No. 21-1506

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBERT UPDEGROVE; LOUDOUN MULTI-IMAGES LLC, d/b/a BOB UPDEGROVE PHOTOGRAPHY,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia (Alexandria)
Case No. 1:20-cv-01141-CMH-JFA

AMICUS BRIEF OF THE STATE OF WEST VIRGINIA AND 10 OTHER STATES IN SUPPORT OF PLAINTIFFS-APPELLANTS FOR REVERSAL

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CORPORATE DISCLOSURE STATEMENT

As governmental parties, amici are not required to file a certificate of interested persons. Fed. R. App. P. 26.1(a).

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INTRODUCTION

After the Supreme Court invalidated Congress's Reconstruction public accommodations law, the States led the charge on passing public accommodation laws to protect the rights of newly freed slaves. *See* Lisa G. Lerman et al., *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 238 (1978); *see also The Civil Rights Cases*, 109 U.S. 3 (1883). Between 1883 and 1885, eleven States barred common carriers and businesses "provid[ing] certain essential goods or services" from unreasonably excluding any members of the public. *Id.* at 238-39; Alfred Avins, *What is a Place of "Public" Accommodation?*, 52 MARQ. L. REV. 1, 2 (1968). More States followed around the turn of the century. Lerman et al., 7 N.Y.U. REV. L. & SOC. CHANGE at 239.

These laws essentially required a right of access to all comers when it came to standard, off-the-shelf goods and services. These laws were not radical—quite the opposite; they codified English common law. *See* Lerman et al., 7 N.Y.U. REV. L. & SOC. CHANGE at 242; Avins, MARQ. L. REV. at 2, 14; *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 571 (1995). Some modern public accommodation laws like the Virginia Values Act ("Act"), however, seek to expand what constitutes a public accommodation to include bespoke services that are the product of an artist's affirmative expression. *That* is radical. The idea

that a State can compel expression itself is divorced from the common law and unnecessarily "increase[s] potential for conflict between state public accommodations laws and [] First Amendment rights." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657 (2000).

The Supreme Court has already granted victory in similar conflicts to the First Amendment. *See Hurley*, 515 U.S. 557; *Dale*, 530 U.S. 640. This Court should do the same and enjoin Virginia from applying the Act to compel Appellant Robert Updegrove's ("Updegrove") expression and halt the ungrounded expansion of public accommodation laws.

IDENTITY AND INTERESTS OF *AMICUS CURIAE*[1]

Amici States of West Virginia, Alabama, Arizona, Arkansas, Louisiana, Mississippi, Montana, Nebraska, South Carolina, Texas, and Utah have an interest in ensuring the proper constitutional scope of enforcement of public accommodation laws. These laws serve a laudable purpose and generally fall within constitutional bounds. But some States are now construing these laws in a way that uproots them from their common law foundation and infringes on the First Amendment. Updegrove's claim is an example of this unconstitutional overreach: A State cannot compel expression as part of its public-accommodation statutory scheme. Amici States are well-positioned to explain the purpose of these laws and show that it is

[1] This brief is filed under Federal Rule of Appellate Procedure 29(a)(2).

unnecessary for a State to impede on the First Amendment to advance its important interests in fighting discrimination.

SUMMARY OF ARGUMENT

I. State public accommodation laws historically followed the English common law and did not focus on speech. Instead, they focused on quasi-monopolistic and quasi-public businesses in three non-governmental areas. As such, these laws were fully consistent with free speech rights and enjoyed limited constitutional scrutiny under the First Amendment.

Modern applications of public accommodation law, as here, to expression unprecedentedly expands these traditional laws. This expansion cannot be squared with the established aims of public accommodation laws and, more importantly, it unnecessarily impedes on the First Amendment.

II. The First Amendment guarantees freedom from compelled speech. This negative right applies with equal force to expression like photography. The Act's application to Updegrove here burdens that right by compelling him to photograph weddings—his expression—against his conscience. The Supreme Court's precedents establish that this is unconstitutional.

III. The Act's application to Updegrove is subject to strict scrutiny. It fails this heightened test because it is not narrowly tailored to achieve Virginia's interest.

ARGUMENT

I. The Goals Animating Public Accommodation Laws Are Fully Consistent With Individual Expressive Freedom.

A. Restrictions On Individual Expression Are Ahistorical Additions To The Tradition Of Public Accommodation Law.

1. Under English common law, "innkeepers, smiths, and others who 'made profession of a public employment,'" had to serve every customer absent a "good reason" not to. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 571 (1995) (quoting *Lane v. Cotton*, 88 Eng. Rep. 1458, 1464-65 (1701) (Holt, C.J.)). Not every business was subject to this rule, however: "[A]n entity [was] not a public accommodation unless it provide[d] an essential good or service and [fell] within one of the categories established by law." James M. Gottry, Note, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 VAND. L. REV. 961, 981 (2011) (quotation omitted). The key element defining a public accommodation was that it provided essential goods and services and often operated with somewhat monopolistic privileges. *See* Alfred Avins, *What is a Place of "Public" Accommodation?*, 52 MARQ. L. REV. 1, 2-3 (1968). They were the type of businesses that would leave would-be customers with "no clear alternative place to go," if the business refused to serve them; in that context "the refusal to deal takes on far greater weight than it does in a purely competitive industry where there are many easily available options to purchase the same (or a very similar) good or service from a rival merchant."

Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1250 (2014).

The rationale of protecting access to essential services for all members of the community also helped explain what businesses were *not* traditionally subject to public accommodation laws. The common law distinguished between the above businesses and businesses generally. Avins, 52 MARQ. L. REV. at 22. Some places of amusement "were allowed to exclude patrons at will" likely because they did not admit patrons indiscriminately and did not require a license. *Id.* at 6 (citing *Bells v. Burghall*, 170 Eng. Rep. 509 (1799)). And even some monopolistic businesses, like theaters, were exempt because they were not considered a "necessity." *Id.*

Tellingly, the historical record does not show examples of common-law public accommodations norms that required compelled speech, nor blanket rules about all comers in the world of bespoke services.

2. "Wherever English common law was exported, the rule that carriers had to serve the public without unreasonable discrimination went with it." Avins, 52 MARQ. L. REV. at 2. America is no exception. Early American law bound railroads, inns, and other common carriers to carry all persons. *Id.* at 2, 5. As under the common law, the American public accommodation duty was based "on the theory that [covered businesses] hold themselves out to the public to accept all guests." *Id.*

at 5. And, like in England, these businesses often possessed some governmental monopoly. *Id.* Some States extended this to theaters, as famously championed by Senator Charles Sumner, *id.* at 6-7, and other places of recreation under either the monopoly theory or a theory of quasi-public use and interest. *Id.* at 31-32. But again, absent from the early American record are examples of the application of these laws to speech.

Traditional public accommodation laws "[did] not on [their] face, 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 on the proscribed grounds." *Hurley*, 515 U.S. at 572. To achieve this, state public accommodation statutes covered businesses operating in three non-governmental areas. *First*, these laws covered businesses engaged in facilitating the freedom of movement—inns, hotels, restaurants—because of the "essential" liberty of movement. Lerman et al., 7 N.Y.U. REV. L. & SOC. CHANGE at 245 (quotation omitted). *Second*, laws covered leisure businesses that "hold themselves out to the public as offering some form of entertainment, amusement, cultural, or religious activity and, therefore, have no right to refuse any comers." *Id.* at 248. *Third*, laws covered businesses that affected transactional freedom, most typically retail stores. *Id.* at 253. States reasoned that these businesses' purpose is profit, "which indicates that all paying customers will

be accepted." Pamela Griffin, *Exclusion and Access in Public Accommodations: First Amendment Limitations Upon State Law*, 16 UNIV. OF THE PACIFIC L.J. 1047, 1055 (1985) (citation omitted). So "racial or other discrimination among customers is unreasonable because such differences are irrelevant to the purpose for which the facilities operate." *Id.*

Businesses in these categories have a common element: They "cater[ed] to nearly all of the public, indicating that significant associational interests are nonexistent." *Id*. Businesses not open to all of the public, such as those of individual professionals like physicians and lawyers "were generally considered exempt." Avins, MARQ. L. REV. at 60. And, when associational interests were implicated, States offered exemptions. While non-sectarian cemeteries were covered under public accommodation laws, in some States religious cemeteries were offered exemptions. Lerman et al., 7 N.Y.U. REV. L. & SOC. CHANGE at 257. Thus some State laws traditionally respected the proper limits of public accommodation laws and did not intrude on First Amendment freedoms.

Even the expansion of public accommodation laws under the Civil Rights Act of 1964 followed the same rationales undergirding the common law. *See* Gottry, 64 VAND. L. REV. at 966 (noting that the Civil Rights Act of 1964 "continued to define public accommodations narrowly"). The law still defined public accommodation similar to what the States covered: establishments that provide lodging to transient

guests like hotels and inns; restaurants and other facilities mainly engaged in selling food for consumption on the premises; places of entertainment like movies, theater, concert halls, sports arenas, and stadiums; and establishments within the covered establishments that serve the same patrons. 42 U.S.C. § 2000a(b). And it exempted private clubs and other businesses not open to the public. *Id.* § 2000a(e). So despite being monumental, the Civil Rights Act was still narrower than some modern public accommodation laws. *See*, *e.g.*, Gottry, 64 VAND. L. REV. at 967 (comparing the Civil Rights Act of 1964 with N.J. Stat. Ann. § 10:5-5(l) (2010)). And it did not reach so far as to compel speech.

3. "Current state public accommodation laws have cast off their historical roots and embrace a wide range of business activity" including expression. Gottry, 64 VAND. L. REV. at 967. On their face, extension to expressive behavior seems to follow "what the old common law promised to any member of the public . . . that accepting the usual terms of service, they will not be turned away merely on the proprietor's exercise of personal preference." *Hurley*, 515 U.S. at 578. But in application these laws turn personal expression into the public accommodation. Put differently, instead of targeting a service, these laws target a message. That is "peculiar." *Id.* at 572.

As discussed above, traditional laws focused on services not speech. Despite this narrow focus, these laws still achieved the important end of preventing discrimination. As the Washington Supreme Court stated over a century ago:

> Every person not belonging to a proscribed class, has a right to go to any public place, or visit a resort where the public generally are invited, and to remain there, during all proper hours, free from molestation by any one, so long as he conducts himself in a decorous and orderly manner.

Davis v. Tacoma Ry. & Power Co., 77 P. 209, 211 (Wash. 1904). Extending modern public accommodation laws to expression instead serves a different purpose. These laws' "apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own." *Hurley*, 515 U.S. at 578. This reaches far beyond the ends under the common law and even America's recent past. Even in encompassing theaters, traditional public accommodation laws did not require theaters to alter their expression, but to merely allow others to passively observe it. More importantly, these modern laws violate the First Amendment when they are applied to compel speech. *See id*.

B. The Supreme Court Privileges First Amendment Freedoms In Non-Traditional Applications Of Public Accommodation Laws.

Consistent with this historical view of the areas public accommodations laws do—and do not—encompass, the Supreme Court has consistently refused to treat all-comers laws as a greenlight to impede on the First Amendment. No matter how

admirable the State's interest in eliminating discrimination, "the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it,'" *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021), is just as present in the public accommodation context as any other.

"Free speech enjoys a level of protection greater than that afforded nearly any other governmental or individual interest." Lauren J. Rosenblum, *Equal Access or Free Speech: The Constitutionality of Public Accommodations Laws*, 72 N.Y.U. L. REV. 1243, 1253 (1997). This protection encompasses more than spoken word, extending as well to expression like "pictures, films, paintings, drawings, and engravings." *Kaplan v. California*, 413 U.S. 115, 119-20 (1973). And the Court has long included expressive acts like "saluting a flag (and refusing to do so), wearing an armband to protest a war . . . and even [m]arching, walking or parading in uniforms displaying the swastika." *Hurley*, 515 U.S. at 569 (quotation omitted).

"One important manifestation of" this right is the choice "of what to say and . . . what not to say." *Hurley*, 515 U.S. at 573 (quotation omitted). The Supreme Court has repeatedly held that the government cannot compel speech without clearing an exceedingly high hurdle. *E.g.*, *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (cannot compel citizens to display the state motto on license plate); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (cannot compel a newspaper to print politician's writings); *W. Va. State Bd. of Educ. v. Barnette*, 319

U.S. 624, 642 (1943) (cannot compel students to recite pledge or salute flag). Public accommodation laws that require expression the speaker would not otherwise engage in summon this First Amendment protection.

Virginia's Act is not the first in this era of newly expansive public accommodation laws. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018); *Hurley*, 515 U.S. 557. But similar to those other laws, it reflects an interpretation that the Supreme Court has found "peculiar"—and unconstitutional. *Hurley*, 515 U.S. at 568-69, 572, 581.

In *Hurley*, the Court unanimously held that Massachusetts violated the First Amendment rights of St. Patrick's Day parade organizers by requiring them to include the Irish-American Gay, Lesbian and Bisexual Group of Boston in their parade. 515 U.S. at 572-73. "While the law is free to promote all sorts of conduct in place of harmful behavior," the Court emphasized that a State may not "interfere with speech for no better reason than promoting an approved message . . . however enlightened [that] purpose may strike the government." *Id.* at 579. Thus the State "may not compel affirmance of a belief with which the speaker disagrees." *Id.* at 573.

The critical element of the Court's analysis was its recognition that applying a public accommodation statute to *expression* crossed the line into violating "the fundamental rule of protection under the First Amendment, that a speaker has the

autonomy to choose the content of his own message." *Id.* at 573. Applying traditional all-comers laws to this novel context in essence "declar[ed] *the sponsors' speech itself* to be the public accommodation." *Id.* (emphasis added).

The Court reiterated this principle five years later in *Boy Scouts of America v. Dale*. There, New Jersey tried to apply its public accommodation statute in way that required the Boy Scouts to admit an openly gay assistant scoutmaster in violation of the Boy Scouts' teachings. 530 U.S. at 659. The Court held that while New Jersey had a compelling interest in preventing discrimination, the First Amendment prohibited it "from imposing such a requirement through the application of its public accommodations law." *Id.* at 659. The Court noted that it was applying the "similar analysis" from *Hurley*, and found that the direct, "severe intrusion on the Boy Scouts' rights to freedom of expressive association" could not be justified by the interests undergirding the State's public accommodation law. *Id.* at 659. And it emphasized that the acceptability of the organization's expression was of no moment: "public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message." *Id.* at 661.

The Court upheld the importance of this negative First Amendment right even in reaching the opposite result in *Roberts v. United States Jaycees*, 468 U.S. 609

(1984). There the Court upheld application of a public accommodation law to an organization seeking to exclude women as voting members, *id.* at 612, yet even so emphasized that organizations can "exclude individuals with ideologies or philosophies different from those of its existing members." *Id.* at 627 (citation omitted). The reason the Jaycees's claim failed was not because the Court held that First Amendment rights must yield to a generally applicable public accommodation law, but because the organization failed at the factual stage to show that it needed an exemption, given that women already made up 2% of its membership. *Id.* at 613, 627.

Finally, the lessons from this line of cases are all the more weighty because the compelled speech Updegrove challenges also implicates the Free Exercise Clause.[2] Artists like Jack Phillips in *Masterpiece* and Updegrove here decline to create art, not out of animus, but out of fidelity to their religious beliefs. Just as the Jehovah's Witness in *Barnett* declined to salute the flag out of belief in the supremacy of God, *see* 319 U.S. 624, so too some artists decline to support weddings

[2] Although this Court has not adopted it, other federal circuit courts have recognized a hybrid-rights claim—when two First Amendment rights combine—one in nearly this exact context. *See, e.g., Telescope Media Grp. v. Lucero*, 936 F.3d 740, 759 (8th Cir. 2019); *see also, e,g., Cornerstone Christian Schs. v. Univ. Interscholastic League*, 563 F.3d 127, 136 n.8 (5th Cir. 2009); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295-97 (10th Cir. 2004). Lower courts within this circuit have as well. *See Hicks ex rel. Hicks v. Halifax Cnty. Bd. of Educ.*, 93 F. Supp. 2d 649, 663 (E.D.N.C. 1999) (strict scrutiny for hybrid free-exercise and parental-right claims).

that do not reflect what their faith teaches about marriage. When applied to compelling expression that violates religious beliefs, public accommodation laws demean certain religious beliefs and impede on free exercise. *Cf. Fulton v. City of Phila.*, 141 S. Ct. 1868, 1876 (2021) ("As an initial matter, it is plain that the City's actions have burdened [the plaintiff organization's] religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs.").

C. Newly Expansive Approaches To Public Accommodation Laws Are Unnecessary To Serve These Laws' Important, Traditional Functions.

This intrusion on the First Amendment is also unnecessary. As noted above, public accommodation laws have long served critical purposes in society. The rationale behind areas that were—and were not—deemed necessary to include in these laws' scope makes clear that protecting broad access to goods and services does not require intruding on expressive rights.

Not only are expressive businesses not equally essential; there are also readily available alternatives. This is not an instance of African-Americans having to restrict their travel for lack of available services. *See Heart of Atl. Motel, Inc. v. United States*, 379 U.S. 241, 252-53 (1964) (noting that African-Americans had to travel great distances for accommodations). For example, there are 800 photographers in Virginia who will photograph same-sex weddings. *See* JA 044

(citing Wedding Wire's list of same-sex wedding photographers). Thus there is little risk of boxing certain groups out of public life. This is a far-cry from the historic quasi-monopolies. As such, there is less of a compelling reason to expand public accommodation laws in this way now than historically.

There is further no quasi-public use here which justified the extension of these laws to places of amusement and other businesses. Unlike those businesses, the goal of commissioned expression is to convey a message, not pure profit, and thus these businesses do not operate indiscriminately. They only operate in a way congenial to their desired message. Thus, like the sectarian cemeteries discussed above, they are not as open to the public in all respects. A customer does not have a right to compel a specific message or association from these businesses. And the State's attempt to create such a right is the very "antithesis" of the First Amendment. *Hurley*, 515 U.S. at 579.

II. Virginia's Attempt To Force Updegrove To Photograph Same-Sex Weddings Crosses The Line From Protecting Public Access To Policing Individual Speech.

Applying the Virginia's Act to Updegrove highlights the disconnect between constitutional public accommodation laws grounded in the common law on the one hand, and those that impermissibly impede freedom of expression on the other. The Act, in relevant part, makes it illegal to "withhold from, or deny" or attempt to withhold from or deny "any of the accommodations, advantages, facilities, services,

or privileges made available in any place of public accommodation . . . on the basis of . . . sexual orientation," or to "segregate or discriminate" in the use of these services on the basis of sexual orientation. Va. Code § 2.2-3904(B). What this means for Updegrove is that, despite his sincerely held desire to limit his expression to that which celebrates his religious beliefs, he cannot deny his wedding photography services to same-sex couples.

Updegrove turned his artistic and creative talent as a photographer into a business. At first glance, Updegrove's refusal to photograph same-sex weddings may sound like denying services to some members of the public that are generally available to others. Yet Updegrove serves LGBTQ persons. For example, Updegrove stated that he would photograph an event for an LGBTQ-owned business. JA 028. His inability to photograph same-sex weddings is not based on the identity of the requester, but rather on the content of the request itself. JA 025, 028. In other words, it turns on the expression a would-be client asks Updegrove to deliver.

The First Amendment protects Updegrove's choice.

A. Requiring Updegrove To Photograph Weddings Against His Conscience Is Unconstitutional Compelled Speech.

Importantly, Virginia did not contest below that Updegrove is engaging in speech. And rightly so: At least three federal circuit courts and one district court have held that "[t]he First Amendment protects actual photos, videos, and

recordings, and for this protection to have meaning the Amendment must also protect the act of creating that material." *Fields v. City of Phila.*, 862 F.3d 353, 358 (3d Cir. 2017) (citation omitted); *see also Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019) (holding that similar Minnesota law regulated videographers' speech, not conduct)[3]; *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) ("The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording." (emphasis in original)); *Silberberg v. Bd. of Elections*, 272 F. Supp. 3d 454, 479 (S.D.N.Y. 2017) ("Photographs are protected by the First Amendment. The act of taking a photograph, though not necessarily a communicative action in and of itself, is a necessary prerequisite to the existence of a photograph." (citation omitted)). And the Supreme Court has recognized that for First Amendment purposes it "makes no difference" whether the government is regulating the "creati[on], distributi[on], or consum[ption]" of the speech. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 792, n.1 (2011).

This means that applying the Act to Updegrove upsets the long-set balance of public accommodation laws and the First Amendment. This is not a case about

[3] On remand, the district court dismissed the case and dissolved the preliminary injunction upon the plaintiff's motion because the plaintiffs stopped producing wedding videos after their business slowed due to the COVID-19 pandemic. *See* 2021 WL 2525412, at *1-3 (D. Minn. Apr. 21, 2021).

providing the same good or service to all comers because the service at issue is inextricably bound up with the expressive message it conveys. And Updegrove chooses to speak a message through his photography that embodies his religious beliefs with respect to weddings. Because the Act requires Updegrove to do the opposite, the challenged law—as in *Hurley*—would make Updegrove's "speech itself . . . the public accommodation." *Hurley*, 515 U.S. at 572-73. This transformation violates the "cardinal constitutional command" against government compelled speech. *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018).

The Act also invokes "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573. Requiring Updegrove to alter his expression to include celebration of same-sex marriage violates this autonomy. *See Telescope Media Grp.*, 936 F.3d at 753-58 (finding a similar Minnesota law compelled speech based on content because it required the plaintiffs to create videos about same-sex weddings if they did the same for heterosexual weddings). The provision of the Act precluding publishing "any communication . . . to the effect that any . . . services of any such place shall be refused, withheld from, or denied to any individual on the basis of . . . sexual orientation," Va. Code § 2.2-3904(B), does this more directly by explicitly providing what written speech is impermissible. *See Chelsey Nelson*

Photography LLC, v. Louisville/Jefferson Cnty. Metro Gov., 479 F. Supp. 3d 543, 559-61 (W.D. Ky. 2020) (finding a similar provision was a content-based restriction on a photographer's speech).

To be sure, to be constitutionally defective laws like these must impede on speech more than merely incidentally. *See Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 62 (2006) ("*FAIR*") (upholding statute where the "compelled speech" at issue was "plainly incidental to the . . . regulation of conduct"). And the speaker must object to the message itself, not the identity of the requestors. *See Hurley*, 515 U.S. at 580 (noting its precedents found the absence of compelled speech where allegedly compelled speakers do not "object[] to the content" (quotation omitted)). But the speech here easily fits within those parameters. Requiring Updegrove to photograph *at all* is a dictate to engage in protected expression. Updegrove's speech is thus not merely incidental to the regulated act, it is the regulated act. *See Telescope Media Grp.*, 936 F.3d at 757. And this means that in acknowledging photography as speech, Virginia effectively concedes that the Act (at least as applied to Updegrove) regulates speech. In this way Updegrove's business is unlike others in the wedding industry to which applying the Act would be uncontroversial—such as "the blow dry bar stylist," "the manicurist," "the limo driver for the married couple," and "the travel agent for the honeymoon." *Chelsey Nelson Photography*, 479 F. Supp. 3d at 558 n.118.

B. The Compelled Speech Here Is Not Merely Incidental.

Virginia relied heavily below on *FAIR*, but comparing what the public accommodation law there required with what the Act demands of Updegrove here highlights how the Act regulates speech more than incidentally. In *FAIR*, an association of law schools that disapproved of the military's treatment of LGBTQ individuals challenged the Solomon Amendment's requirement that the schools allow equal access to military recruiters or lose certain federal funding. 547 U.S. at 51-52. Allowing equal access to the recruiters often required the law schools to engage in some speech, such as sending emails and posting notices on the recruiters' behalf. *Id.* at 61. The Court, however, deemed this speech to be "a far cry" from that at issue in its compelled speech cases because the schools "remain[ed] free . . . to express whatever views they may have on the military's congressionally mandated employment policy." *Id.* at 60, 62. Thus, critically, the government was not forcing the schools to "alter their *own* message." *Masterpiece*, 138 S. Ct. at 1745 (Thomas, J. concurring in part) (citation omitted; emphasis in original).

The Supreme Court highlighted the difference between laws that compel speech and those that only regulate speech incidentally twenty years prior in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). There, the Court upheld a law that required the owner of a shopping mall to allow individuals to distribute pamphlets on the premises. It emphasized that the state law left the owner free to

disassociate from the views of the pamphleteers—he was in no way "being compelled to affirm a belief in any governmentally prescribed position or view." *Id.* at 88. Thus, "[n]otably absent from *PruneYard* was any concern that access . . . might affect the shopping center owner's exercise of his own right to speak." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 12 (1986) (plurality op.).

By contrast, Updegrove is not being asked to provide access for others to express themselves. He cannot hand over his camera so that same-sex couples can create their own photographic message; the essence of his business is that he creates the expression himself. In other words, Updegrove cannot both do the job a same-sex couple hires him for and simultaneously disassociate himself from the message he is creating.

Worse still, unlike the plaintiffs in *FAIR* and *PruneYard*, Updegrove cannot escape having others impute his work's expressive message to him. A university can post a notice that it does not necessarily endorse the views of its invited speakers, but it would be absurd for Updegrove to include a disclaimer on each print that he does not necessarily endorse the message he himself created through his artistic talent. That the couples pay for Updegrove's work is of no moment. Newspapers are sold for a profit, after all, yet there is little debate that they enjoy similar First Amendment protection against laws forcing their creators to publish views they

would rather not include in their work. *See, e.g., Tornillo*, 418 U.S. at 258 (Florida statute requiring newspapers that published attacks on political candidates publish a candidate's reply violated the First Amendment). For-profit or not, media businesses "contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster" and—just like individual speech—are entitled to constitutional protection. *Pac. Gas & Elec. Co.*, 475 U.S. at 8 (plurality op.) (citation omitted). Nor does it change the analysis that Updegrove would simply be following the Act. Indeed, the Court in *Hurley* "did not hold that reasonable observers would view the organizers as merely complying with Massachusetts' public-accommodations law," *Masterpiece*, 138 S. Ct. at 1744 (Thomas, J. concurring in part) (citing *Hurley*, 515 U.S. at 572-73), but instead expressly recognized that the parade organizers could not sever their views from that of the individual participants, *Hurley*, 515 U.S. at 576-77.

The same is true here. "[L]ike a composer," *Hurley*, 515 U.S. at 574, the photographer selects the right elements—lighting, gradient, saturation—to create a photograph imbued with the artist's desired emotion. That expressive message stays with the photograph even after it is delivered to the client, and no one imputes the message to that client. Photography's predecessor—painting—offers a ready example: Although, Francesco del Giocondo commissioned the portrait of his wife, no one attributes the Mona Lisa to him instead of Leonardo di Vinci.

Virginia accordingly cannot find solace in *FAIR* and its incidental speech doctrine.

III. The Act, Applied To Updegrove, Cannot Satisfy Strict Scrutiny.

Once properly understood as an intrusion into Updegrove's speech rights rather than an ordinary application of public accommodations laws, the only remaining question is whether Virginia can justify that constitutional burden. It cannot.

Updegrove is likely to succeed on the merits because Virginia cannot satisfy strict scrutiny. To begin, strict scrutiny is the correct standard because the Act compels Updegrove to speak a specific message: If Updegrove instead follows his conscience, he could be sued, fined, and potentially lose his business. "[T]he presence of compulsion from the state . . . compromises the First Amendment." *Washington Post v. McManus*, 944 F.3d 506, 515 (4th Cir. 2019). It is therefore no surprise that laws compelling speech are generally subject to the highest level of scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

A compelled-speech law "can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests. *Fulton*, 141 S. Ct. at 1881 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)). Importantly, to survive the as-applied portion of Updegrove's challenge, Virginia must prove the Act satisfies this standard as to

Updegrove's speech "specifica[lly]." *Id.* (quotation omitted). "The question, then, is not whether [Virginia] has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest" in compelling Updegrove to speak against his conscience. *Fulton*, 141 S. Ct. at 1881. And whatever broad interest Virginia may have in preventing discrimination, *see Hurley*, 515 U.S. at 572, it does not have a compelling interest in requiring Updegrove to create speech that violates his religious beliefs. *Cf. Telescope Media*, 936 F.3d at 755 ("As compelling as the interest in preventing discriminatory conduct may be, speech is treated differently under the First Amendment."). Moreover, public accommodation laws in other States show that the Act is not narrowly tailored to achieve Virginia's purported interest.

1. "Even antidiscrimination laws . . . must yield to the Constitution." *Telescope Media*, 936 F.3d at 755. Two federal courts and a state supreme court have already found that States do not have a compelling interest in compelling expression like Updegrove's. *See id.*; *see also Chelsey Nelson Photography*, 479 F. Supp. 3d at 559; *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 915 (Ariz. 2019). And for good reason: Supreme Court precedent counsels that an otherwise laudable interest in preventing discrimination loses its compelling character when a challenged law uses compelled speech as a means to that end.

As the Court held in *Hurley*, while Massachusetts may have a compelling interest in prohibiting "the act of discriminating against individuals in the provision of publicly available goods, privileges, and services," it had no "legitimate interest" in "declaring [another's] speech itself to be [a] public accommodation." *Id.* at 573, 578. That is "what the general rule of speaker's autonomy forbids." *Id.* at 578. The Court doubled down on this rule in *Dale*, holding that "the choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government's power to control." 530 U.S. at 654 (quotation omitted). New Jersey's compelling interest in preventing or eliminating discrimination therefore did "not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." *Id.* at 659. Yet the Act seeks to do what both of these cases forbid—and just like there, an antidiscrimination goal cannot salvage its constitutionality.

2. Virginia further cannot show that the Act is narrowly tailored as to Updegrove. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963) (citations omitted). Virginia cannot show the Act's "broad" sweep of compelling Updegrove's speech is "the least restrictive means among available, effective alternatives" to combat discrimination. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

To the extent Virginia is concerned about discriminatory conduct, it could have tailored the Act more precisely by preventing businesses from refusing non-speech services. These types of laws, after all, are the historical norm. *See supra* Part I.A.

Virginia could also allow narrow exceptions. It has already shown that exempting minors, Va. Code § 2.2-3904(D), employees who work for businesses of specified sizes, *id.* § 2.2-3905(A), and certain housing entities, *id.* § 36-96.2(A)-(B), is not fatal to its purpose. "The creation of a system of exceptions . . . undermines the [] contention that its non-discrimination policies can brook no departures." *Fulton*, 141 S. Ct. at 1882. And other States' experiences have shown that exempting religious expression,[4] religious organizations,[5] or private clubs,[6] is also not fatal to a State's ability to prevent discrimination in the public-accommodations context.

These are just a few alternatives that balance First Amendment rights with Virginia's stated interests. Updegrove offers even more. *See* Pet. Br. at 53. Particularly given the ready availability of photographers who do not share

[4] Miss. Code §§ 11-62-3(a), 11-62-5(5)(a).
[5] Colo. Rev. Stat. § 24-24-601(1) (excluding religious places from the definition of public accommodation); Neb. Rev. Stat. § 20-137 (exempting religious organizations who give preference to members of the same faith).
[6] Neb. Rev. Stat. § 20-138.

Updegrove's reservations about creating photography for same-sex weddings, *see* JA 044, the existence of these alternatives is fatal to Virginia's claims.

"From the beginning, [the Supreme] Court's compelled-speech precedents have rejected arguments that 'would resolve every issue of power in favor of those in authority.'" *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1744 (Thomas, J. concurring in part) (quoting *Barnette*, 319 U.S. at 636). This case is an example of that principle at work. Virginia simply cannot show that compelling Updegrove to photograph weddings against his conscience is necessary to achieve its purported goals.

* * *

In sum, requiring Updegrove "to mouth support for views [he] find[s] objectionable violates [a] cardinal constitutional command"—and is "universally condemned." *Janus*, 138 S. Ct. at 2463. However admirable Virginia's efforts to mold public accommodation laws to protect additional sectors of the community from discrimination, the First Amendment requires stopping short of forcing creative professionals to choose between their livelihood and speaking messages they do not wish to espouse. Virginia's statute wrongly elevated a "peculiar" interpretation of public accommodation laws above the First Amendment—which properly understood, benefits us all.

CONCLUSION

For these reasons and those in Appellants' brief, this Court should reverse the district court and preliminarily enjoin the Act.

Dated: July 21, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2021, the foregoing document was served on all counsel of record via the CM/ECF system.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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