VIRGINIA:

IN THE CIRCUIT COURT FOR LOUDOUN COUNTY

CALVARY ROAD BAPTIST CHURCH, *et al.*,

Plaintiffs,

v.

MARK HERRING, *et al.*,

Defendants.

Civil Action No. CL 20006499

PLAINTIFFS' MOTION TO RECONSIDER

COME NOW Plaintiffs, by counsel, pursuant to Va. Supreme Court Rules 1:1 and 4:15, and petition this Court to reconsider the Court's ruling on August 11, 2021, for the reasons stated in Plaintiffs' Brief in Support of Motion to Reconsider filed herewith. Pursuant to Rule 4:15(d), Plaintiffs request a hearing on this Motion.

Dated this 20 day of August, 2021.

Respectfully Submitted,

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VIRGINIA: IN THE CIRCUIT COURT FOR LOUDOUN COUNTY

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CIRCUIT COURT
LOUDOUN COUNTY, VA

CALVARY ROAD BAPTIST CHURCH, *et al.*, Plaintiffs, v. MARK HERRING, *et al.*, Defendants.	Civil Action No. CL 20006499 **BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO RECONSIDER**

INTRODUCTION

After Plaintiffs' Opposition to Defendants' plea in bar was due and submitted, the Fourth Circuit issued two decisions[1] on standing, *Bryant v. Woodall*, 1 F.4th 280 (4th Cir. 2021), and *Edgar v. Haines*, 2 F.4th 298 (4th Cir. 2021), that significantly underscore Plaintiffs' arguments establishing pre-enforcement standing here. In addition, after this Court's hearing on the plea in bar, the Tenth Circuit issued its decision in *303 Creative LLC v. Elenis*, No. 19-1413, __ F.4th __, 2021 WL 3157635 (10th Cir. July 26, 2021), holding that a Christian website designer had standing to bring a pre-enforcement challenge to Colorado's Anti-Discrimination Act where the plaintiffs' religious speech and conduct as alleged in the complaint arguably exposed them to liability under the language of the statute.

Because the timing of those persuasive decisions did not allow the Court an opportunity to be briefed on them, or allow for fulsome discussion at the hearing, Plaintiffs respectfully move this Court to reconsider its Order on Plaintiffs' standing, in light of the additional authority and arguments contained in this motion that plainly indicate the need for an opposite result.

Additionally, Plaintiffs recently discovered mandatory authority not cited by either party that dispositively establishes this Court's jurisdiction over Plaintiffs' claims against the State Corporation Commission. Because the Court did not have the benefit of briefing or argument on *Citizens Mutual Building Association v. Edwards*, 167 Va. 399 (1937), which holds that Article IX, Section 4 is not a jurisdictional bar in a constitutional challenge to a statute enforceable by the

[1] Decided June 16 (amended June 23) and June 23, 2021 respectively. Opposition was due June 16, 2021.

State Corporation Commission, Plaintiffs respectfully request that this Court reconsider its Order dismissing the State Corporation Commission for lack of jurisdiction, in light of the newly discovered binding precedent as explained in this motion, which compels a different result.

ARGUMENT

I. Post-briefing and post-hearing authority on pre-enforcement challenges warrants reconsideration of Plaintiffs' standing.

After the opening and opposition briefs on Defendants' plea in bar, the Fourth Circuit issued two decisions confirming that plaintiffs need not subject themselves to prosecution or an enforcement action before seeking to have their constitutional rights vindicated and protected by a court. In *Bryant*, the Fourth Circuit held that the plaintiffs had standing to challenge a law that had not been enforced *in nearly 50 years*, because recent amendments to the statute "cast doubt on whether" the state was "truly disinterested in enforcing its abortion laws." 1 F.4th at 286. While it makes sense "to discount moth-eaten statutes, laws that are recent and not moribund typically do present a credible threat." *Id.* "[S]tanding does not require that a litigant fly as a canary into a coal mine before she may enforce her rights." *Id.* And "a court presumes that a legislature enacts a statute with the intent that it be enforced." *Id.*

Importantly, the Fourth Circuit in *Bryant* found standing even though "two of the defendants [had] made informal statements indicating they [had] no present intent to enforce the challenged provisions." *Id.* at 287 n.1. Those statements were "not binding," and the other defendants had said nothing about their intent either way. *Id.* Because all government officials charged with enforcing the challenged laws did not formally (and bindingly) disclaim an intent to enforce, the court concluded that plaintiffs faced a credible threat of enforcement and therefore had standing. *Id.* at 289 ("Unofficial and non-binding statements . . . do not and cannot override the plain text of the statutes when it comes to establishing a credible threat of enforcement") (cleaned up).

Here, no defendant has disclaimed an intent to enforce the Act or HB 1429, but instead defendants urge the wisdom and perceived need for these laws. Plea at 1 ("With these laws, Virginia's elected leaders sought to protect the Commonwealth's more than 300,000 LGBT

residents from the type of discrimination that has long infected public life."); Opp. to Plea at 12 & n.3 (Defendant Herring's January 2021 press release announcing creation of a new Office of Civil Rights that "include[s] additional personnel to investigate allegations" and will enforce the Virginia Values Act, which "make[s] it illegal to discriminate against LGBTQ Virginians").

Another recent Fourth Circuit decision shows why pre-enforcement standing is even more appropriate in Plaintiffs' speech and free-exercise claims. Standing requirements are "somewhat relaxed" in First Amendment cases because "even the risk of punishment could chill speech." *Edgar*, 2 F.4th at 310 (cleaned up). In *Edgar*, the Fourth Circuit held that five former government-security-agency employees had standing to challenge "prepublication review" requirements that allegedly "caused them to write some pieces differently" and had "dissuaded them from writing" others. *Id.* (cleaned up). One plaintiff never submitted anything to the review process and "ha[d] no plans to submit any future work"—she was merely "concerned" her former government employer "might sanction her for failing to submit [a prior] work for review." *Id.* at 308. Still, it was enough that "some" plaintiffs alleged that they had "decided not to write about certain topics because of the prepublication review policies." *Id.* at 310. "Such self-censorship is enough for an injury-in-fact to lie." *Id.* (cleaned up). The plaintiffs had standing. *Id.* at 311.

Unlike the plaintiffs in *Edgar*, Plaintiffs here have submitted concrete examples of the speech they have been saying and continue to say, which the Act bans—as well as speech they have stopped making because the Act outlaws it. *E.g.*, Compl. ¶¶ 70–72, 74, 86, 103, 112, 138, 210, 216–18; Opp. to Plea at 10. Such specific chilling and self-censorship constitute injury-in-fact sufficient for standing, as *Edgar* shows. *Edgar*'s articulation of the standard also warrants reconsideration of this Court's suggestion that self-censorship in response to a law restricting First Amendment activities is "self-inflicted" and thus not actual harm. Tr. 12:7.

Finally, even more recently in a pre-enforcement challenge to Colorado's similar anti-discrimination law, the Tenth Circuit held that a website designer had standing because she and her company faced "a credible threat Colorado [would] prosecute them under that statute." *303 Creative*, 2021 WL 3157635 at *4. The court reached that conclusion though the plaintiffs did "not

yet offer wedding-related services," but merely "intend[ed] to do so in the future." *Id.* at *2. That intent was enough because the plaintiffs' "potential liability [was] inherent in the manner they intend[ed] to operate—excluding customers who celebrate same-sex marriages." *Id.* at 5. And the threat was especially credible given "Colorado's strenuous assertion that it [had] a compelling interest in enforcing CADA." *Id.* at *6.

All the more so here, where Plaintiffs have long engaged in their religious speech, policies, and practices that are inherent in their operation as Christian ministries and unlawful under a reasonable reading of the Act that Defendants are admittedly committed to enforcing. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 162 (2014). "When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Id.* at 158.

These decisions warrant reconsideration of the Court's incorrect conclusion of law that Plaintiffs must prove a "probability of prosecution" in order to have standing, Tr. 13:3–5, and this Court's oral ruling that Plaintiffs would "have an actual controversy" only after a civil action is filed against them, Tr. at 12:2–3. Likewise, these cases advise reconsideration of the Court's oral ruling that the Court cannot proceed if it finds that "the defendants are not presently enforcing the challenge[d] laws against the Plaintiffs, and that they presently are not threatening to enforce the laws against the Plaintiffs." Tr. 18:8-14. To the contrary, as these federal appellate rulings confirm, and as Plaintiffs' counsel urged at the hearing, whether Defendants are currently prosecuting or explicitly threatening to prosecute the Plaintiffs does not determine whether a credible threat of enforcement—the standard for standing—exists. Tr. 11:8–9. The "credible threat" posed by a non-moribund statute is enough. *Bryant*, 1 F.4th at 286.

II. Newly discovered binding authority establishes this Court's jurisdiction over Plaintiffs' claims against the State Corporation Commission.

Following the hearing on Defendants' Plea in Bar, Plaintiffs' counsel discovered a dispositive case that no party cited, briefed, or raised at the hearing: In *Citizens Mutual Building Association v. Edwards*, the Virginia Supreme Court held that the trial court "was clearly within

its power in passing upon the constitutionality" of a statute enforceable by the State Corporation Commission because the court had reviewed "the statute itself,—the act of the legislature,—not the 'action of the Commission'" that had been based on that statute. 167 Va. 399, 414 (1937). Importantly, the Virginia Supreme Court did "not perceive in [Art. IX, § 4] of the Constitution any intention to prohibit [the trial court's] action." *Id.*

Years later, the Virginia Supreme Court reaffirmed *Edwards*, recognizing again that Article IX, Section 4 does not prohibit a trial court "from granting relief where it [is] necessary to declare unconstitutional an act of the General Assembly" authorizing the Commission to act, where the trial court is asked to "review and annul . . . the statute itself, which directed the action taken by the Commission, and not the action of the Commission." *Little Bay Corp. v. Va. Elec. & Power*, 216 Va. 406, 411 (1975). This is precisely what Plaintiffs asked this Court to do in bringing "an ordinary challenge to a legislative enactment that is unconstitutional on its face," Tr. 5:25–6:2, "an ordinary pre-enforcement challenge seeking a declaration of what the law means, and that there needs to be a religious exemption," *id.* at 5:14–17, where no Commission action is under appeal.

Edwards and *Little Bay* confirm that Article IX, Section 4 is no bar to this Court's jurisdiction. The Court's conclusion to the contrary is legal error at odds with mandatory precedent. Tr. 7:25–8:3. Plaintiffs ask this Court to exercise jurisdiction to review the constitutionality of an act of the General Assembly, HB 1429, "and not [any] action of the Commission" based on that legislative act. *Little Bay*, 216 Va. at 411. Accordingly, this Court is "clearly within its power in passing upon the constitutionality" of that statute.[2] *Edwards*, 167 Va. at 414.

Respectfully Submitted, this ___ day of August, 2021,

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[2] A declaratory ruling on the claims against the Commission based on HB 1429 is sufficient to grant Plaintiffs relief.

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