NO. 21-1506

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

REPLY BRIEF OF APPELLANTS ROBERT UPDEGROVE AND BOB UPDEGROVE PHOTOGRAPHY

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In this appeal, Bob Updegrove challenges the Virginia Values Act. Virginia enacted the Act less than two years ago. And the Attorney General says he will enforce and defend it. The Act could be enforced against Updegrove at any time. And if it is, Updegrove faces $50,000 and $100,000 penalties, compensatory damages, punitive damages, and attorney fees and court costs. To avoid these crippling penalties, Updegrove is censoring his speech.

This Court recently held that abortion providers had standing to challenge a law the State had not enforced in nearly 50 years. *Bryant v. Woodall*, 1 F.4th 280, 286 (4th Cir. 2021). Updegrove's claim to standing is *at least* as strong as those providers. And Virginia's contrary arguments ignore (and even suggest the Court should overrule) the well-established presumption that non-moribund statutes create a credible threat of enforcement.

Virginia also mostly ignores Updegrove's standing to challenge the Act's publication clause—which is causing him to self-censor *right now*. And Virginia ignores that the Act's accommodations clause could be enforced against Updegrove at any time—with or without a same-sex couple's request for wedding photography.

Updegrove is entitled to a preliminary injunction to prevent the Act from being enforced against him while this case proceeds below. And this Court should direct the district court to issue one on remand.

I. Updegrove has standing to challenge the Act.

A. By barely disputing that Updegrove has standing to challenge the Act's publication clause, Virginia all but concedes that he does.

1. Updegrove's self-censorship creates an ongoing injury, and Virginia's cursory responses both fail.

Updegrove challenges two provisions in the recently enacted Virginia Values Act. J.A. 12–13, 29–35, 51–56. First, he challenges the Act's mandate that public accommodations cannot "refuse, withhold from, or deny" any available services based on "sexual orientation." Va. Code § 2.2-3904(B) (the "accommodations clause"). And second, he challenges the Act's prohibition on publishing "any communication" indicating certain services will be "refused, withheld from, or denied" based on "sexual orientation." *Id.* (the "publication clause").

In its response, though, Virginia focuses almost exclusively on Updegrove's standing to challenge the accommodations clause—mostly ignoring Updegrove's arguments that his self-censorship gives him standing to challenge the publication clause. Resp. Br. 13–14, 17–33. Specifically, Virginia repeatedly argues that Updegrove's claims are too speculative because he has not yet received a request to photograph a same-sex ceremony. *Id.* at 13–14, 17, 19–20, 31–32. But that's irrelevant to Updegrove's standing to challenge the Act's *publication* clause. That clause is chilling Updegrove's speech right now, even without his receiving a request to photograph a same-sex ceremony.

In response to *that* argument, Virginia offers two arguments in a single sentence and a footnote. Resp. Br. 18, 20 n.3. First, it quotes the district court's claim that "the lack of a 'criminal penalty' in this matter distinguishes it from '*almost* every case where standing was found' based on an alleged chilling effect." Resp. Br. 18 (quoting J.A. 511) (emphasis added). But Virginia never explains why that distinction should matter. A $100,000 civil penalty surely deters as much as a $100 criminal penalty. That explains why courts regularly find standing based solely on *non*-criminal penalties. Virginia cannot distinguish any of these cases. And it barely even tries.

In *MedImmune, Inc. v. Genentech, Inc.*, for example, the Supreme Court held that the plaintiff could seek declaratory judgment based solely on the threat of civil penalties: "treble damages and the loss of 80 percent of [plaintiff's] business." 549 U.S. 118, 130, 134 (2007). Such consequences are "every bit as coercive as the modest penalties" for misdemeanor crimes, *id.* at 134 n.12, as are the fines, fees, and penalties Updegrove faces here. But Virginia never mentions *MedImmune*.

Likewise, in *Edgar v. Haines*, 2 F.4th 298 (4th Cir. 2021), *People for the Ethical Treatment of Animals, Inc. v. Stein*, 737 F. App'x 122 (4th Cir. 2018) (per curiam) ("*PETA*"), and *Mobil Oil Corporation v. Attorney General of the Commonwealth of Virginia*, 940 F.2d 73 (4th Cir. 1991), this Court held that the plaintiffs had standing based on the risk of *non*-criminal consequences. Opening Br. 32–33.

But again, Virginia never mentions *PETA* or *Mobil Oil*. And it only mentions *Edgar* in a footnote, (wrongly) claiming it "did not involve a pre-enforcement challenge." Resp. Br. 32 n.8. *Edgar* did involve a pre-enforcement challenge: none of the plaintiffs had been disciplined for failing to comply with the challenged policy, 2 F.4th at 307–08, and their standing was based on their self-censorship, *id.* at 310–11.

Second, Virginia argues in a footnote that Updegrove's publication clause claim "require[s] knowing exactly" what he intends to say and a finding that it "violate[s] the law." Resp. Br. 20 n.3. But Updegrove attached to his complaint the *exact statements* he wants to publish. J.A. 60–64. And he does not have to "deliberately break the law and take his chances in the ensuing suit or prosecution," *Mobil Oil*, 940 F.2d at 75, to find out whether his statements "violate the law," Resp. Br. 20 n.3.

2. This panel cannot (and should not) overrule the presumption for non-moribund statutes.

North Carolina Right to Life, Inc. v. Bartlett, holds that a "non-moribund statute that facially restricts expressive activity by the class to which [a] plaintiff belongs presents" a "credible threat" that the statute will be enforced against the plaintiff, "and a case or controversy thus exists in the absence of compelling evidence to the contrary." 168 F.3d 705, 710 (4th Cir. 1999) (cleaned up). "This presumption is particularly appropriate" in cases where, as here, "the presence of a statute tends to chill the exercise of First Amendment rights." *Id.*

This Court has repeatedly reaffirmed this presumption. Opening Br. 23 (collecting cases). Other courts have adopted it, too. *E.g. Hedges v. Obama*, 724 F.3d 170, 197 (2d Cir. 2013) (noting the Supreme Court "appears willing to presume that the government will enforce the law as long as the relevant statute is recent and not moribund") (cleaned up); *Bauer v. Shepard*, 620 F.3d 704, 708 (7th Cir. 2010) (observing that "the existence of a statute implies a threat to prosecute, so pre-enforcement challenges are proper" based on "a probability of future injury"); *N.H. Right to Life Pol. Action Comm. v. Gardner*, 99 F.3d 8, 16 (1st Cir. 1996) (applying the presumption because the state could not "convincingly demonstrate" the statute was "moribund" or would "not be enforced").

Virginia does not dispute that Updegrove belongs to the class of people whose expressive activity the publication clause "facially restricts." *Bartlett*, 168 F.3d at 710.[1] Nor does Virginia argue that the Act has somehow already become moribund. Instead, Virginia cites general principles to suggest that the Court's cases applying the presumption were wrongly decided. Resp. Br. 22–25 (claiming standing principles are "fundamentally inconsistent" with the credible-threat presumption for non-moribund statutes).

[1] *E.g.*, Resp. Br. 37–38 (making clear Virginia believes the Act applies to Updegrove's photography studio); *id.* at 43 (defending ban on "announcing" the withholding of services "based on sexual orientation").

Virginia misreads the cases and the presumption.[2] But more importantly, this panel can't overrule cases like *Bryant* and *Bartlett* that apply the presumption. A prior panel's decision "becomes the law of the circuit and is binding on other panels unless it is overruled" either by the en banc Court or by the Supreme Court. *United States v. Collins*, 415 F.3d 304, 311 (4th Cir. 2005) (cleaned up). So this "panel cannot overrule a decision issued by another panel." *McMellon v. United States*, 387 F.3d 329, 332 (4th Cir. 2004). Nor should it even if it could.

"[I]n numerous preenforcement cases where the Supreme Court has found standing," that Court "did not place the burden on the plaintiff to show an intent by the government to enforce the law against it." *Hedges*, 724 F.3d at 197. "Rather, it presumed such intent in the absence of a disavowal by the government or another reason to conclude that no such intent existed." *Id.* (collecting cases in footnote).[3] So cases like *Bryant* and *Bartlett* merely follow the Supreme Court's approach.

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[2] For example, Virginia argues that, under Updegrove's view, "any conduct that may arguably violate the law" would "automatically" create a credible-threat presumption. Resp. Br. 23. But Updegrove still must show (1) that the statute is "non-moribund," and (2) that he belongs to the class whose "expressive activity" the statute "facially restricts." *Bartlett*, 168 F.3d at 710. And Updegrove has made both showings here.

[3] *Cf. Spencer v. Kemna*, 523 U.S. 1, 8–10, 12 (1998) (reaffirming the Supreme Court's "practice of presuming [that] collateral consequences" from a criminal conviction are sufficient to establish an Article III injury because "the presumption . . . is likely to comport with reality").

"Presumptions typically serve to assist courts in managing circumstances in which direct proof, for one reason or another, is rendered difficult." *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988). And when "facts relating to a disputed issue lie peculiarly within the knowledge of one party, it is fair to assign the burden of proof to that party." *United States v. Santee Sioux Tribe of Neb.*, 254 F.3d 728, 733 (8th Cir. 2001).

Here, the "facts relating to" Virginia's intent "lie peculiarly within [its] knowledge," so it is "fair to assign" Virginia the burden of proof. *Id.* Otherwise, Updegrove would have to "violate the law and wait to see what happens; the Attorney General knows, but will not say, and until [he] does," supposedly, "there is no dispute." *Mobil Oil*, 940 F.2d at 76.

"This argument is apparently a favorite of the Virginia Attorney General." *Id.* But it is not the law. *Id.* In *American Booksellers*, this Court and the Supreme Court rejected it. *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) ("The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise."); *Am. Booksellers Ass'n, Inc. v. Virginia*, 802 F.2d 691, 694 n.4 (4th Cir. 1986) ("It would be unreasonable to assume that the General Assembly adopted the 1985 amendment without intending that it be enforced."). This Court rejected it again in *Mobil Oil*, 940 F.2d at 76 (rejecting Virginia's argument "that unless [the plaintiff] can show that the Attorney General will enforce the statute, there is no dispute with the Attorney General"). And the Court should reject it again here.

3. Virginia has not met its burden to overcome the presumption, and the only evidence it offered turned out to be wrong.

Far from presenting "compelling evidence" to prove it does not intend to enforce the Act, *Bartlett*, 168 F.3d at 710, Virginia offers *no* evidence to support that conclusion. All it offered below was a declaration claiming that it had "not received, filed, or investigated any complaints of unlawful discrimination" based on sexual orientation or gender identity. J.A. 399–400. But even if that had been true, past enforcement "is irrelevant given the statute's recent origin." *Gardner*, 99 F.3d at 17. "It is only evidence—via official policy or a *long history* of disuse—that authorities actually reject a statute that undermines its chilling effect." *281 Care Comm. v. Arneson*, 638 F.3d 621, 628 (8th Cir. 2011) (emphasis added). And Virginia offered no such evidence here.

Moreover, as Virginia now concedes, its earlier declaration contained statements that "had not been accurate" when Virginia filed it. Resp. Br. 11 n.2. Virginia *had* received complaints alleging unlawful discrimination based on sexual orientation and gender identity. J.A. 516–17. It had referred *seven* to federal agencies "for further processing" because they "involved employment discrimination" or "the provision of medical services." J.A. 517. And it had "determined" that an eighth fell outside its jurisdiction because it involved membership at a private club. J.A. 517. So Virginia *had* received complaints. It had just decided not to pursue them for reasons not applicable here.

On appeal, Virginia tries to salvage its failure to produce any evidence to show that it does not intend to enforce the Act. But those attempts all fail.

First, Virginia says the district court's ultimate conclusion that Updegrove "does not face a credible threat of enforcement" qualifies as a factual finding, reviewable "'only for clear error.'" Resp. Br. 20–21 (quoting *Sanders v. United States*, 937 F.3d 316, 329 (4th Cir. 2019)). But Virginia does not cite any authority for that contention (*Sanders* was an FTCA case, and standing wasn't at issue). Nor can it.

Courts regularly review the credible-threat question de novo alongside other standing questions. *E.g.*, *SBA List v. Driehaus*, 573 U.S. 149, 167 (2014) (pre-enforcement challenge presented "purely legal" issue that would "not be clarified by further factual development") (cleaned up); *Abbott v. Pastides*, 900 F.3d 160, 175 (4th Cir. 2018) (reviewing no-credible-threat finding "de novo"); *Mobil Oil*, 940 F.2d at 75 ("Review is *de novo*."). And that makes sense. The question is part of the broader determination whether the plaintiff alleged an "objectively reasonable" chilling effect—one "likely to deter a person of ordinary firmness from the exercise of First Amendment rights." *Edgar*, 2 F.4th at 310 (cleaned up). And what "a reasonable person would believe or do under the particular circumstances of a case is normally a question of law . . . reviewed *de novo*." *Hui Lin Huang v. Holder*, 677 F.3d 130, 135 (2d Cir. 2012) (collecting examples).

That explains why, in *Kenny v. Wilson*, this Court applied de novo review and "accept[ed] the facts of the complaint as true," reasoning that the "defendants' motions to dismiss [were] facial challenges to standing that [did] not dispute the jurisdictional facts alleged in the complaint." 885 F.3d 280, 287 (4th Cir. 2018). Like here, the defendants *had* disputed the ultimate question whether a credible threat of enforcement existed. *Id.* at 288–89; *accord* Br. for Appellees, *Kenny v. Wilson*, 885 F.3d 280 (4th Cir. 2018) (No. 17-1367), 2017 WL 2889085, at *1–2. But that wasn't the same as disputing "the jurisdictional facts alleged in the complaint," *Kenny*, 885 F.3d at 287, nor is it the same thing here.

Second, Virginia highlights that the complaints it received did not involve Updegrove "or his photography studio," and that Virginia determined they fell "outside [its] jurisdiction." Resp. Br. 29. But that doesn't help Virginia's argument. Updegrove does not have to "fly as a canary into a coal mine" to prove standing. *Bryant*, 1 F.4th at 286. And the fact that Virginia referred other canaries to other (federal) coal mines doesn't make Updegrove's fear of enforcement any less reasonable.

Third, Virginia insists that these "unrelated complaints" are not "dispositive" because "the filing of a complaint does not automatically trigger enforcement activity or penalties." Resp. Br. 30. But that misses the point. Updegrove doesn't argue the prior complaints are dispositive or that he faces a credible threat of enforcement because of them. He faces a credible threat because the Act is a "non-moribund statute that

facially restricts expressive activity by the class to which [Updegrove] belongs," and because Virginia still has not proffered any "compelling evidence to the contrary." *Bartlett*, 168 F.3d at 710 (cleaned up).

Fourth, Virginia tries to distinguish *Bryant* by insisting that the circumstances there were "materially different." Resp. Br. 31. "First," Virginia notes that "the law challenged in *Bryant* was criminal." *Id.* Under this Court's cases, though, that's a distinction without a difference. Opening Br. 32–33; *supra* 3–4. "Second," Virginia says "there does not appear to have been any dispute in *Bryant* about the factual predicate of the providers' claims—that women seek abortions not permitted under the challenged law." Resp. Br. 31–32. But there also is no dispute that same-sex couples seek photographers for their weddings. Nor is there any dispute that Updegrove is a wedding photographer. And whether the *Bryant* providers actually had received requests for illegal abortions did not matter; that fact appears nowhere in the opinion.

Instead, three things mattered in *Bryant*, and all three apply here. Opening Br. 23–27. First, there was "no evidence of open and notorious violations of the challenged statutes." *Bryant*, 1 F.4th at 286 (cleaned up). Second, even though the state had not enforced the statutes "against any abortion provider in nearly fifty years," recent amendments had "cast doubt on whether" it was "truly disinterested in enforcing its abortion laws." *Id.* And third, "[a]bortion access remains a subject of lively debate in this country." *Id.* at 287.

Here, Virginia *concedes* that the "significant constitutional questions" in this case "are the subject of lively debate across the country." Resp. Br. 35. Thus, "[w]hile this conversation rages around us, this court cannot say that the threat" of enforcement against wedding photographers like Updegrove "is not credible." *Bryant*, 1 F.4th at 288.

Fifth and finally, Virginia's reliance on *American Federation of Government Employees v. Office of Special Counsel*, 1 F.4th 180 (4th Cir. 2021), is misplaced. Resp. Br. 32. That case challenged agency advisory opinions (not statutes) that the agency had since withdrawn—mooting the case and contributing to the Court's conclusion that the case was unripe. *Am. Fed'n*, 1 F.4th at 187–88. "For if a legal controversy be once dead, who knows at what time or in what form it might conceivably assume a second life." *Id.* at 188. Not so here. The General Assembly has not repealed the Act, so this case is not moot or unripe.

B. Updegrove has standing to challenge both clauses because they raise the same set of concerns.

In *Gratz v. Bollinger*, the Supreme Court held that a college student who intended to transfer schools had standing to seek relief on behalf of a class enjoining the university's *freshman* admissions policy—even though the student was no longer eligible under that policy. 539 U.S. 244, 251 n.1, 261–67 (2003). The Court held that the student had standing to challenge both the transfer policy and the freshman policy because they both implicated "the same set of concerns." *Id.* at 267.

Updegrove's claims "are even more intertwined." Opening Br. 39. His "ability to publish his statements turns on the constitutionality of the underlying activity he wants to speak about." *Id.* And contrary to Virginia's new argument that his publication clause claim involves a narrower question, Resp. Br. 27, Virginia has already conceded that the claims "rise and fall together." J.A. 494. "[S]o there's no reason to split [the two claims] out for the justiciability analysis when [Updegrove is not] even splitting [them] out on the merits." *Id.*

Nor can Virginia distinguish *Gratz* as turning on the presence of a class-action claim. Resp. Br. 27. "*Gratz*'s posture as 'a class action adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured.'" Opening Br. 38 n.7 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 n.6 (2016)).

Of course, that does not mean Updegrove has standing merely because his claims arise "from the same nucleus of operative fact." Resp. Br. 26 (cleaned up). Standing to raise one claim does not confer standing to raise a separate claim "involv[ing] a number of fundamentally different concerns." *Gratz*, 539 U.S. at 264. But like in *Gratz*, Updegrove's claims do not just arise from the same set of facts—they implicate "the same set of concerns." *Id.* at 267. Indeed, they "rise and fall together," J.A. 494, such that this Court cannot decide one without deciding the other. Thus, Updegrove has standing to challenge both.

For the first time on appeal, Virginia tries to back away from its concession that Updegrove's claims are intertwined, suggesting the Court can decide the former without deciding "whether the underlying prohibition on conduct passes constitutional muster." Resp. Br. 27. But Virginia offers no authority for that assertion, and precedent proves otherwise. *Carey v. Population Servs., Int'l*, 431 U.S. 678, 700–01 (1977) (invalidating prohibition on contraceptive advertising because the "information suppressed . . . related to activity with which, at least in some respects, the State could not interfere") (cleaned up); *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (same result for abortion advertising because the "activity advertised pertained to constitutional interests").[4]

Virginia's new theory also makes little sense and would have dire ramifications for speech, as it would allow governments to outlaw any conduct in one statue and then ban promotion of that activity—immune from constitutional challenge—in another. For example, the state could declare all abortions or firearm possession illegal in one statute and then ban promotion of those activities in another. But no court has ever countenanced that. *See Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1238-39 (11th Cir. 2017) (recognizing that "[s]uch reasoning is self-evidently circular"). And this Court should not be the first.

[4] Virginia does not even believe its new theory. Resp. Br. 43 (arguing the publication clause only imposes an "incidental burden on speech in connection with" the underlying "unlawful conduct").

C. Updegrove also has standing to challenge the accommodations clause because his practice places him constantly at risk of enforcement.

Updegrove also has standing to challenge the accommodations clause because he faces an imminent risk that the Act will be enforced against him based on his practice of only photographing opposite-sex weddings. Opening Br. 40–44. Virginia argues that Updegrove's accommodations clause claim is too speculative because no one has "*ever* approached him about photographing a same-sex wedding," and Virginia thinks "there is no suggestion that [he] may receive any such request now or in the future." Resp. Br. 13–14; *id.* at 17–20. But there are four problems with that argument.

First, Virginia's "strenuous assertion that it has a compelling interest in enforcing [the Act] indicates that enforcement is anything but speculative." *303 Creative LLV v. Elenis*, 6 F.4th 1160, 1174 (10th Cir. 2021). If Virginia truly believed it was "entirely speculative" that Updegrove would "*ever* receive a request to photograph a same-sex wedding," Resp. Br. 19, it would not need to oppose an injunction allowing him to deny such a request.

Second, the Act's "pattern or practice" provision arguably allows for enforcement even if Updegrove never receives or denies a request for same-sex wedding photography. Opening Br. 42–43. If Virginia thought the Act could only be enforced against Updegrove *after* he declined a request, it could say so. But Virginia "has not disavowed any intention"

to enforce the Act against Updegrove even *before* he declines a request, so he is "not without some reason in fearing" its enforcement. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979). And that reasonable fear is enough "to present a case or controversy." *Id.*[5]

Third, Virginia has decided that Updegrove's photography qualifies as a public accommodation under the Act. Resp. Br. 37–38. As such, Updegrove "is himself an object" of the Act, leaving "little question" that the Act "has caused him injury." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992). And it is not at all speculative to conclude that wedding photographers will receive requests to photograph same-sex weddings. *See 303 Creative*, 6 F.4th at 1173 (holding that a website designer had standing to challenge a public accommodations law because there was "nothing imaginary or speculative" about her fear she might violate the law if she offered "wedding-based services in the manner" she intended) (cleaned up).

[5] *Accord Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Supreme Ct.*, 769 F.3d 447, 452 (6th Cir. 2014) (finding state's refusal to disavow enforcement against plaintiff "add[ed] credibility" to his fear); *Harrell v. Florida Bar*, 608 F.3d 1241, 1257 (11th Cir. 2010) ("[I]f the enforcing authority is defending the challenged law or rule in court, an intent to enforce the rule may be inferred."); *Gardner*, 99 F.3d at 17 (reasoning that "the defendants [had] not only refused to disavow" the challenged statute, but "their defense of it indicate[d] that they [would] some day enforce it").

Just as abortion providers can challenge abortion laws without identifying pending requests for illegal abortions, Updegrove can challenge the Act without identifying pending requests to photograph same-sex ceremonies. *See Bryant*, 1 F.4th at 286 (holding abortion providers had standing to challenge abortion law without mentioning whether they had identified any requests to perform illegal abortions).

Fourth and finally, Updegrove should not have to "bet the farm" by waiting until after he receives a request to photograph a same-sex ceremony to determine whether Virginia can constitutionally require him to do so. *MedImmune*, 549 U.S. at 129. Updegrove could receive that request at any time—especially now that Virginia has passed a law arguably requiring creative professionals to accept such requests. Resp. Br. 37–38. And Virginia's allergic reaction to the prospect of granting even the most modest exceptions, Resp. Br. 45–46, confirms that forcing Updegrove to wait until after he receives a request would mean forcing him to place a dangerous bet.

That Updegrove should not have to place that bet is "especially true in First Amendment cases" like this one, "'for free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser.'" *Bland v. Fessler*, 88 F.3d 729, 736–37 (9th Cir. 1996) (cleaned up) (quoting *Dombrowski v. Pfister,* 380 U.S. 479, 486 (1965)). Updegrove faces a credible threat of enforcement, and he has standing to challenge the Act.

II. This Court can—and should—direct the district court to issue a preliminary injunction on remand.

A. Given the First Amendment interests at stake, this Court should decide the issue in the first instance.

On the same day Updegrove filed his complaint, he moved for a preliminary injunction to prevent Virginia from enforcing the Act "as applied to [his] constitutionally protected activities." J.A. 65. Updegrove explained that Virginia was "seek[ing] to compel [his] speech, regulate [his] speech based on content, and compel [him] to participate in religious ceremonies, causing irreparable harm and violating the First Amendment." J.A. 66. The district court dismissed for lack of standing, implicitly (and summarily) denying his preliminary injunction motion. J.A. 499–513.

Virginia urges this Court not to consider Updegrove's argument that the Court should direct the district court to enter a preliminary injunction on remand. Opening Br. 45–54; Resp. Br. 33–47. Virginia insists the district court should consider the question first. Resp. Br. 33. But while the Court *could* do that,[6] it has the discretion to weigh the injunction factors itself.[7] And it should exercise that discretion here.

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[6] *E.g.*, *Educ. Servs., Inc. v. Md. State Bd. for Higher Educ.*, 710 F.2d 170 (4th Cir. 1983).

[7] *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) (en banc); *Barnes v. Gulf Oil Corp.*, 824 F.2d 300, 306–07 (4th Cir. 1987) (district court "apparently failed" to assess "relative hardships").

"Appellate courts have the power to vacate and remand a denial of a preliminary injunction with specific instructions for the district court to enter an injunction." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 248 (4th Cir. 2014). And when "First Amendment interests [are] either threatened or in fact being impaired," an order directing an injunction on remand is particularly appropriate. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality) (holding that "the issuance of a preliminary injunction was properly directed by the Court of Appeals"); *accord Hsu By & Through Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 872 (2d Cir. 1996) (remanding "for the issuance of an injunction" given that the petitioner had "been suffering and continue[d] to suffer irreparable harm," namely the loss of his "free speech rights").

In *Elrod*, one of the class-action plaintiffs seeking an injunction was being "threatened with discharge" because he was a Republican, and other members of the putative class "were threatened with discharge or had agreed to provide support for the Democratic Party in order to avoid discharge." 427 U.S. at 373. Those "threatened and occurring" First Amendment injuries justified the entry of an order directing the district court to enter a preliminary injunction on remand. *Id.* at 374. And the same applies here.

The accommodations clause threatens to force Updegrove to speak messages with which he disagrees. And the publication clause is preventing him from speaking messages he has wanted to speak since filing his complaint. So Updegrove is already suffering irreparable harm: the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373.

Under these circumstances, it doesn't matter that the district court did not expressly consider the issue. *See Conservation Council of N.C. v. Froehlke*, 473 F.2d 664, 665 (4th Cir. 1973) (per curiam) (in summary judgment appeal, directing entry of preliminary injunction "to restrain and prevent any action that might further change the environment," including "destruction of trees and clearing of land"). This Court can—and should—reach the merits of Updegrove's preliminary injunction motion and direct the district court to issue one on remand.

B. Each of Virginia's defenses fail as applied to Updegrove.

On the merits, Virginia argues that Updegrove's preliminary injunction "request should be denied" in light of the heavy burden in cases "where [the] plaintiff seeks to overturn a state statute by way of a facial challenge." Resp. Br. 35. But Updegrove's preliminary-injunction motion is not based on his facial challenge. He seeks relief to prevent Virginia from enforcing the Act "*as applied* to [his] constitutionally protected activities." J.A. 65 (emphasis added). Considered through that lens, each of Virginia's four responses falls short.

1. The Act regulates Updegrove's speech, not merely his conduct.

First, Virginia argues the Act "regulates *conduct*, not *speech*." Resp. Br. 37. But its arguments are mostly conclusory. *Id.* at 37–38. And *FAIR*, the main case Virginia cites, is distinguishable. There, the Supreme Court held Congress could require law schools to provide military recruiters "equal access" to an empty conference room because such access does not affect what the schools "may or may not *say*." *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 60 (2006) ("*FAIR*"). Updegrove's photography is not an empty room. His photography is speech. Opening Br. 4–5, 41, 47.[8] So Virginia is not demanding he provide access to a place. It's demanding he provide "access" to his speech. And *that* violates the First Amendment. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 578–79 (1995) (public accommodation law could not require "access to a speaker's message").

Virginia tries to distinguish *Hurley*, Resp. Br. 39–40, but its attempt seems premised on its belief that Updegrove's preliminary injunction motion is based on his facial challenge, Resp. Br. 35. For example, Virginia quotes *Hurley*'s acknowledgement that public

[8] *See also* Br. of *Amici Curiae* Inst. for Faith & Family, *et al.*, at 12–13 (the "[a]cts necessary to create expression—writing, painting, or editing—cannot be disconnected from the finished product"); Br. of *Amici Curiae* States of West Virginia, *et al.*, at 16–17 (collecting cases holding "that the First Amendment protects actual photos, videos, and recordings" as well as "the act of creating that material") (cleaned up).

accommodation laws "do not, *as a general matter*, violate the First or Fourteenth Amendments." Resp. Br. 39 (emphasis added) (quoting *Hurley*, 515 U.S. at 572). But that is not the question.

As Virginia concedes, the Supreme Court held in *Hurley* that the law "had 'been applied in a peculiar way' that 'essentially required' the sponsors of a parade to 'alter the expressive content of their parade.'" *Id.* (cleaned up) (quoting *Hurley*, 515 U.S. at 572–73). Applying the Act against Updegrove would have the same effect on "the expressive content" of his wedding photography. *Id.* And Virginia's retort that the Act "has not been applied to [his] conduct *at all*," Resp. Br. 40, is not a real response—it merely conflates Virginia's standing arguments with a response on the merits. Courts routinely grant preliminary injunctions in pre-enforcement challenges. So the fact that Updegrove's challenge is pre-enforcement does not make *Hurley* distinguishable.

2. The Act alters Updegrove's speech about marriage, not his customers' speech.

Second, Virginia insists that "any 'message' conveyed" by Updegrove's wedding photography "would be that of [his] customers," and a "particular couple's 'message' is not attributable to [Updegrove] any more than it would be to a caterer or lighting designer." Resp. Br. 40. But again, Updegrove only seeks a preliminary injunction as applied to him, so non-expressive wedding vendors are beside the point. And Virginia's continued reliance on *FAIR* is misplaced.

Virginia argues photographing same-sex ceremonies "does not 'suggest that [Updegrove] agrees with any speech' by the couples he serves," and that nothing in the Act "'restricts what [he] may say'" through other avenues. Resp. Br. 41 (quoting *FAIR*, 547 U.S. at 65) (cleaned up). But similar arguments worked in *FAIR* only because law schools "are not speaking when they host interviews and recruiting receptions." 547 U.S. at 64. The result is different in cases—like this one—where "the complaining speaker's own message [is] affected by the speech [he is] forced to accommodate." *FAIR*, 547 U.S. at 63.[9]

"Thus, when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." *Hurley*, 515 U.S. at 576. Updegrove's approach to photographing weddings makes him "intimately connected" with the messages expressed by his photography. J.A. 18–26. He is selective about the events he photographs because he is selective about the messages he expresses. J.A. 24–25. So for him, photographing same-sex ceremonies "would likely be perceived as having resulted from [his] customary determination about" every event he photographs: "that its message [is]

[9] Likewise, it does not matter that Updegrove can speak elsewhere. Resp. Br. 41. That just "begs the core question." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974). Virginia cannot "require speakers to affirm in one breath that which they deny in the next." *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1, 16 (1986).

worthy of presentation and quite possibly of support as well." *Hurley*, 515 U.S. at 575. And Virginia cannot force *any* speakers to appear to endorse messages they oppose. *Id.* at 578–79; a*ccord Pac. Gas & Elec.*, 475 U.S. at 15 (invalidating forced access to private utility's envelope containing its bill and newsletter because the utility "may be forced either to appear to agree with [the intruding leaflet] or to respond").

3. The Act requires Updegrove to express (and refrain from expressing) certain messages about marriage—it does not merely regulate commercial speech.

Virginia's third argument—that "the First Amendment permits restrictions of speech that are 'incidental to a valid limitation on economic activity'," Resp. Br. 42–43 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 389 (1973))—begs the question whether states can compel speakers to express messages they oppose. And expressly distinguishing *Pittsburgh Press*, the Supreme Court has held they cannot. States "may at times prescribe what shall be orthodox in commercial advertising by requiring the dissemination of purely factual and uncontroversial information," but "outside that context [they] may not compel affirmance of a belief with which the speaker disagrees." *Hurley*, 515 U.S. at 573 (cleaned up). And that rule is not "restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers." *Id.* at 574.

Weddings are not "commercial advertising," and forcing Updegrove to celebrate same-sex ceremonies is not the same as requiring him to disseminate "purely factual and uncontroversial information." *Id.* at 573. Thus, like the parade organizers in *Hurley*, Updegrove cannot be compelled to affirm "a belief with which [he] disagrees." *Id.*

4. As applied to Updegrove's speech, the Act is not likely to survive strict scrutiny.

Finally, Virginia argues the Act "survive[s] strict scrutiny." Resp. Br. 44. Adopting the Tenth Circuit's reasoning in *303 Creative*, Virginia argues it has a compelling interest in eliminating all forms of discrimination based on sexual orientation and that the Act is narrowly tailored to that interest. Resp. Br. 45–46. But Virginia makes the same mistakes the Tenth Circuit made in *303 Creative*.

First, Virginia "states [its] objectives at a high level of generality, but the First Amendment demands a more precise analysis." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021). The question "is not whether [Virginia] has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to [Updegrove]." *Id.* It does not. Opening Br. 52; West Virginia Br. 23–25. Updegrove distinguishes based on message, not status. And Virginia's willingness to exempt other employers, Opening Br. 52, "undermines [its] contention that its non-discrimination policies can brook no departures." *Fulton*, 141 S. Ct. at 1882.

Second, Virginia's claim that the Act is narrowly tailored despite Virginia's refusal to grant an exception for Updegrove's wedding photography overlooks the reality that states have effectively combatted discrimination for decades—and many still do today—without compelling speech. For example, Virginia could "define public accommodations narrowly to apply only to essential or non-expressive businesses" and services. Opening Br. 53; *see also* West Virginia Br. 4–8. Or it could make exceptions for creative professionals like Updegrove to avoid violating the First Amendment. But Virginia has refused to do either of those things. And that choice does not survive strict scrutiny. Virginia's threatened enforcement of the Act is causing Updegrove irreparable constitutional harm right now. Opening Br. 53–54. And Updegrove is entitled to a preliminary injunction right now.

CONCLUSION

Updegrove has standing because his speech is being chilled, and he faces a credible threat that the Act will be enforced against him if he continues his current business practice. Accordingly, this Court should reverse, hold that Updegrove has standing, and direct the district court to issue a preliminary injunction to prevent Virginia from applying the Act against him while the case proceeds below.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,356 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Office 365.

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

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