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

BRIEF *AMICI CURIAE* OF THE NATIONAL LEGAL FOUNDATION AND THE FAMILY FOUNDATION, *supporting Appellants and urging reversal*

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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? No.

5. Is party a trade association? No.

6. Does this case arise out of a bankruptcy proceeding? No.

7. Is this a criminal case in which there was an organizational victim? No.

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DATED: July 21, 2021

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STATEMENTS OF INTEREST

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in Virginia, seek to ensure that those with a religiously based view of marriage continue to be free to express those views without being compelled to express the opposite view by state-enforced association with those holding that opposite view.

The Family Foundation is a Virginia non-stock corporation that advocates for religious freedom, life, and family policy issues in courts, legislatures, the executive branch, and in the public square. The Family Foundation is concerned that the outcome of this case could affect the ability of religious wedding vendors, as well as people of faith more broadly, to live out their beliefs in contemporary American society. More specifically, forcing religious wedding vendors to violate their consciences by participating in certain wedding ceremonies under the threat of very significant state sanctions will lead to societal conflict that could otherwise be avoided.

This brief is filed with the consent of all Parties.

STATEMENT OF COMPLIANCE WITH FRAP 29(a)(4)(E)

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than *Amici Curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

Because the issues and facts relating to standing and to the merits of this case are so intertwined, the Court will need to examine the merits of the case. When it has done so, it will see that Updegrove's request to remand the case with instructions to enter a preliminary injunction is the appropriate way to proceed.

Turning to the merits, the central fact of this case is that a marriage ceremony is a communal, expressive event. Thus, this case is principally about what the brides or grooms (and the State) are communicating when they get married. It is about the marriage *event*, and the message that event publishes to the community. Thus, the question of whether the Virginia Values Act ("VVA") violates the

vendor's free speech and free exercise rights is inextricably bound up with another aspect of VVA, the consideration of which is required for the resolution of this case: the State is compelling the vendor to associate with, and facilitate, the *message* of his *customers* that the vendor finds offensive.

Does a law prohibiting religious discrimination require a Jewish caterer who incorporates numerous creative, expressive elements into the events he or she caters to cater a Muslim gala with the announced purpose of fundraising for those fighting for the abolition of the State of Israel? It does not, because the caterer objects, not to Muslims per se, but to their message of the gala, a message with which he does not want to associate or facilitate.

So it is here. Updegrove will have his associational rights violated because he has a sincere objection to supporting the message being communicated by the *recipient* of the services. No vendor may be compelled to join that assembly and associate with that message. The most relevant speech in this case is that proclaimed from the altar by the wedding participants (and the State) that a same-sex marriage is a type of marriage that should be celebrated and approved. Those who

disagree with that message, especially if they disagree from a religious perspective, may not constitutionally be compelled to assemble for the purpose of joining or facilitating that message or face being punished for refusing to do so.

ARGUMENT

I. This Court Should Examine the Merits of this Case for Several Reasons Relating to the Intertwining of the Merits and the Required Standing Analysis.

Your *Amici* agree with Mr. Updegrove that this Court can and should remand this case with instructions to enter a preliminary injunction. When the district court dismissed this case, it implicitly denied his Motion for a Preliminary Injunction. Although the district court did not explicitly deny the motion as moot in light of its dismissal of the case for lack of standing, it did state—in the first line of its Memorandum Opinion—that the motion was part of what was "before the Court." JA 499.

And, as Updegrove also argues (Opening Br. at 54), quoting *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 248 (4th Cir. 2014), "[a]ppellate 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." As Updegrove

further argues (at 54), that authority extends to cases such as this one, in which a preliminary injunction is denied *because* the case was dismissed and in which the court of appeals would therefore need to "address the merits in the first instance," allowing this Court to evaluate the preliminary injunction factors, including, most importantly, the likelihood of success on the merits. Indeed, the case that Updegrove cites for this proposition (*id.*), *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012), was cited approvingly by this Court in *League of Women Voters* to support the sentence from it quoted above.

Updegrove is also correct that the merits are in play for two additional reasons. First, as Updegrove argues, this Court's analysis of standing on his "publication clause" claim will impact this Court's analysis of standing on his "accommodations clause" claim because they are *intertwined on the merits*. (at 38-39 (discussing the merits implications of standing analyses for two distinct, but intertwined, claims in *Gratz v. Bollinger*, 539 U.S. 244 (2003)).) Second and derivatively, because the jurisdictional issue of standing is so intertwined with the issues presented by the merits, there could be

some question as to how best to proceed. However, this Court answered that question nearly 40 years ago: "in those cases where the jurisdictional facts are intertwined with the facts central to the merits of the dispute[, i]t is the better view that in such cases the entire factual dispute is appropriately resolved *only* by a proceeding on the merits." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982) (emphasis added).

Because your *Amici* believe that an examination of the merits by this Court in the first instance is permissible—indeed, in these circumstances, essential—we will proceed to address aspects of the merits of this dispute. They are relevant however the Court resolves this appeal.

II. The Freedoms of Speech and of Association are Frequently Bound Together, as They are Here, and this Court Should Consider that the Compelled Association is Demanded by the VVA is Exactly What Compels Updegrove's Speech.

The photographer in this case is a Christian whose faith shapes everything he does. JA 17 (Complaint, ¶¶ 31-32). He believes that God equips people with creative gifts to create art that reflects God's beauty, artistry, and truth, and that he has been so equipped. JA 18 (¶¶ 35-36). He wants to honor God in how he interacts with others, including being honest with them. *Id.* (¶¶ 41-42). Updegrove believes that God designed

marriage to be a lifelong union between one man and one woman and that this design is God's gift for people of all faiths, races, and backgrounds. JA 18-19 (¶ 43). He desires to only celebrate and photograph marriages that are consistent with his belief "in order to promote God's design for marriage as a beautiful and sacrificial relationship." JA 19 (¶ 44). He purposely does not accept work that celebrates sacrilegious ideas, "because Bob believes that all wedding ceremonies are inherently religious events that solemnize and initiate a sacred institution created by God." JA25 (¶ 105). He "cannot provide photography services for same-sex, polygamous, or open-marriage engagements or weddings because photographing about these events would force Bob to participate in ceremonies that violate his religious beliefs." JA 27 (¶ 117). If he receives a request for his services that he cannot fulfill because of his beliefs, he tries to refer the request to another photographer. *Id.* (¶ 122). He is a highly skilled artist who seeks to give glory to God in his work. JA 19-21, 23 (¶¶ 46-70, 92-93).

Updegrove is willing to photograph gays individually, create event photography for businesses owned by LGBT individuals, and photograph weddings between a man and woman when a gay parent is

paying for the wedding. JA 28 (¶¶ 125-26). He does not object to serving members of the gay community, including weddings in which one of the two is gay, "so long as the couple intends the marriage to be a lifelong union between one man and one woman." *Id.* (¶ 127)1 Rather, he objects to associating with and facilitating a same-sex marriage ceremony between two men or two women and the message the ceremony conveys. His objection is based on sincerely held religious convictions that it would be ethically wrong for him to associate with and to help foster such a ceremony and its particular message.2

A. The Wedding Participants, and the State, Are Communicating a Message in the Same-Sex Marriage Ceremony.

Everyone who has been married knows the myriad choices a couple to be married must make: Where will the wedding be held—a church, city hall, reception hall, wayside chapel in Las Vegas, or outside

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[1] According to research cited by Plaintiff, about 13% of adults who identify as LGBT are married to members of the opposite sex. See *id.* (¶ 128).

[2] Significantly, the first count in Updegrove's complaint alleges violations of the freedoms of Speech, Association, and Press. JA 51. Specifically, Updegrove points out, *id.* (¶264), that "[t]he First Amendment's Free Speech . . . Clause[ ] protects Plaintiffs' ability to speak; . . . to associate with others for expressive purposes; and to associate with messages of Plaintiffs' choosing."

flower garden? Who will officiate—a minister, priest, a judge, or someone else licensed to marry someone? Whom will be invited and what saying, if any, will be on the cake? Will the wedding include communion/mass and will the officiant (minister or priest or judge) give a homily, and, if so, what will he or she say? Before all these questions are those related to the couple itself, including their genders—are they one man and one woman, two men, or two women? Each choice reveals something about the couple. As stated well by the Ninth Circuit,

> The core of a wedding ceremony's 'particularized message' is easy to discern, even if the message varies from one wedding to another. Wedding ceremonies convey important messages about the couple, their beliefs, and their relationship to each other and to their community. . . . The core of the message in a wedding is a celebration of marriage and the uniting of two people in a committed long-term relationship.

Kaahuumanu v. Hawaii, 682 F.3d 789, 799 (9th Cir. 2012).

Same-sex weddings have another important expressive component. As noted by the Seventh Circuit: "Marriage confers respectability on a sexual relationship." *Baskin v. Bogan,* 766 F.3d 648, 658 (7th Cir. 2014). Accordingly, by engaging in a marriage ceremony, both the same-sex wedding participants and the State are broadcasting a clear message that same-sex couples are entitled to engage in such

unions with the State's full blessing.

As the Supreme Court recounted in the various opinions in *Obergefell v. Hodges,* 135 S. Ct. 2584 (2015), whether same-sex marriage is a legitimate form of marriage is an issue that deeply divides the citizens of this country. A same-sex marriage ceremony is divisive precisely because it "makes a statement," just as the denial of the right to marry by same-sex couples communicated the message that such marriages were illegitimate. As the majority noted in *Obergefell,* without being able to marry with the imprimatur of the State, "[a] truthful declaration by same-sex couples of what was in their hearts had to remain unspoken." *Id.* at 2596. Moreover, same-sex couples were "burdened in their rights to associate." *Id.* Conversely, permitting same-sex couples to marry allows them to proclaim that their relationship is "sacred," at least by their own definition, *id.* at 2599, and to associate to the same extent as heterosexual couples.

That the State is also communicating its own message by prohibiting or sanctioning a same-sex marriage ceremony was also emphasized by the Supreme Court in *Obergefell,* as well as in *United States v. Windsor,* 133 S. Ct. 2675 (2013). Stated negatively, the

Supreme Court held that, when the Federal Government only recognized heterosexual marriages, it "impermissibly disparaged those same-sex couples 'who wanted to affirm their commitment to one another before their children, their family, their friends, and their community.'" *Obergefell,* 135 S. Ct. at 2597 (quoting *Windsor,* 133 S. Ct. at 2689). Stated positively, the Court recognized that, during a marriage ceremony, "just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union." *Id.* at 2601. "The right to marry [with legal sanction] thus dignifies couples who 'wish to define themselves by their commitment to each other.'" *Id.* at 2600 (quoting *Windsor,* 133 S. Ct. at 2689). Simply put, the Supreme Court recognized that the marriage ceremony is both an individual and a societal statement most fundamental.

B. The Vendor Has a Sincere Objection to the Message of the Wedding Ceremony.

The Court in *Obergefell* also recognized that many in our country do not agree with these messages that same-sex marriage is either morally permissible or good social policy. The Court noted, "Marriage, in their view, is by its nature a gender-differentiated union of man and

woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world." *Id.* at 2594. And, again, the *Obergefell* majority observed, "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." *Id.* at 2602.

It is evident from the Complaint that Updegrove is one of those who sincerely believes that same-sex marriage is wrong and that, by facilitating such a ceremony, he would associate with and express by his actions his support of it, contrary to his convictions. *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.,* 450 U.S. 707, 714 (1981) (holding that a court may not judge the reasonableness of a sincere religious belief). He comes to that belief "based on decent and honorable religious or philosophical premises." *Obergefell,* 135 S. Ct. at 2602. Whether the Commonwealth of Virginia can constitutionally punish Updegrove for his religious beliefs and the conduct arising from those beliefs is the question presented in this case.

C. The Vendor Is Not Discriminating on the Basis of "Sexual Orientation."

The Complaint is clear in this case that the photographer does not

discriminate against same-sex wedding participants because of their sexual orientation. He is quite willing to serve them, despite being aware of their sexual orientation, in a non-marriage context. The photographer has no objection to serving members of the gay community, but only to participate in a same-sex marriage ceremony. Such participation by assisting the ceremony with his services, just like the State's licensing, would send a message to others of acceptance and approval, "offering symbolic recognition and material benefits to protect and nourish the union." *Obergefell,* 135 S. Ct. at 2601. And it does that in a way that is not present in the mere exchange of goods and services disassociated from the ceremonial event.

This would be similar to an African American caterer who incorporates numerous creative, expressive elements into the events he or she caters serving Caucasians, but refusing to cater their Ku Klux Klan banquet. In this situation, the refusal is tied not to the race of the customer, but to the message that will be communicated at the event. It is not a rejection of all Caucasians, but a refusal to become associated with or to facilitate a racist ideology.

The same is true here. Updegrove only refuses to participate in

the message communicated during the same-sex marriage. He does not refuse service on the basis of sexual orientation, but on the basis of the desire (indeed, the ethical imperative in his case) not to become associated with, or to assist in communicating, a message with which he disagrees and that would, in his view, directly indicate his support for that message. In this respect, the ruling in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group,* 515 U.S. 557 (1995), controls. There, the Court held that, when parade organizers refused to let LGBT individuals march with them, it was not because they wished "to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner," expressing an unwanted message at the event. *Boy Scouts of Am. v. Dale,* 530 U.S. 640, 653 (2000) (summarizing and quoting *Hurley,* 515 U.S. at 574-75). The same is true here: Updegrove refuses to service the same-sex marriage not because the couple is gay, but because of the message the marriage communicates.

D. Non-discrimination Laws Used in This Way Unconstitutionally Compel Speech and Assembly by Forcing the Vendor to Associate with and Facilitate the Ceremony's Message or Punishing the Refusal to Do So.

Even assuming that it violated the non-discrimination laws for a African American caterer who incorporates numerous creative, expressive elements into the events he or she caters to refuse to cater a Ku Klux Klan banquet or a white one to refuse to cater a Black Muslim gala, the caterers would have a valid defense to being punished for their refusals. That is because they would be exercising their own constitutional rights not to associate with or to facilitate racist messages. By requiring such association and facilitation on pain of compensatory and punitive damages and other penalties, the State would unconstitutionally compel speech and assembly. The same is true here for this photographer. *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) (holding that conditioning a grant on compelled speech is unconstitutional).

The Court in *Obergefell* took pains to explain that it understood the very situation in which this photographer finds himself and that, by ruling that States could not deny gay couples a marriage license, it did

not intend to infringe on the First Amendment rights of those who would object for religious or other sincere reasons:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons.

135 S. Ct. at 2607. Like the liberty interest to define one's own identity that the Court found controlling in *Obergefell, id.* at 2593, 2599, individuals have a liberty interest, founded both in the First and Fourteenth Amendments, not to be compelled to propagate or advocate a message they find ethically objectionable. "The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Wooley v. Maynard,* 430 U.S. 705, 715 (1977). Here Updegrove could service the same-sex marriage ceremony "only at the price of evident hypocrisy." *Agency for Int'l Dev. v. All. for Open Soc'y,* 570 U.S. 205, 219 (2013).

Laws "that compel speakers to utter or distribute speech bearing a

particular message are subject to the same rigorous scrutiny" as those "that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 624, 642 (1994). Indeed, "[t]he government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves. . . . The First Amendment protects 'the decision of both what to say and what not to say.'" *Knox v. Serv. Employees Int'l Union, Local 1000,* 567 U.S. 298, 309 (2012) (quoting *Riley v. Nat'l Fed. of the Blind of N.C., Inc.,* 487 U.S. 781, 797 (1988)).

The freedom of assembly, although a free-standing right, is a close cousin of the freedom of speech. Quite commonly, individuals exercise their freedom of speech by gathering in groups. Conversely, by restricting the access of individuals to each other, their rights to free speech can be restricted or eliminated altogether. The two rights, then, often do their essential work in tandem. *See NAACP v. Ala.,* 357 U.S. 449, 460 (1958) ("this Court has more than once recognized . . . the close nexus between the freedoms of speech and assembly"); *Thomas v. Collins,* 323 U.S. 516 (1945) (noting that rights of the speaker and audience are "necessarily correlative"); *De Jonge v. Oregon,* 299 U.S.

353, 364 (1937) ("the right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental"); *Whitney v. Cal.,* 274 U.S. 357, 375 (1927) (Brandeis, J., concurring in the result) ("without free speech and assembly discussion would be futile"), *majority opinion overruled on other grounds, Brandenburg v. Ohio,* 395 U.S. 444 (1969). Furthermore, the right of association is also implicated in the outworking of these rights: "The established elements of speech, assembly, association, and petition, 'though not identical, are inseparable.'" *NAACP. v. Claiborne Hardware Co.,* 458 U.S. 886, 911 (1982) (quoting *Thomas v. Collins,* 323 U.S. 516, 530 (1945)).

In its celebrated decision in *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), the Supreme Court illustrated this conjoining of the rights of speech and assembly. State law required assembled school children to participate in a ceremony upon pain of expulsion and other punishment, the ceremony being the salute of the nation's flag during the pledge of allegiance. The Supreme Court first noted that such ceremonies involve speech:

> There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. . . . A person gets from a symbol the meaning he puts into it, and what is one

man's comfort and inspiration is another's jest and scorn.

Id. at 632-33; *see also Tinker v. Des Moines Ind. Community Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (holding that armband was symbolic speech the government could not prohibit).

The *Barnette* Court then observed that the First Amendment covers compelled speech as well as voluntary speech: "To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." 319 U.S. at 634. The Court then found this compelled speech and assembly unconstitutional, in ringing prose:

> One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. . . . [F]reedoms of speech and of press, of assembly, and of worship … are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.
>
> . . . .
>
> There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public

> opinion, not public opinion by authority.
>
> . . . .
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Id. at 638-39, 641-42.

Barnette controls here. The Commonwealth, through its non-discrimination laws, is trying to force an individual with religious objections to facilitate and support a ceremony with great symbolic significance. Just as the school children objected to assembling with those saluting the flag, Updegrove objects to being associated with a marriage he considers improper because it implies his consent to, and approval of, the message of the event. The First Amendment freedoms of speech and assembly "deny those in power any legal opportunity to coerce that consent." *Id.* at 641. No officials may "force citizens to confess by word or act" the "orthodox" position in "religion[ ] or other matters of opinion." *Id.* at 642.

This case provides an appropriate counterpoint to *Rumsfeld v.*

Forum for Academic and Institutional Rights, Inc., 547 U.S. 47 (2006) ("*FAIR*"). The law schools claimed that they were being unconstitutionally compelled to associate with speech with which they disagreed by the federal law that linked grants to allowing the military to recruit along with multiple other organizations and firms on campus. In that circumstance, there was no valid compelled speech and association claim because the forum was an open one in which many with different viewpoints came to speak and no one could validly claim that a law school was approving of or fostering all the different viewpoints simultaneously, rather than just providing a forum for the speech of others, leaving the law schools free to articulate their views in the same forum. *Id.* at 65 ("Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies."). Similarly, in *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980), the Court upheld a state law requiring a shopping center owner to allow certain expressive activities by others on its property, but only because there was little likelihood that the views of those engaging in the expressive activities would be identified with the owner,

who remained free to disassociate himself from those views and who was "not . . . being compelled to affirm [a] belief in any governmentally prescribed position or view." *Id.* at 88.

A wedding is not an open forum where different views can appropriately be expressed, as in *FAIR* and *PruneYard*. All who participate presumably do so to communicate their approval of the wedding's overriding message. Moreover, unlike in *FAIR*, here Updegrove is trying to *avoid* having a message attributed to him and from affirming the event's overriding message, rather than attempting to force his attendance when it is being resisted, as the Government was doing via the Solomon Amendment. Compelling the photographer to facilitate the wedding celebration concerning which he has religious scruples is personal, focused, compelled speech. It is unconstitutional. *See Wooley,* 430 U.S. at 717 (1977) (holding State could not require Jehovah's Witness adherent to communicate a motto concerning which he had religious scruples).

A helpful analogy is found in the rule that a fair share of mandatory union dues cannot include those that support political causes to which the nonunion employee objects without violating the

employee's constitutional rights of assembly, association, and speech. A union cannot, "consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent." *Ellis v. Railway Clerks,* 466 U.S. 435, 447 (1984); *accord Janus v. Am. Fed. of State, Co., and Mun. E'ees,* 138 S. Ct. 2448 (2018). The Supreme Court has "recognized that requiring non-union employees to support their collective-bargaining representative 'has an impact upon their First Amendment interests,' and may well 'interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit . . . .'" *Chicago Teachers Union, Local No. 1 v. Hudson,* 475 U.S. 292, 301 (1986) (quoting *Abood v. Detroit Bd of Ed.,* 431 U.S. 209, 222 (1977). Similarly here, the government cannot penalize an individual for refusing to service and associate with an event when the vendor has a religious objection to the message the event communicates.

CONCLUSION

A Muslim caterer cannot constitutionally be punished for racial discrimination for his refusal to service a State of Israel fundraiser. Nor

can this photographer properly be compelled to associate with and foster a wedding ceremony he finds morally objectionable. Nor can he be penalized constitutionally for refusing to do so. This court should remand this case with instructions to enter a preliminary injunction.

Respectfully submitted
this 21st day of July, 2020,

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(5)(A) and 32(a)(7)(B)(i) and the corresponding local rules, the attached Brief *Amici Curiae* has been produced using 14-point Century Schoolbook font which is proportionately spaced and contains 4,863 words, excluding those portions not required to be counted, as calculated by Microsoft Word 365.

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DATED: July 21, 2021

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2021, the foregoing brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit through the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

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☑ Pro Bono ☐ Government

COUNSEL FOR: The National Legal Foundation & The Family Foundtion

_____ as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

s/ Steven W. Fitschen
(signature)

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