ATTACHMENT

Proposed Brief of *Amicus Curiae* American Civil Liberties Union of Virginia

VIRGINIA:

In the Circuit Court for the City of Richmond

CONNOR BLEAKLEY	|	**Case No CL22002232-00-7**
And	|	
SAMI ALSAWAF,	|	
Petitioners.	|	

BRIEF OF *AMICUS CURIAE*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF VIRGINIA
IN SUPPORT OF PETITIONERS

Introduction and Summary of Argument

Among the firmest commands of the U.S. Constitution is that the government is not allowed to offer a benefit to one group of people but deny it to another without a compelling reason. This principle protects the non-religious from discrimination in favor of the religious through the Equal Protection Clause of the Fourteenth Amendment. It protects out-of-state persons from discrimination in favor of in-state persons through the Privileges and Immunities Clause of Article IV of the Constitution. And it protects those who do not practice religion from being denied the benefits offered to religious practitioners under the Free Exercise and Establishment Clauses of the First Amendment.

Despite this clear command of our nation's highest law, the Virginia Code has enshrined just such an impermissible discrimination in its laws regarding wedding celebrants in Sections 20-13 through 20-26, especially sections 20-23, 20-25, and 20-26 (collectively, "The Law"). The Law explicitly imposes restrictions on non-religious celebrants that it does not impose on certain religious celebrants, including that the non-religious celebrants live in Virginia and that they post a $500 bond in order to perform a wedding—and imposes criminal sanctions for failure to follow them. These barriers prevent non-religious Virginians like Petitioners from exercising their right to wed under circumstances where such a right would be freely extended to religious Virginians.

This unequal treatment cannot be squared with the Constitution. For that reason, the Law has, in a different case, been declared unconstitutional by the Fairfax County Circuit Court. *See generally, In re Dhanoa*, 86 Va. Cir. 373 (Fairfax Cty. Cir. Ct. 2013). This Court should once again find that the sections of the Virginia Code providing unequal treatment of religious and non-religious wedding celebrants are unconstitutional and grant Petitioners their right to wed with the wedding celebrant of their choice.

Argument

I. The Law Is Unconstitutional Under the Equal Protection Clause.

A. The Equal Protection Clause Demands Strict Scrutiny When Government Benefits Are Provided To Those Who Practice Religion But Denied To Non-Religious People.

Because the Law explicitly grants different rights and privileges to religious practitioners and non-religious persons, it is unconstitutional under the Equal Protection Clause. While a state may regulate marriage and its practice, any such regulation is constrained by the Equal Protection Clause of the Fourteenth Amendment. *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Skinner v. Oklahoma*, 316 U.S. 535 (1942)). The principle of equal protection is simply "the principle that all persons similarly situated should be treated alike." *Maye v. Klee*, 915 F.3d 1076, 1085 (6th Cir. 2019). To protect this principle, the Equal Protection Clause requires that a state law meet strict scrutiny if it is "drawn upon inherently suspect distinctions such as . . . religion . . . ." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). In an equal protection context, "express" classifications are "immediately suspect." *Johnson v. California*, 543 U.S. 499, 509 (2005).

The Law clearly draws express distinctions on the basis of religion by providing different rights to people based on religious categorizations. Ordained religious ministers who provide proof of ordination and regular communion with a religious society may be authorized to celebrate weddings in Virginia with no additional showing. Va. Code § 20-23. The Law distinguishes these "ordained" ministers from a "religious society which has no ordained minister" which permits those people to designate a single person "chosen by the society" to celebrate the wedding and, if that person posts a $500 bond, they may be authorized to celebrate

the wedding. *Id*. at § 20-26. A third section authorizes "[p]ersons other than ministers" to preside at a wedding so long as that person resides in the circuit where the authorizing judge sits and the person posts a $500 bond. *Id*. at § 20-25. A person who presides over a wedding ceremony without authorization can be imprisoned for up to a year and fined up to $500. *Id*. at § 20-28.

The Fairfax County Circuit Court has held that "[b]y drawing a distinction between religions on the basis of whether they ordain ministers, this statutory scheme clearly implicates the Equal Protection Clause because it is a classification 'drawn upon [the] inherently suspect distinction' of religion." *In re Dhanoa*, 86 Va. Cir. at *4 (quoting *Dukes*, 427 U.S. at 303). While that case considered the Law's discrimination against members of the Sikh faith, the court's holding is no less applicable in the context of Petitioners' case. The Law's discrimination against the non-religious in favor of the religious (and especially ordained ministers) depends on the same differential treatment created by the Law's religious classifications that were found unacceptable in *Dhanoa*. Because the threshold discrimination is clearly present, this Court must proceed to evaluate whether or not the Law's categorization of people by religion meets the requirements of strict scrutiny. *See id*.

B. The Law's Discrimination Against Non-Religious Wedding Celebrants Is Not Narrowly Tailored To A Compelling Government Interest.

The Law's discrimination against the non-religious cannot meet the high bar of strict scrutiny. Strict scrutiny is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). In order to meet strict scrutiny, a law must be "narrowly tailored" to a "compelling" state interest. *Johnson v. California*, 543 U.S. 499, 505 (2005). "Only rarely are statutes sustained in the face of strict scrutiny." *Bernal v. Fainter*, 467 U.S. 216, 220 n.6 (1984).

No reason for the distinction among religions is apparent on the face of the Law. However, the Commonwealth has defended the Law in court before. In the 1974 case *Cramer v. Commonwealth*, the Commonwealth attempted to justify its policy of denying members of the Universal Life Church the right to celebrate weddings by defending the state interest in "the contract between the parties who marry, and in the proper memorializing of the entry into, and execution of, such a contract." 214 Va. 561, 565. The Virginia Supreme Court accepted the

argument that ordained religious ministers were reliable stewards of this state interest because "[m]inisters, as a profession, class or group, are persons of integrity and responsibility, and are persons qualified to perform a marriage in a proper manner, execute the necessary forms required by the state, and report the contract of marriage between two people within the time prescribed." *Id*.

U.S. Supreme Court case law since 1974 has made clear that, however acceptable this line of reasoning may have been in 1974, it cannot be squared with the Court's current jurisprudence on strict scrutiny or the Equal Protection Clause. For example, in the 2005 case *Johnson v. California*, the U.S. Supreme Court rejected a state prison system's practice of housing prisoners of the same race together in order to avoid racial violence. The Court held that the prison system could not treat prisoners differently based on a status protected under the Equal Protection Clause—there, race—because such a classification "threaten[ed] to stigmatize individuals by reason of their membership" in a protected group. 543 U.S. at 507. Similarly, here, by explicitly writing into law the presumption that ordained ministers are more likely to be "persons of integrity and responsibility" also possessed of the literacy necessary to perform ceremonies and thus trusted to perform weddings, the Commonwealth has stigmatized non-religious persons with the label of "untrustworthy" or "unreliable."

Another telling reason to find the Law is not narrowly tailored is that it allows for exceptions unrelated to the supposed state interest. As the U.S. Supreme Court has held, "[i]t is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993) (cleaned up). Where such obvious underinclusiveness exists, "[t]here can be no serious claim that those [purported] interests justify" the law under strict scrutiny. *Id*.

If the Law were truly concerned with (as claimed in *Cramer*) finding persons with integrity, the ability to execute forms and report marriage contracts, and the nebulous quality of "being qualified to perform a marriage in a proper manner," it would not permit any Virginia resident to post a $500 bond and become authorized to perform the ceremony (as it does in Section 20-25). The non-ministers and the members of religious societies who are authorized to

perform the ceremonies under the Law are not required to make any showing that they actually have the qualities that the Commonwealth in *Cramer* claimed justify the existence of the Law. Permitting these people to perform wedding ceremonies undermines the supposed rationale for the Law's authorization of ordained ministers as wedding celebrants in the first place. Such arbitrary lines concerning who can and cannot perform religious ceremonies cannot qualify as "narrow tailoring" for purposes of strict scrutiny and, as in *Lukumi*, therefore cannot justify the Law.

Because the Law is not narrowly tailored to any compelling government interest, including the interests historically advanced to justify the Law, it does not meet strict scrutiny under modern U.S. Supreme Court jursidprudence. Where the Virginia Supreme Court's past precedents conflict with subsequent decisions by the U.S. Supreme Court, trial courts must follow the holdings of the U.S. Supreme Court. *See Commonwealth v. Washington*, 38 Va. Cir. 116, at *4 (1995). Accordingly, to the extent that the holding of *Cramer* regarding members of the Universal Life Church would be applicable to this challenge by non-religious persons to the invidious classifications of the Law, it has been abrogated by the U.S. Supreme Court and should not be adhered to by this Court.

The Law's overt categorization of and differential treatment of wedding celebrants on the basis of their religion cannot be squared with the requirements of the Equal Protection Clause and the Law must be declared unconstitutional, independent of any of the other grounds of unconstitutionality asserted in this brief.

II. The Law Is Unconstitutional Under the Privileges and Immunities Clause.

Not only is the Law unconstitutional under the Equal Protection Clause, the Law's discrimination against out-of-state persons who wish to celebrate weddings in Virginia violates the Privileges and Immunities Clause. Article IV of the Constitution guarantees that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. This clause, referred to as the "Privileges and Immunities Clause," is meant to ensure that the fundamental rights granted by a state to its citizens are not withheld from citizens of other states.

Courts apply a two-part test when evaluating a state law under the Privileges and Immunities Clause: first, the court asks whether the right burdened by the law is a "fundamental right" intended to fall within the purview of the Privileges and Immunities Clause; if the right in question is sufficiently fundamental, the court will strike down the challenged law unless the law's discrimination against out-of-state persons can be shown to be "closely-related to the advancement of a substantial state . . . interest" unrelated to their status as out-of-state persons. *Brusznicki v. Prince George's Cty.*, 42 F.4th 413, 420 (4th Cir. 2022).

The Law explicitly discriminates against out-of-state persons by permitting non-religious citizens of Virginia to act as celebrants in wedding ceremonies while forbidding non-religious out-of-state persons from doing so. This discrimination against citizens of non-Virginia states is unconstitutional under the Privileges and Immunities Clause and the Law, accordingly, must be struck down.

A. The Privileges and Immunities Clause Is Implicated When A State Government Denies Permits Its Citizens To Act As Wedding Celebrants Under Circumstances Where It Bars Citizens Of Other States.

The Law's text clearly makes one set of rules for would-be wedding celebrants who live in Virginia and another set of rules for those who live in other states. Petitioners' case illustrates this discrimination. Petitioners desire Brandon Bleakley, the groom's brother, to serve as the non-religious celebrant at their wedding. Brandon is a citizen of the state of New York and *by virtue of that citizenship*, is not eligible to act as celebrant at his brother's wedding. However, if Brandon were to move permanently to Virginia and become a citizen of the Commonwealth, he would be eligible to apply to serve as a non-religious wedding celebrant pursuant to Virginia Code Section 20-25. Nothing else about Brandon would have changed; the relevant trait for determining his eligibility under the law is purely that he resides outside of Virginia.

Because the right to participate in a wedding ceremony is clearly being granted to citizens of Virginia under circumstances in which it is denied to citizens of other states, the inquiry must proceed to whether or not the right to marry is a fundamental right. A fundamental right, for purposes of the Privileges and Immunities Clause, is one that "bear[s] upon the vitality of the Nation as a single entity." *United Bldg. & Const. Trades Council of Camden Cnty. & Vicinity v.*

Mayor & Council of City of Camden, 465 U.S. 208, 218 (1984) (quoting *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 383 (1978)).

While *amicus* has found no court that has considered the issue, the right to perform a wedding ceremony is one of those fundamental rights protected by the Privileges and Immunities Clause. "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)). By denying those outside a state the right to be a part of such an intimate and personal ceremony, the Law effectively weakens ties between in-state and out-of-state citizens, fostering the kind of division of state citizens that the Privileges and Immunities Clause is meant to protect.

Not only this, the Law infringes on the right of non-religious celebrants outside of Virginia to compete for business officiating weddings in Virginia. The Privileges and Immunities Clause, beyond question, protects "nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the State." *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978); *accord Brusznicki*, 42 F.4th at 421. While some couples turn to friends or family in order to perform their ceremony, some may want to engage a non-religious wedding celebrant that charges money for the service. According to Brides.com, the cost of a wedding officiant starts in the $200-250 range and can easily climb up to the $500-800 range once all fees are included.[1] By restricting these business opportunities only to citizens of Virginia, the Law infringes on the fundamental right of the citizens of other states to compete for work in Virginia.

Because the Law discriminates against out-of-state citizens in favor of Virginia citizens and burdens their fundamental rights, the Court must examine whether the law is closely related to the advancement of a substantial state interest.

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[1] "How Much Does a Wedding Officiant Cost?", https://www.brides.com/wedding-officiant-cost-5074508 (last accessed Dec. 15, 2022).

B. The Law's Discrimination Against Out-of-State Wedding Celebrants Is Not Closely Related To A Substantial State Interest.

The Law offers no reason why non-religious wedding celebrants living in Virginia are permitted to serve as wedding celebrants but those from outside the state are not. Nor is there any logical reason to draw such a distinction.

As noted above, the state interest in the Law identified in *Cramer* involved mainly the trustworthiness and reliability of the person performing the ceremony. By authorizing some non-religious Virginians to perform weddings but denying that chance to non-residents of Virginia, the Law effectively makes the categorical determination that non-residents are less trustworthy or reliable than residents of Virginia. These categorical implications about out-of-state persons are exactly the "kinds of arguments the [U.S.] Supreme Court has rejected many times before." *Brusznicki*, 42 F.4th at 424. Thus, for example, lawyers not resident in Virginia may not be denied the opportunity for move for admission to the bar by motion. *Supreme Ct. of Virginia v. Friedman*, 487 U.S. 59, 67 (1988). Similarly, the chance for non-religious persons to perform wedding ceremonies, out of either a desire to be participate in a deeply meaningful ceremony or for business reasons, may not be restricted only to Virginia citizens.

Because the Law limits fundamental rights to Virginia citizens without being closely related to a substantial state interest, the Law is unconstitutional under the Privileges and Immunities Clause, independent of how the Court rules on the other constitutional issues presented in this brief.

III. The Law Is Unconstitutional Under the First Amendment's Religion Clauses.

A. The Free Exercise Clause Forbids The Conditioning Of A Government Benefit On Religious Beliefs Or Practice.

The Free Exercise Clause of the First Amendment[2] prohibits the government from "hamper[ing] its citizens in the free exercise of their own religion" by, among other things,

[2] The Free Exercise Clause has been incorporated into the Due Process Clause of the Fourteenth Amendment and fully applies to the states. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940)).

excluding people "*because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 198 L. Ed. 2d 551 (June 26, 2017) (quoting *Everson*, 330 U.S. at 16) (emphasis in original) ("*Trinity Lutheran*"). Thus, a state cannot "constitutionally pass laws or impose requirements which aid all religions as against non-believers, and [cannot] aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

The Petition establishes that Petitioners and their would-be wedding celebrant Brandon Bleakley are non-religious. Yet the only way the Law will permit an out-of-state resident like Brandon to perform Petitioners' wedding ceremony is if Brandon becomes an ordained minister (under Virginia Code Section 20-23) or Petitioners and Brandon all join a religious society that has no ordained ministers (under Virginia Code Section 20-26) in violation of their sincerely held beliefs that there is no deity. If Brandon became an ordained minister, he would gain the additional benefit of not needing to post a $500 bond that would be required for a member of a religious society. Yet if Brandon does not do these things and proceeded to act as a wedding celebrant, he would face criminal charges and could be imprisoned for an entire year.

By conditioning a government benefit upon the religious identity of the people applying for it, the Law effectively compels the practice of religion in violation of the Free Exercise Clause. There is no question that "the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or a privilege." *Trinity Lutheran*, 137 S. Ct. at 2022. Thus, in the U.S. Supreme Court case *Trinity Lutheran*, a church's free exercise rights were infringed when it was "put to the choice between being a church and receiving a government benefit." *Id*. at 2024. Similarly, here, Petitioners are put to the choice between being non-religious or receiving the government benefit of having Brandon perform a wedding ceremony. Because of that deprivation of a benefit based on religion, laws that deny atheists and non-religious persons the same rights to celebrate weddings as religious celebrants are unconstitutional under the Free Exercise Clause.

The Seventh Circuit, applying similar reasoning, held unconstitutional Indiana's laws permitting religious officiants to perform weddings but denying that right to secular humanists.

See Ctr. for Inquiry, Inc. v. Marion Cir. Ct. Clerk, 758 F.3d 869, 875 & *passim* (7th Cir. 2014). As with the Law, Indiana's statute "discriminate[d] arbitrarily among religious and ethical beliefs" by denying non-religious persons the right to perform wedding ceremonies. *Id*. at 875. Holding that "[a]n accommodation cannot treat religions favorably when secular groups are identical with respect to the attribute selected for that accommodation," the Seventh Circuit held the law unconstitutional and required the state to grant the plaintiffs' requested relief. *Id*. at 872, 875.

There is no question the Law is such an impermissible restriction on religious freedom and, regardless of the Court's findings on other grounds, it must be held unconstitutional as violating the Free Exercise Clause.

B. The First Amendment's Establishment Clause Forbids The State To Grant Benefits Only To Religious Persons.

The Establishment Clause of the First Amendment[3] prevents the establishment of a religion by the state government. While the test for finding violations of the Establishment Clause has evolved over time in the courts, as recently as six months ago the U.S. Supreme Court has reaffirmed that the government may not "make a religious observance compulsory" or "force citizens to engage in 'a formal religious exercise.'" *Kennedy v. Bremerton Sch. Dist.*, 213 L. Ed. 2d 755 (June 27, 2022) (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) and *Lee v. Weisman*, 505 U.S. 577, 589 (1992)).

The requirement that the state remain "neutral" with regard to a person's religious practice is based in both the Free Exercise Clause and the Establishment Clause and thus analysis under the two clauses "may overlap." *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 83 S. Ct. 1560, 1571 (1963). Such is the case here, where the same methods of compelling Petitioners and Brandon Bleakley to engage in religious conduct that are repugnant to the Free Exercise Clause are equally repugnant to the Establishment Clause. Thus, the Seventh Circuit used the same analysis for the religion clauses (and the Equal Protection Clause) when it found that Indiana's

[3] The Establishment Clause is incorporated in the Due Process Clause of the Fourteenth Amendment and fully applies to the states. *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 13 (1947).

wedding celebrant law unconstitutional, finding that the law "not only discriminates against non-religious ethical groups such as humanists but also discriminates among religions, preferring those with a particular structure (having clergy) . . . ." *Ctr. for Inquiry, Inc.*, 758 F.3d at 874. The Law here has the same structure and is subject to the same analysis.

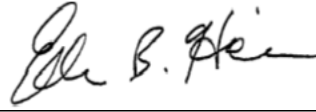
Because the Law is not neutral with regard to the religion of Petitioners and Brandon Bleakley, this Court should find it unconstitutional under the Establishment Clause independent of the other grounds for unconstitutionality in this brief.

Conclusion

For the foregoing reasons, this Court should declare the Law unconstitutional and grant Petitioners' petition.

Dated: December 16, 2022

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and accurate copy of the foregoing Brief of *Amicus Curiae* American Civil Liberties Union Foundation of Virginia was e-mailed to Petitioners (pursuant to an agreement between the parties) and sent via email and USPS mail to counsel for the Commonwealth at the following address:

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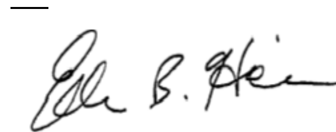
Dated: December 16, 2022

Respectfully submitted,



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