, or any other characteristic protected by the law. A ruling in Updegrove's favor would therefore undermine, not strengthen, religious freedom, by hamstringing Virginia's ability to ensure that its citizens can live as equal members of the community, regardless of faith or belief.

ARGUMENT

I. THE RELIGION CLAUSES NEITHER AUTHORIZE NOR ALLOW THE EXEMPTION THAT PLAINTIFFS SEEK.

The First Amendment's Religion Clauses work in tandem to safeguard religious freedom for all by barring both governmental favoritism and governmental antagonism toward religion. *See McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (Religion Clauses mandate "governmental neutrality" with respect to religion (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968))). But the guarantee of religious freedom does not entitle anyone to "general immunity from secular laws." *Our Lady of Guadalupe Sch. v. Morrisey-Berru*, 140 S. Ct. 2049, 2060 (2020). It is not, and never has been, a license to discriminate.

Yet Updegrove asserts that the First Amendment entitles it to an exemption from Virginia's neutral, generally applicable public-accommodations law so that it may refuse to serve customers

who do not conform to its religious views. The Free Exercise Clause does not require that exemption; and the Establishment Clause outright forbids it.

A. The Free Exercise Clause does not authorize the requested exemption.

1. Virginia's antidiscrimination law is neutral and generally applicable.

While government cannot regulate a religious practice *because* it is religious (*see Lukumi*, 508 U.S. at 531–33), religion-based disagreement with the law does not excuse noncompliance. "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, . . . permit[ting] every citizen to become a law unto himself." *Emp. Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878)).

The Supreme Court has therefore held that laws that are neutral with respect to religion and apply generally need satisfy only rational-basis review, even if they "ha[ve] the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. at 531. Application of a compelling-interest test is reserved for laws that are not neutral and generally applicable—i.e., those that disfavor religion or a religious practice *because of* its religious character. *Id.* at 531–32. Virginia's antidiscrimination law has neither failing. Thus, Updegrove's religious motivations cannot excuse it from noncompliance, and its free-exercise claim fails as a matter of law.

a. The neutrality requirement means that a law must not "infringe upon or restrict practices *because of* their religious motivation." *Lukumi*, 508 U.S. at 533 (emphasis added). Discriminatory intent may be apparent on the face of a law; or it may be revealed through the law's practical effects, as when legal requirements have been "gerrymandered with care to proscribe" religious conduct *qua* religious conduct. *See id.* at 533–34, 542. But neutrality is not undermined just because a law *affects* a claimant's religious exercise. Rather, the claimant bears the burden to show that government has targeted specific religious conduct for maltreatment. *See id.*; *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 654 (4th Cir. 1995).

The Virginia law is neutral. Far from "singl[ing] out religious practices for discriminatory treatment" (*Reno*, 47 F.3d at 654), it bars discrimination in all places of public accommodation, full stop. A business's motivations, religious or otherwise, are immaterial. And Updegrove offers no evidence that the law was "designed to suppress religious belief or practice" (*id.*). At most, the business asserts that the law conflicts with its religious beliefs. But the fact that a law may affect some religiously motivated conduct is an unavoidable result of how law operates in a religiously diverse society. *Cf. Smith*, 494 U.S. at 888–89; *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988) ("[G]overnment simply could not operate if it were required to satisfy every citizen's religious needs and desires."). Such incidental effects do not amount to religious targeting and do not render a law non-neutral. *See Lukumi*, 508 U.S. at 533–34.

Accordingly, Virginia may regulate in ways that affect religious conduct if, as here, it acts on "a legitimate concern of government for reasons quite apart from [religious] discrimination." *Lukumi*, 508 U.S. at 535. That is true even if some religious exercise is affected disproportionately by the legal requirements.[2] *See, e.g.*, *id.* at 531 (law neutral and generally applicable "even if [it] has the incidental effect of burdening *a particular religious practice*" (emphasis added)). "The Free Exercise Clause is not violated even though a group motivated by religious reasons may be more likely to engage in the proscribed conduct." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1131 (9th Cir. 2009); *cf. Reno*, 47 F.3d at 650 (in free-speech context, law not rendered non-neutral because it proscribes conduct "even though the conduct is motivated by certain biases or beliefs").

[2] Nor does a law cease to be neutral just because some secular views or religious beliefs are *un*affected by it. Incidental alignment of the government's secular aims with some people's beliefs does not amount to an unconstitutional religious preference any more than incidental disagreement does. *See Hernandez v. C.I.R.*, 490 U.S. 680, 696 (1989) ("[A] statute primarily having a secular effect does not violate the Establishment Clause merely because it 'happens to coincide . . . with the tenets of some or all religions.'" (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961))). Updegrove's insistence that § 2.2-3904 favors businesses with beliefs that do not call for discrimination against LGBTQ people (*see* Compl. ¶¶ 217–21) is irrelevant as a matter of law.

A free-exercise jurisprudence that instead treated neutral, generally applicable laws as impermissibly targeting religion whenever a religious individual or group was affected by them (or felt more burdened than other groups) would "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind," from drug laws to traffic laws. *See Smith*, 494 U.S. at 888–89. The Supreme Court has thus flatly rejected that approach: "[T]he 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).'" *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

b. General applicability is the closely related concept that government, "in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543; *accord Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 99 (4th Cir. 2013). Government thus cannot prohibit religious conduct while ignoring significant nonreligious conduct that is equally detrimental to the underlying state interests. *Lukumi*, 508 U.S. at 543–44.

The purpose of the Virginia law is to eradicate discrimination in public accommodations based on a wide array of protected characteristics, including sexual orientation. It achieves that end by flatly prohibiting all public accommodations from discriminating against customers on those grounds. The statute applies generally and uniformly, regardless of any business owner's beliefs, motivations, or affiliations, religious or otherwise.

That the law contains two special, age-related provisions (permitting businesses to restrict their goods and services to adults age 18 or over (§ 2.2-3904(D)(i)) and to provide special benefits such as senior-citizen discounts to those who are age 50 or older (§ 2.2-3904(D)(ii)) does not undermine general applicability. For "[a]ll laws are selective to some extent" and need not be

universal to be generally applicable. *See Lukumi*, 508 U.S. at 542–43. The existence of exemptions drawn on objective grounds unrelated to religion does not by itself trigger heightened scrutiny of a refusal to provide a religious exemption. *See, e.g.*, *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1135 (9th Cir. 2009) ("That the . . . regulations recognize some exceptions cannot mean that the [state] has to grant all other requests for exemption to preserve the 'general applicability' of the regulations."); *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 701–02 (10th Cir. 1998). A compelling-interest test is triggered only when the exempted conduct is "similar enough in all material respects" to nonexempt religious conduct to support the conclusion that the prohibition itself "was based on [the prohibited conduct's] religious nature." *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 52 (10th Cir. 2013).

The age-related provisions here further the State's interests in "preserv[ing] the public safety, health, and general welfare" (§ 2.2-3900(B)(3))—as well as the State's antidiscrimination interests specifically. The 18-and-over provision is legitimate because certain products, such as alcohol and tobacco, and certain establishments, such as adult businesses, are not appropriate for children; and the exemption avoids conflicts between the public-accommodations law and the health and safety laws that bar children from those goods and services. The allowance of senior-citizen benefits reflects the aim of state and federal age-discrimination laws to bar *dis*favor of the elderly. And the fact that most people pass through all three stages of life means that the law recognizes all these special considerations without categorically and permanently relegating anyone to any disfavored group. Hence, the provisions do not cast doubt on the general antidiscrimination framework that the law puts in place and do not trigger heightened scrutiny.

Relatedly, purported carve-outs in *other* state antidiscrimination provisions do not undermine the general applicability of *this* provision, contrary to Updegrove's suggestion (*see* Compl. ¶ 284; Mot. 27–28). Section 2.2-3904 bars discrimination in all public accommodations.

Whether entirely different laws might contemplate any exceptions in employment (§ 2.2-3905) or housing (§ 36-96.2), for example, is of no moment, because the question is whether the challenged law is neutral and generally applicable, not whether every aspect of every state law is.

The pertinent legal inquiry is thus whether the State has decided "that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Lukumi*, 508 U.S. at 542–43. The answer is no. Virginia seeks to eradicate sexual-orientation (and other) discrimination by regulating all public accommodations. It proscribes "conduct for the harm it causes, not because the conduct is religiously motivated." *Reno*, 47 F.3d at 654. There is no allegation that the State has singled out only those public accommodations that discriminate for religious reasons while ignoring those that discriminate for secular ones, or that the State has otherwise treated Updegrove differently from similarly situated covered entities. And there is no whiff of religious animus, either on the face of the law or in its application.

2. Updegrove's assertion of a so-called hybrid right does not warrant heightened scrutiny.

Updegrove alternatively contends that adding a free-speech claim to its legally insupportable free-exercise claim creates a "hybrid right" that triggers application of a compelling-interest test. Not so.

As Updegrove itself acknowledges (Mot. 25), the Fourth Circuit has never recognized or endorsed this approach or applied heightened scrutiny to constitutional claims because of it. *See Workman v. Mingo Cnty. Bd. of Educ.*, 419 F. App'x 348, 353 (4th Cir. 2011). And there is substantial reason not to create a new hybrid-rights jurisprudence now: The mention of the concept in *Smith* has been criticized by scholars and courts of appeals alike as incoherent and inconsistent with the Supreme Court's own holding in *Smith* (*see, e.g.*, *Leebaert v. Harrington*, 332 F.3d 134, 144 (2d Cir. 2003); *Kissinger v. Bd. of Trs.*, 5 F.3d 177, 180 (6th Cir. 1993); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1121–

22 (1990)). As Professor McConnell put it: "the *Smith* Court's notion of 'hybrid' claims was not intended to be taken seriously." *Free Exercise Revisionism*, *supra*, at 1122.

Indeed, even courts that have entertained the possibility of hybrid rights have required "a colorable showing of infringement of *recognized* and *specific* constitutional rights." *Swanson*, 135 F.3d at 699 (emphasis added). "[T]he mere invocation of a general right" (*id.* at 700) is "not a talisman that automatically leads to the application of" strict scrutiny (*id.* at 699). For the reasons already explained, Updegrove's free-exercise claim is subject to rational-basis review only and fails as a matter of law. And there is no established free-speech right to violate otherwise-valid public-accommodations laws. Quite the contrary. *E.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995) ("Provisions like these are well within the State's usual power to enact[,] . . . and they do not, as a general matter, violate the First or Fourteenth Amendments."); *accord Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018). The Supreme Court has repeatedly affirmed that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011); *see also R.A.V. v. St. Paul*, 505 U.S. 377, 389 (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct."). Thus, as Chief Justice Roberts explained for a unanimous Court in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006), the fact that a prohibition against race discrimination in hiring "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 the conduct." Virginia's antidiscrimination law likewise regulates conduct. Any incidental burden on speech does not violate the Free Speech Clause. And "the Constitution . . . places no value on discrimination." *Norwood v. Harrison*, 413 U.S. 455, 469 (1973).

In short, this Circuit has never recognized a hybrid-rights theory of heightened scrutiny, and this Court should not do so now. For even if multiple weak claims that are subject to rational-basis review somehow *could* add up to heightened scrutiny, legally insupportable claims surely cannot contribute to that equation—Updegrove should not be able to mash together two losing First Amendment claims to create a winning one. *Cf. Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 171 (2002) (Scalia, J., concurring) (rejecting notion that invalid free-exercise claim and invalid free-speech claim could produce valid legal claim).

* * * *

Section 2.2-3904 is a neutral law of general applicability, evincing neither favor toward nor animus against any religion. Hence, it is subject to rational-basis review only (*see Lukumi*, 508 U.S. at 531). The law more than satisfies that test: It serves not just the requisite legitimate state interest but a compelling one, by prohibiting discrimination and its associated harmful effects (*see Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) ("[E]liminating discrimination and assuring its citizens equal access to publicly available goods and services . . . plainly serves compelling state interests of the highest order.")).[3] It is not just rationally related but narrowly tailored to achieving

[3] Updegrove insists that it refuses service based not on sexual orientation but on the same-sex character of marriages. *See* Mot. 26–27. But the Supreme Court has "declined to distinguish between status and conduct in this context," because the two are so closely linked. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689 (2010); *accord Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J. concurring in the judgment); *see also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

Updegrove's desire to create sub-classes of marriages based on the (protected) characteristics of the partners undermines the value of the civil status of marriage for members of a protected class. A fundamental right is defined by the nature of the right itself, not by the identity of those who seek to exercise it or have been excluded from doing so in the past. *See Obergefell v. Hodges*, 576 U.S. 644, 671 (2015); *see generally, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967) (rejecting separate category for interracial marriage); *Turner v. Safley*, 482 U.S. 78 (1987) (same as to prisoner marriages). Allowing businesses to close their doors to same-sex couples who choose to exercise their fundamental right to marry would revive the second-class status that the Supreme Court forbade in *Obergefell*. Virginia has a strong—indeed, compelling—interest in ensuring that that does not happen.

that end, because prohibiting the discrimination sought to be eradicated "abridges no more [activity] than is necessary to accomplish that purpose" (*id.* at 628–29). And Virginia need not substitute Updegrove's proposed alternatives (*see* Mot. 28–29) where they "will not be as effective" in achieving the State's goal of eradicating discrimination (*see Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004)). The religious motivation behind Updegrove's desire to deny wedding-related services to same-sex couples thus does not excuse it from the obligation, shared by all public accommodations, to comply with the law. The free-exercise claim fails as a matter of law.

B. The Establishment Clause forbids the requested exemption.

Not only does the Free Exercise Clause not mandate the exemption sought here, but the Establishment Clause flatly forbids it.

The rights to believe, or not, and to practice one's faith, or not, are sacrosanct. But they do not extend to imposing on others by operation of law the costs and burdens of one's beliefs. Government should not, and under the Establishment Clause cannot, favor the religious beliefs of some at the expense of the beliefs and rights of others. For if religious exemptions from general laws detrimentally affect nonbeneficiaries, they amount to unconstitutional preferences for the benefited religious beliefs and their adherents. *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005); *Thornton*, 472 U.S. at 709–10.

a. Thus, in *Estate of Thornton v. Caldor*, the Supreme Court invalidated a law requiring employers to accommodate Sabbatarians in all instances, because "the statute t[ook] no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." 472 U.S. at 709. The Court held that "unyielding weighting in favor of Sabbath observers over all other interests" had "a primary effect that impermissibly advances a particular religious practice." *Id.* at 710. Similarly, in *Texas Monthly, Inc. v. Bullock*, the Court invalidated a sales-tax exemption for religious periodicals in part because it "burden[ed] nonbeneficiaries" by

making them underwrite the "benefit bestowed on subscribers to religious publications." 489 U.S. 1, 18 n.8 (1989) (plurality opinion).

Because the two Religion Clauses work hand-in-hand, free-exercise jurisprudence likewise reflects this fundamental limitation. In *United States v. Lee*, 455 U.S. at 261, the Court rejected an Amish employer's request for an exemption from paying social-security taxes because the exemption would "operate[] to impose the employer's religious faith on the employees." And in *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944), the Court denied an exemption from child-labor laws to allow minors to distribute religious literature because while "[p]arents may be free to become martyrs themselves . . . it does not follow [that] they are free, in identical circumstances, to make martyrs of their children." In contrast, the Court recognized a Seventh-Day Adventist's right to an exemption from a restriction on unemployment benefits in *Sherbert v. Verner*, 374 U.S. 398, 409 (1963), because the exemption would not "serve to abridge any other person's religious liberties." And the Court partially exempted Amish parents from state compulsory-education laws in *Wisconsin v. Yoder*, 406 U.S. 205, 235–36 (1972), only after the parents demonstrated the "adequacy of their alternative mode of continuing informal vocational education" to meet the children's educational needs.

In short, a religious accommodation "must be measured so that it does not override other significant interests" (*Cutter*, 544 U.S. at 722), or "impose substantial burdens on nonbeneficiaries" (*Texas Monthly*, 489 U.S. at 18 n.8 (plurality opinion)), for if it did, it would violate the constitutional protections for religious freedom embodied in the Establishment Clause. "[T]he limits [on religious exercise] begin to operate whenever activities begin to affect or collide with liberties of others or of the public." *Prince*, 321 U.S. at 177 (Jackson, J., concurring); *see generally* James Madison, Memorial and Remonstrance Against Religious Assessments ¶¶ 3, 15 (1785), reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 63–72 (1947) (appendix to dissent of

Rutledge, J.) (requiring support for another's faith infringes "the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience").

b. In only one narrow category of circumstances has the Supreme Court ever upheld religious exemptions that materially burdened third parties—namely, when core Establishment and Free Exercise Clause protections for the ecclesiastical authority of religious institutions together required the exemption. In *Our Lady of Guadalupe*, 140 S. Ct. at 2055, and *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 196 (2012), the Court held that employment-discrimination laws cannot be enforced in a way that would interfere with a church's selection of its ministers. And in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 330, 339 (1987), the Court upheld, under Title VII's statutory religious exemption, a church's firing of an employee who was not in religious good standing. These exemptions did not amount to impermissible religious favoritism because they embodied the Establishment Clause's "special solicitude" for the rights of churches to select their clergy and control their internal operations (*Hosanna-Tabor*, 565 U.S. at 189).

This ecclesiastical-authority doctrine has no bearing on whether a for-profit business that sells goods in the public marketplace may ignore antidiscrimination laws because it holds conflicting religious views. Indeed, in *Masterpiece* the Supreme Court warned against expanding this tightly circumscribed doctrine, lest "a long list of persons who provide goods and services for marriages and weddings . . . 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." 138 S. Ct. at 1727.

c. Recognizing that LGBTQ people "cannot be treated as social outcasts or as inferior in dignity and worth" (*id.*), Virginia's public-accommodations law ensures that sexual orientation is not a barrier to "acquiring whatever products and services [one] choose[s] on the same terms and

conditions as are offered to" everyone else (*id.* at 1728). And it protects LGBTQ people "from a number of serious social and personal harms," including deprivation "of their individual dignity" (*Roberts*, 468 U.S. at 625). Granting a religious exemption from this law would license Updegrove—and by extension, all other public accommodations—to discriminate against customers because of their sexual orientation—and any other protected characteristics—as long as the business offered a religious reason for doing so. LGBTQ people and members of other vulnerable groups would then suffer the social, psychological, and physical harms that the law was designed to prevent.

To suggest that granting an exemption to Updegrove poses no "actual problem" because "[m]any photographers and other creatives in Virginia gladly provide services celebrating same-sex weddings" (Mot. 27) misses the point. Even assuming that there are comparable wedding vendors throughout the State, telling a same-sex couple who is suffering the pain and humiliation of discrimination to "just go someplace else" is no remedy for the grave stigmatic harms. For "[d]iscrimination 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." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring); *see id.* at 250 (antidiscrimination laws "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments" (internal quotation marks omitted)); *cf. Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954).

Moreover, that some, or even most, wedding vendors in Virginia might serve same-sex couples does nothing to alleviate the "serious stigma" (*Masterpiece*, 138 S. Ct. at 1729) of living in a community in which businesses can publicly bar the doors to LGBTQ people. Were the requested exemption granted, same-sex couples and other disfavored classes would awaken each

day knowing that, wherever they go, they might be turned away from public accommodations that deem them unfit and unworthy to be served; and they would have no legal recourse as long as the denials were explained in religious terms.

Allowing discrimination by places of public accommodation also carries economic harms that ripple well beyond the standalone discriminatory encounter. *See Heart of Atlanta Motel*, 379 U.S. at 258 (recognizing the "substantial and harmful effect upon [interstate] commerce" that may flow from seemingly local acts of discrimination in the marketplace); *cf.* CHRISTY MALLORY ET AL., WILLIAMS INST., THE IMPACT OF STIGMA AND DISCRIMINATION AGAINST LGBT PEOPLE IN TEXAS 56 (2017), https://bit.ly/2UtopRq (explaining that "state economies benefit from more inclusive legal and social environments"). Must LGBTQ people and members of other historically disfavored classes carry around a Green Book to find establishments that will serve them? *Cf.* Brent Staples, *Traveling While Black: The Green Book's Black History*, N.Y. TIMES (Jan. 25, 2019), https://nyti.ms/3aaPiAB. And must Virginia allow businesses to force them to do so, at so great a cost to the State, its economy, and the dignity and well-being of its citizens?

Put simply, "acts of invidious discrimination in the distribution of publicly available goods [and] services . . . cause unique evils" (*Roberts*, 468 U.S. at 628), which Virginia has chosen to exorcise. To accept Updegrove's arguments would instead give official imprimatur to those acts. It would deny LGBTQ people the fundamental American promise of equality for all and diminish their standing in society. These grave harms are ones that the Establishment Clause forbids government to impose in the name of religious accommodation.

C. The antidiscrimination law does not coerce Updegrove to participate in religious activity.

Updegrove also alleges that the law is unconstitutionally coercive, in violation of both the Free Exercise and Establishment Clauses. *See* Compl. ¶¶ 286–88, 293–94; Mot. 23–25. It has no cognizable claim under either Clause.

"It is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'" *Town of Greece v. Galloway*, 572 U.S. 565, 586 (2014) (plurality opinion) (quoting *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring)). Whether a law coerces religious exercise, however, is an objective question for the courts. *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 592–94 (1992) (making fact-specific determination that prayer at public-school event was coercive); *Town of Greece*, 572 U.S. at 588–89 (plurality opinion) (rejecting plaintiffs' argument that official prayers were coercive, based on Court's interpretation of factual record). A plaintiff's subjective feelings, standing alone, are legally insufficient.

Bob Updegrove says that he must "participate" in religious ceremonies at the weddings that he photographs, "act[ing] as a witness before God and before those attending." Mot. 24. But the Virginia law does not require a photographer to sign a marriage license or swear to the validity of a marriage. Rather, it requires only that a business, having chosen to offer the service of wedding photography to the public, must provide that same service—taking photos—regardless of the sexual orientation (or race or religion) of the marrying couple. Merely being present to do that job while others engage in religious activity does not constitute legal coercion to join the religious practice. *See Fields v. City of Tulsa*, 753 F.3d 1000, 1010–12 (10th Cir. 2014) (no Establishment Clause violation where police officer ordered to attend event hosted by Islamic community center, when attending events hosted by both secular and religious organizations was regular aspect of his duties). It would take voluntary additional acts not required by the law to create even the appearance of "participation" in the religious exercise. Indeed, Updegrove can and presumably does make clear that it and its photographer are not participants in any religious activities merely by taking the photographs of those activities for which they are being paid.

Finally, that Updegrove subjectively believes that the statute coerces religious activity because "all wedding ceremonies are inherently religious events" (Mot. 4) does not make it so. This Court must decide, from an objective viewpoint, whether the requirement to provide wedding-related services on an equal basis coerces individuals to engage in religious exercise at each and every client's wedding. From that viewpoint, Updegrove is no more being hired to participate in religious activity with which it disagrees when it is hired for a wedding of a same-sex couple than when it is hired for a wedding of a Hindu, Jewish, or interfaith couple. To state the obvious: a photographer is hired to take pictures—not to join in the couple's faith practice.

II. ANTIDISCRIMINATION LAWS PROTECT RELIGIOUS FREEDOM.

Lest there be any doubt, this is not a case pitting religion against only secular rights and interests. For far from offending religious freedom, public-accommodations laws like the one here protect religion and its exercise: The challenged law advances Virginia's strong interests in preventing discrimination of all kinds, *including religious discrimination*, in the provision of goods and services, thereby ensuring that all people can believe and worship according to their conscience, without fear that they will be denied equal treatment. The religious freedom of all is therefore threatened, not served, by efforts to use the First Amendment to license discrimination.

It is true that Updegrove asserts an objection solely to weddings that are not between one man and one woman (Mot. 4). But the drastic revision of free-exercise law that it seeks could not be so cabined. For in a pluralistic society such as ours, there is an almost limitless variety of religious motivations, interests, and potential objections. What is more, many religious adherents view themselves as guided by religion in all aspects of life and ascribe religious motivations to virtually every one of their undertakings. *See Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001). Bob Updegrove is a case in point: He asserts that his faith "shapes every aspect of his life, including why and how he operates his business" and "how he interacts with others." Compl. ¶¶ 32,

41. And antidiscrimination laws "protect[] against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996). If this Court were to interpret the Religion Clauses to grant a license to violate these laws whenever one has a religious motivation, all manner of discrimination would become permissible: Anyone could be denied service in a restaurant, hotel, shop, or other public establishment, for no reason other than that the person is gay, Black, Jewish, or disabled, and the proprietor states a religious reason for denying service. *Cf., e.g.*, *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (per curiam) (restaurant owner's refusal to serve Black patrons based on belief that federal public-accommodations law "contravenes the will of God" (citation omitted)).

These harms are not merely theoretical. The case law shows—and the experiences of *amici* and our members confirm—that disfavor toward, unequal treatment of, and denials of service to members of minority faiths and nonbelievers are all too common. And religious discrimination, like other forms of discrimination, is often premised on the discriminator's religious views.

In *Paletz v. Adaya*, No. B247184, 2014 WL 7402324 (Cal. Ct. App. Dec. 29, 2014), for example, a hotel owner in California closed a poolside event after learning that it was hosted by a Jewish group. The hotelier told an employee, "I don't want any [f—ing] Jews in the pool" (*id.* at *2 (alteration in original)); said that her family would cut off funding to the business if they learned of the gathering (*id.* at *4); and directed hotel staff to remove the Jewish guests from the property (*id.* at *2). In *Khedr v. IHOP Restaurants, LLC*, 197 F. Supp. 3d 384 (D. Conn. 2016), a restaurant in Connecticut refused service to a Muslim family because of their faith. The father recounted: "The restaurant manager started to look at us up and down with anger, hate, and dirty looks because my wife was wearing a veil, as per our religion of Islam." *Id.* at 385. In front of the family's 12-year-old child, the IHOP manager told his staff "not to serve 'these people' any food." *Id.* And in

Fatihah v. Neal, the owners of a gun range posted a sign declaring the facility a "MUSLIM FREE ESTABLISHMENT," armed themselves with handguns when a Muslim man wanted to use the facility, and accused him of wanting to murder them because "'[his] Sharia law' required" it. *See* Compl. ¶¶ 24, 32, 34, No. 6:16-cv-00058-KEW (E.D. Okla. Feb. 17, 2016).

The closely related context of employment discrimination further illuminates the danger. *See, e.g.*, *Huri v. Office of the Chief Judge*, 804 F.3d 826, 830, 834 (7th Cir. 2015) (supervisor called Muslim employee who wore hijab "evil," denied her time off for Islamic religious holidays, and engaged in "social shunning, implicit criticism of non-Christians, and uniquely bad treatment of [the employee] and her daughter"); *Nappi v. Holland Christian Home Ass'n*, No. 11-cv-2832, 2015 WL 5023007, at *1–3 (D.N.J. Aug. 21, 2015) (Catholic maintenance worker subjected to harassment by colleagues—who encouraged him to leave his church, put religious literature in his locker, "wanted to shoot [him]," and ultimately fired him "because, as a Roman Catholic, he was an 'outsider' who did not 'fit in.'"); *Minnesota ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 846–47 (Minn. 1985) (en banc) (gym excluded applicants and employees not living according to owners' faith, based on owners' "religious belief that they are forbidden by God, as set forth in the Bible, to work with 'unbelievers'").

It follows that if the Religion Clauses were construed to grant businesses a license to violate antidiscrimination laws whenever they cite a religious motivation, religious discrimination would receive governmental sanction and could become commonplace across Virginia.

In the wedding context alone, suppose that an interfaith couple wished to marry, and in keeping with the religion of one partner, the couple planned to serve kosher or halal food. But the only kosher or halal caterer in town refused to prepare food for the wedding based on its religious belief that interfaith marriages are sinful. Should the caterer have the right, in the face of public-accommodations protections against religious discrimination, to force the couple to choose

between forgoing a catered reception, on the one hand, and violating one spouse's sincere religious beliefs, on the other?

And what of children who are part of a family that, in the opinion of a businessowner, should not exist because the parents are of different faiths or were married within a faith that the merchant's own religion rejects? Might the children be denied a birthday cake or a party celebrating a bar or bat mitzvah or a communion? Similarly, may a restaurant deny service to a Muslim woman who wears a hijab or a Sikh man who wears a turban, because the owner's religion forbids associating with members of other faiths? May a grocer refuse to sell fruit to an unmarried pregnant woman because his religion tells him that he would be facilitating someone else's living in sin? And what about the recently widowed Catholic whose Protestant spouse wanted a Protestant funeral? May a Protestant funeral director bar the widow from the memorial on account of her faith, leaving her unable to say goodbye in a way that respects her beloved's faith?

If the Religion Clauses license religiously motivated denials of service to same-sex couples, as Updegrove contends, then they also sanction and authorize all other religiously motivated denials, including exclusions based on customers' faiths. One could be refused employment, thrown out of a hotel, or barred from purchasing a hamburger just for being the "wrong" religion. And no state or local authority or law could do anything to remedy the situation. Such a system would devastate religious freedom, not protect it.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for preliminary injunction should be denied and Defendants' motion to dismiss should be granted.

Respectfully submitted,

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Date: November 23, 2020.

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2020, the foregoing brief was filed using the Court's CM/ECF system, through which counsel for all parties will be served.

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