**UNITED STATE DISTRICT COURT**
**EASTERN DISTRICT OF VIRGINIA**
**ALEXANDRIA DIVISION**

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CG4, LLC, dba CHEF GEOFF'S-TYSONS CORNER, and GEOFF TRACY,

Case No. 1:18-cv-00360-AJT-IDD

Plaintiffs,

v.

The VIRGINIA ALCOHOLIC BEVERAGE CONTROL AUTHORITY, et al.,

Defendants.

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**OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

## INTRODUCTION

Plaintiff Geoff Tracy and his restaurant, CG4, LLC, dba Chef Geoff's-Tysons Corner, allege that various Virginia regulations restricting the way that businesses advertise happy hour violate their right to free speech under the First Amendment. Defendants agree that at least one plaintiff has standing to bring a claim against at least one defendant, but argue that various parties on each side should be dismissed and that the claims were not pled with enough clarity. Each of Defendants' arguments fail, and their motion should be denied.

## BACKGROUND

Virginia permits businesses to offer happy hour, but it strictly limits how they may advertise it. 3 Va. Admin. Code § 5-50-160. Plaintiffs have brought this suit to challenge three provisions of Virginia's happy hour speech code: the ban on advertising happy hour prices or discounts, 3 Va. Admin. Code § 5-50-160(b)(8), Va. Code § 4.1-111(15), the ban on using any term other than "happy hour" or "drink specials" to describe the offerings, 3 Va. Admin. Code § 5-50-160(b)(8), and the ban on offering "two-for-ones." 3 Va. Admin. Code § 5-50-160(b)(4).

Geoff Tracy is the owner, namesake, and spokesperson for Chef Geoff's-Tysons Corner, a restaurant located in Northern Virginia. First Amended Complaint (FAC), Doc. 9, ¶¶ 8, 9. The restaurant holds a mixed beverage on-premises license and a wine and beer license with the Virginia Department of Alcoholic Beverage Control/Virginia Alcoholic Beverage Control Authority [1] (ABC). *Id.*

[1] The Department is currently transitioning to an "Authority." During the transition, the two are operating concurrently. For ease of reference, the Department, Authority, and the individual defendants sued in their official capacity pursuant to *Ex parte Young*, 209 U.S. 123 (1908), are referred to collectively as "Defendants."

One of the ways in which Tracy and his restaurant try to beat the competition and attract new customers is by offering happy hour specials in a town well-known for its love of happy hour. *Id.* ¶ 3. Tracy attributes part of his restaurants' success to his popular happy hour offerings. *Id.* In 2011, Chef Geoff-Tysons Corner won the RAMMY award for "Hottest Restaurant Bar Scene." *Id.* ¶ 8. To attract new patrons, Tracy places advertisements for the restaurant's happy hour specials using various mediums, including direct mail campaigns, signs outside his restaurants, his restaurants' website and Facebook pages, and his personal Twitter account. *Id.* ¶¶ 3, 15. However, Virginia makes it illegal to say many things that Plaintiffs would like to say about their legal happy hour practices.

If it were not for Virginia law, Plaintiffs would advertise their happy hour prices and specials and use creative terms to describe their offerings, like "Wednesday Wine Night." *Id.* ¶¶ 20, 25, 27. Plaintiffs do not seek to advertise to children, to promote illegal activity, or to encourage excessive drinking. *Id.* ¶ 4. Instead they seek to communicate truthful information in the form of playful advertisements about their legal business practices. *Id.* Because happy hour is part of what makes Chef Geoff's competitive and successful, Plaintiffs believe that the restriction on happy hour advertising not only injures their speech rights, it hurts their bottom line. *Id.* ¶ 26.

Plaintiffs have brought suit under Section 1983 to vindicate their constitutional rights, and they seek prospective injunctive and declaratory relief on all of their claims. *Id.* at Requested Relief.

## STANDARD OF REVIEW

Defendants' motion to dismiss Geoff Tracy for lack of standing is brought pursuant to Fed. R. Civ. P. 12(b)(1), and their motion to dismiss for failure to state a claim is brought under Fed.

R. Civ. P. 12(b)(6). In reviewing such a motion, the Court must accept all factual allegations in the Complaint as true and make all inferences in the light most favorable to Plaintiffs. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323 (2007). At the pleading stage, "general allegations embrace the specific facts that are necessary to support the claim." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

A 12(b)(6) motion must be denied so long as the Complaint alleges facts that, if true, would "plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009). Dismissal is improper "even if it appears 'that a recovery is very remote and unlikely.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (citation omitted). A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle it to relief." *Id.* at 577.

Under both 12(b)(1) and 12(b)(6), courts should "construe pleadings to do substantial justice" and give the plaintiff "the benefit of the doubt if his pleading makes out any claim for relief." *Charfauros v. Bd. of Elections*, 249 F.3d 941, 956-57 (9th Cir. 2001). Plaintiffs' Complaint easily withstands Defendants' motion.

## SUMMARY OF THE ARGUMENT

Defendants concede that Chef Geoff's-Tysons Corner has standing; they even concede that Geoff Tracy has suffered a financial injury. However, they argue that Tracy does not have standing because he hasn't suffered any harm to his speech rights. Moreover, they claim that Plaintiffs cannot seek pre-enforcement judicial review and must violate the law and wait for Defendants to bring an enforcement action against them before bringing suit. They also argue that the Complaint is too vague under Fed. R. Civ. P. 8 because they cannot determine which portions of the happy hour speech code Plaintiffs are challenging, they do not understand the "nature" of Plaintiffs' First

Amendment injury, Motion to Dismiss, Doc. 12 (MTD) at 11, and they do not know "which count is seeking declaratory relief and which seeks relief under § 1983." *Id.* at 7. Finally they argue that Count II must be dismissed because it does not concern a First Amendment issue.[2] Those arguments fail.

First, Defendants' standing arguments should be denied because they concede that at least one plaintiff has standing. Where one plaintiff has standing, courts need not consider the remaining plaintiffs' standing. *See, e.g.*, *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006). Nevertheless, Tracy has standing in his own right because he owns and operates a restaurant that is subject to the challenged law. FAC ¶¶ 3, 15. This causes him financial injury, which Defendants do not dispute. FAC ¶ 26; MTD at 11 ("Inasmuch as the Amended Complaint fails to adequately allege a non-monetary harm, it should be dismissed."). The challenged law also injures Tracy's speech rights because, as owner, he is responsible for operating the restaurant and crafting its messaging, and because he often advertises on behalf of the restaurant. FAC ¶¶ 3, 8, 15, 16, 25, 27.

Second, in a claim under Section 1983, plaintiffs need not expose themselves to liability and wait for defendants to take action against them before challenging a law in federal court. Instead, they need only allege that they would like to engage in constitutionally protected conduct and that their desired conduct is prohibited by the challenged law. *See, e.g., Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Here, Plaintiffs have alleged that they would like to advertise in a certain way but face fines and penalties if they do so. FAC ¶ 27. They further allege that Defendants are responsible for enforcing (and regularly do enforce) the

[2] Defendants also argue that the Department and Authority must be dismissed due to sovereign immunity. Given Fourth Circuit precedent, Plaintiffs agree and voluntarily dismiss both as Defendants.

challenged laws. FAC ¶¶ 10, 11, 24. That is sufficient to bring suit against Defendants in their official capacity under Section 1983.

Third, Plaintiffs' complaint is straightforward and there is no ambiguity about which portions of the law they are challenging, or on which basis they seek relief. Plaintiffs challenge (1) the restriction on advertising happy hour prices or specials, (2) the ban on using terms other than "happy hour" or "drink specials," and (3), the ban on offering "two-for-one" specials, and they seek both injunctive and declaratory relief for all of their claims. Their First Amendment injury is simple: Virginia law prohibits them from saying what they would like to say and this restricts their right to free speech under the First Amendment. Those allegations are clear, and Defendants' attempt to feign ignorance fails.

Fourth, Plaintiffs have adequately alleged that, in practice, Virginia's ban on two-for-one specials amounts to a restriction on speech. *See Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017) (restriction on imposing surcharges amounted to a restriction on speech). Because the merits of that claim will largely come down to the way the law is enforced, that claim should not be dismissed. Defendants' motion should be denied.

## ARGUMENT

### I

### GEOFF TRACY HAS STANDING

A plaintiff has standing if he has suffered a concrete and particularized injury that is fairly traceable to the defendant's conduct, and which the court can remedy. *Lujan*, 504 U.S. at 560-61. Plaintiffs allege that they would like to advertise the price of happy hour beverages, utilize creative terms in their advertisements, and offer "two-for-one" specials, but they are barred from doing so by Virginia law. FAC ¶¶ 3, 19, 20, 21, 32, 39, 47. They allege these restrictions injure them

because they prohibit Plaintiffs "from communicating entirely truthful information about their business practices to the public," *id.* ¶ 25, and because they cause Plaintiffs to lose potential profits. *Id.* ¶ 26 ("In addition to harming his speech rights, the happy hour advertising restrictions hurt Chef Geoff's ability to attract new customers and cost him precious foot traffic."). Both the law's effect on his speech rights and his pocketbook are injuries sufficient to confer Article III standing. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2343 (2014) (desire to engage in speech prohibited by law is an Article III injury); *Toomer v. Witsell*, 334 U.S. 385, 392 (1948) (plaintiffs had standing where they faced loss of business).

Defendants do not contest the standing of Chef Geoff's-Tysons Corner; they acknowledge that the restaurant is injured and has standing under Article III. However, Defendants contest the standing of the restaurant's owner, Geoff Tracy. Even then, Defendants do not contend that Tracy has not been injured *at all*; they argue only that Tracy has not suffered an injury to "his expressive activity" because the law operates against "licensees," and the licensee in this case is the restaurant.[3] *See* MTD at 4. That's wrong. At the outset, where it is undisputed that one plaintiff has standing, courts need not inquire whether the other plaintiffs have standing. *See, e.g., Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. at 53 n.2 (court refused to inquire into standing of other plaintiffs because "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement"); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (because at least one plaintiff had standing, the court "need not consider the standing issue" as to the other plaintiffs) *Babbitt*, 442 U.S. at 299 n.11. (same); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1159 (10th Cir. 2013) (same).

[3] Because Defendants concede that Tracy has suffered a financial harm, their standing arguments fail on that basis alone.

But even if this Court were to make that inquiry, Tracy's speech interests are injured by the challenged law. First, the restaurant's speech is often Tracy's speech. Chef Geoff's-Tysons Corner is inanimate. It does not have a mouth to speak, nor thumbs to tweet. Instead, people like its owner design its specials and conceive of its messaging. Plaintiffs have alleged that Tracy is the owner of the restaurant. FAC ¶ 8. A fair inference is that Tracy is responsible for directing its operations, including crafting its specials and advertisements. Because Tracy is responsible for designing Chef Geoff's happy hour offerings and promotions, the happy hour speech code restricts Tracy's speech.

Second, as the owner, namesake, and spokesperson of the restaurant, Tracy frequently advertises on behalf of the restaurant on his popular social media accounts. *See id.* ¶ 3. Tracy reasonably assumes that if he were to advertise in a way that violates the happy hour speech code, the restaurant would face penalties for his speech. That threat of enforcement against his restaurant has caused Tracy to censor himself. Again, the statute's operation against the restaurant serves to harm Tracy's own speech interests.

Defendants argue that Tracy's speech is not harmed because the law only operates against licensees, implying that Tracy is free to promote his restaurant's happy hour specials however he pleases without fear of reprisal. But they cannot credibly contend that the law permits Tracy to advertise with impunity, even if he does so on the restaurant's behalf. If one of Chef Geoff's employees were to put up a sign outside the restaurant's doors, that must be a violation of the speech code, otherwise there would be no way to violate it. There's no principled reason to treat the restaurant's owner any differently than the employees. Moreover, if the restaurant can evade liability by having its owner advertise on its behalf, the law has a loophole so big that it undercuts any legitimate interest Defendants have in enforcing it. *See, e.g.*, *Smith v. Daily Mail Publ'g Co.*,

443 U.S. 97, 104-05 (1979) (State's decision to prohibit newspapers, but not electronic media, from releasing the names of juvenile defendants was not narrowly tailored because it was underinclusive). Still, even taking Defendants at their word that Tracy can advertise without the restaurant facing liability, Tracy still has standing because he crafts the restaurants' specials and advertisements.

In sum, Defendants acknowledge that the restaurants have standing, and their standing claims are therefore irrelevant. But even if this Court were to address Tracy's standing, he has standing because (1) he has suffered a financial injury which the Defendants do not dispute, (2) Tracy crafts the restaurants' advertisements, so when those advertisements are censored, his speech is censored, and (3) Tracy advertises on behalf of the restaurants, and his fear that his restaurants will be punished for his speech has caused him to censor himself. Defendants' standing arguments against Tracy should therefore be denied.

## II

## THE COMPLAINT ADEQUATELY PLEADS A CLAIM AGAINST DEFENDANTS IN THEIR OFFICIAL CAPACITY

To state a claim against government employees in their official capacity under Section 1983, a plaintiff must allege that defendants have deprived them of a constitutional right and that the deprivation was committed under color of state law. *Steffel v. Thompson*, 415 U.S. 452, 464 (1974). Plaintiffs allege that Defendants regularly enforce Virginia's happy hour speech code, FAC ¶¶ 11, 24, and to avoid prosecution, Plaintiffs must censor their speech. *Id.* ¶ 25. Defendants' enforcement of the challenged law therefore deprives Plaintiffs of their First Amendment rights, and that deprivation is committed under color of state law because it is Defendants' job to enforce those restrictions.

Defendants argue that those allegations are insufficient because Plaintiffs have not alleged that Defendants engaged in any "affirmative conduct . . . against the Plaintiffs." MTD at 9. But in a case seeking prospective relief under Section 1983, a plaintiff need not wait for the government to take action against him before bringing suit. Instead, the fact that a plaintiff desires to engage in a course of conduct but is threatened with prosecution if he does so is sufficient to enter federal court. Thus, even absent an enforcement action, a plaintiff facing a credible threat of prosecution may seek prospective injunctive relief to prevent the government from enforcing the law against them *in the future*. *See Susan B. Anthony List*, 134 S. Ct. at 2343 (Plaintiff could bring suit to enjoin enforcement of false statement statute against them in future election cycle); *Babbitt*, 442 U.S. at 298 ("[O]ne does not have to await the consummation of threatened injury to obtain preventive relief."); *Wooley v. Maynard*, 430 U.S. 705, 710 (1977) (A plaintiff may seek prospective relief when he "finds himself placed 'between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity.'"); *Toomer*, 334 U.S. at 391-92 (Plaintiffs had standing where compliance with allegedly unconstitutional law "would have required payment of large sums of money," "defiance would have carried with it the risk of heavy fines and long imprisonment," and "withdrawal" from working resulted in "substantial loss of business."). The threat of future enforcement harms Plaintiffs in the present by forcing them to forego the exercise of their constitutional rights or risk being prosecuted.

In *Babbitt*, 442 U.S. at 293, a union brought a pre-enforcement action against Arizona challenging provisions of a state labor law. Arizona argued that the plaintiffs could not bring suit because the state had not yet enforced the challenged provision against the union, or against anyone else. *Id.* at 302. The Court disagreed. Because the union alleged that it intended to engage in

activities that the statute proscribed on its face, the union's fear of prosecution was "not imaginary or wholly speculative." *Id.* Further, "the State ha[d] not disavowed any intention" of enforcing the statute, meaning that the union was "not without some reason in fearing prosecution for violati[ng]" it. *Id.* As in *Babbitt*, Plaintiffs allege that they would like to engage in expression that is prohibited on the law's face and that Defendants regularly enforce that law. They may therefore bring suit to enjoin Defendants' enforcement of the challenged law in the future.

Defendants agree that Plaintiffs may bring a case for declaratory relief under the Declaratory Judgment Act prior to any enforcement action, but argue that a case under Section 1983 requires some affirmative conduct against them. That's simply not so. *See, e.g.*, *Steffel*, 415 U.S. at 459 ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."). In a pre-enforcement action seeking declaratory relief under the Declaratory Judgment Act *or* seeking injunctive relief under Section 1983, a plaintiff need only allege that he intends to engage in conduct proscribed by a statute, and he faces prosecution if he does so. Plaintiffs have sufficiently alleged those facts here.

Defendants further argue that if the Plaintiffs ever face an enforcement action, they can vindicate their rights during the administrative hearing. But Section 1983 does not require exhaustion of state remedies. *Patsy v. Bd. of Regents of the State of Fla.*, 457 U.S. 496, 503 (1982). Its "very purpose" was to "interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Id.* Section 1983 therefore permits Plaintiffs to go directly to federal court when threatened with violation of their constitutional rights, as Plaintiffs are entitled to do here.

## III

## PLAINTIFFS HAVE ADEQUATELY PLED A FACIAL FIRST AMENDMENT CLAIM

### A. Plaintiffs Have Adequately Pled That They Challenge Three Specific Portions of the Happy Hour Speech Code

Plaintiffs challenge Virginia's ban on advertising happy hour prices or discounts, 3 Va. Admin. Code § 5-50-160(b)(8), Va. Code Ann. § 4.1-111(15), its ban on creative synonyms for "happy hour," 3 Va. Admin. Code § 5-50-160(b)(8), and its ban on two-for-one specials. 3 Va. Admin. Code § 5-50-160(b)(4). They contend that these three portions of the happy hour advertising code injure them by prohibiting them from speaking as they would like to speak, and they violate the First Amendment on their face because they are not related to any compelling state interest. *See* FAC ¶¶ 30, 31, 47. They therefore ask the Court to declare the challenged provisions unconstitutional and to enjoin the Defendants from enforcing those laws. *See id.* at Requested Relief.

Defendants contend that Plaintiffs have failed to state a claim because they have not "state[d] which specific provisions of 3 Va. Admin. Code § 5-50-160 impose a direct injury upon them." But a cursory reading of the Complaint indicates that the Plaintiffs challenge three specific portions of the happy hour speech code. *See* FAC ¶¶ 29, 30, 31. Plaintiffs allege in support of their first claim that:

"[Plaintiffs] seek[] to advertise truthful, non-misleading information about [their] legal business practices, including the specials and price of drinks offered during happy hour. [They] also seek[] to promote [their] happy hour specials in creative, non-generic terms, including puns, exclamations, and allusions." *Id.* ¶ 30.

They further allege:

"Virginia law prohibits [them] from making these statements, on penalty of fines and suspension of his license. [They] therefore suffer[] harm due to Defendants' enforcement of the challenged laws." *Id.* ¶ 31.

With regard to their second claim, Plaintiffs allege:

"[I]t is illegal to offer… special[s] if expressed as a 'two-for-one.'" *Id.* ¶ 45. That "ban on two-for-one specials" is "a restriction on speech" that harms them because it "deprives establishments from offering a special in the most effective way" and "depriv[es]" them of their "constitutional right to speak freely under the First Amendment." *Id.* ¶ 47, 48, 51.

There is no ambiguity about what portions of 3 Va. Admin. Code § 5-50-160 Plaintiffs are challenging. Their first claim challenges the ban on advertising pricing or creative terms for "happy hour," and their second claim challenges the ban on two-for-one specials. Though Plaintiffs occasionally refer to those provisions together as the "happy hour speech code" or "3 Va. Admin. Code § 5-50-150," a fair reading of the Complaint indicates that they specifically challenge 3 Va. Admin. Code § 5-50-160(b)(4), Va. Code Ann. § 4.1-111(15), and 3 Va. Admin. Code § 5-50-160(b)(8). They have therefore adequately pled that these portions of the speech code, on their face, violate the First Amendment.[4]

## IV

## PLAINTIFFS HAVE ADEQUATELY ALLEGED HOW THE CHALLENGED LAWS HARM THEM

Defendants argue that Plaintiffs have "not explain[ed] the nature of [their]" First Amendment harm, which makes the Complaint defective under Fed. R. Civ. P. 8. That rule

[4] Defendants say nothing about Plaintiffs' as-applied claims, meaning that, at the very least, those claims should not be dismissed.

requires that Plaintiffs give a "short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8 does not require "detailed factual allegations," but it requires more than "naked assertion[s]" devoid of "further factual enhancement." *Ashcroft*, 556 U.S. at 678.

The Complaint very plainly spells out the First Amendment harm in specific terms: Virginia law prohibits businesses from truthfully describing their business practices to the public under threat of fines and penalties. FAC ¶ 25. Plaintiffs offer specific examples of the types of phrasing they'd like to use, but cannot because of the challenged law. *Id.* ¶¶ 3, 20, 27. For instance, Plaintiffs' contend that if it were not for Virginia's happy hour speech code, Plaintiffs would "advertise prices, discounts, and use festive terms like 'Wednesday Wine Night' to promote his restaurant." *Id.* ¶ 27. Plaintiffs argue that these specific restrictions on the way that Plaintiffs speak deprive them of their "constitutional right to speak freely under the First Amendment." *Id.* ¶ 39. There is no way to explain the "nature" of that harm any more clearly: Plaintiffs cannot say what they would like to say, and that's a violation of the First Amendment.

Defendants further state that Plaintiffs "do not even allege that they have faced enforcement action for violation of this regulation." MTD at 11. But again, Plaintiffs need not wait for prosecution in order to bring suit under the First Amendment. They need only allege that they would like to engage in conduct prohibited by the challenged law, and Plaintiffs have made that allegation here.

## V

## PLAINTIFFS HAVE ADEQUATELY PLED THAT THEY SEEK INJUNCTIVE RELIEF UNDER 42 U.S.C. § 1983 AND DECLARATORY RELIEF UNDER THE DECLARATORY JUDGMENT ACT FOR ALL CLAIMS

Plaintiffs have brought this First Amendment lawsuit pursuant to Section 1983, which grants plaintiffs the right to seek redress in the courts for constitutional violations by state and

local officials. As Section 1983 lawsuits regularly do, Plaintiffs seek both prospective injunctive and declaratory relief on all of their claims. While injunctive relief is inherent in the court's power, Plaintiffs seek declaratory relief under the Declaratory Judgment Act.

Defendants argue that Plaintiffs have not specified which count is seeking declaratory relief under the Declaratory Judgment Act and which seeks injunctive relief under 42 U.S.C. § 1983, which makes "the Amended Complaint . . . deficient as a matter of law." MTD at 7. Yet it is plain from the face of the document that Plaintiffs seek injunctive and declaratory relief with respect to *all* of their claims. For each claim, Plaintiffs have alleged that they are "suffering and will continue to suffer substantial and irreparable harm unless Virginia's happy hour advertising restrictions are declared unlawful and enjoined by this court." FAC ¶¶ 40, 52. They have also alleged that a "judicial determination of the rights and responsibilities arising from this actual controversy" is "necessary and appropriate." *Id.* ¶¶ 42, 54. They therefore request that the Court "[d]eclare the happy hour speech code" unconstitutional, and "[e]njoin Defendants" from enforcing it. *Id.* at Requested Relief. It is plain that Plaintiffs have brought every claim pursuant to Section 1983 and seek injunctive relief under that law as well as declaratory relief under the Declaratory Judgment Act.

Defendants further argue that "[t]o the extent that Plaintiffs are seeking a Declaratory Judgment, this Court should decline to exercise such jurisdiction." MTD at 7. Defendants point to four factors used by the Fourth Circuit in Declaratory Judgment cases to determine whether jurisdiction is appropriate. However, as the Fourth Circuit has made clear, "these factors have been formulated in cases where there were parallel state court proceedings." *Aetna Cas. & Sur. Co. v. Ind-Com Elec. Co.*, 139 F.3d 419, 422 (4th Cir. 1998). There are no parallel state court proceedings here, so the factors are irrelevant.

Nevertheless, those factors weigh *in favor* of jurisdiction. First, Defendants state without argument that "Virginia's state courts have the stronger interest in deciding the constitutionality of Virginia Regulations and are equally able to resolve any potential dispute." MTD at 7-8. But Plaintiffs challenge the state law under the *federal* Constitution. Federal courts routinely evaluate whether state statutes comport with the federal Constitution under the Declaratory Judgment Act. *See Steffel*, 415 U.S. at 467-68 ("Congress anticipated that the declaratory judgment procedure would be used by the federal courts to test the constitutionality of state criminal statutes."); *see also Polykoff v. Collins*, 816 F.2d 1326, 1333 (9th Cir. 1987) (noting that federal courts need not "forego the exercise of their jurisdiction to decide a federal constitutional question under the Declaratory Judgment Act whenever a state prefers to litigate the question of declaratory relief in state court"). Indeed, many suits challenging Virginia statutes as unconstitutional *have* been decided by federal courts under the Declaratory Judgment Act. These include many suits specifically asking federal courts to declare Virginia statutes unconstitutional under the First Amendment. *See, e.g.*, *Marcellus v. Va. State Bd. of Elections*, 849 F.3d 169 (4th Cir. 2017); *Imaginary Images, Inc. v. Evans*, 612 F.3d 736 (4th Cir. 2010); *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (en banc); *American Booksellers Ass'n, Inc. v. Virginia*, 802 F.2d 691 (4th Cir. 1986), *rev'd*, 488 U.S. 905 (1988).

Second, Defendants provide no arguments to suggest why "state courts could resolve the issues more efficiently than the federal courts" in this case. That condition is present when, for example, a state action on the same matter is *already pending* which "include[s] more parties than [does] the federal action, suggesting that the state action would be more efficient in resolving all interested parties' rights." *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 494 (4th Cir. 1998). It's also relevant when, for whatever reason, the result of entertaining a declaratory judgment

action in federal court "would be to 'try a controversy by piecemeal, or to try particular issues without settling the entire controversy.'" *Mitcheson v. Harris*, 955 F.2d 235, 239 (4th Cir. 1992) (quoting *Aetna Cas. & Sur. Co. v. Quarles*, 92 F.2d 321, 325 (4th Cir. 1937)). But neither of those factors are present here.

If anything, those factors lead to the opposite conclusion: this Court should exercise jurisdiction under the Declaratory Judgment Act because it already has jurisdiction to provide injunctive relief under Section 1983. It would serve efficiency to provide both injunctive and declaratory relief in the same proceeding.

As Defendants must concede, the third factor, whether overlapping issues of fact or law might create entanglement between state and federal courts, is irrelevant because there is no existing state proceedings. Lastly, Defendants fail to explain why this "federal action is mere 'procedural fencing,' in the sense that the action is merely the product of forum-shopping." Such "procedural fencing" occurs where a party seeks "'to provide another forum in a race for res judicata' or 'to achiev[e] a federal hearing in a case otherwise not removable.'" *Nautilus Ins. Co. v. Winchester Homes, Inc.*, 15 F.3d 371, 377 (4th Cir. 1994) (quoting 6A Moore's Federal Practice, ¶ 57.08 [5] (2d ed. 1993)). Neither of these concerns are present here: no other action is pending which this suit was intended to "race," and this suit is a straightforward federal-question case that could be brought in federal court with or without the declaratory judgment claim.

A court "should exercise its discretion [under the Declaratory Judgment Act] liberally, and articulate a good reason to decline to extend review in the event the Court chooses to exercise such discretion." *Kettler Int'l, Inc. v. Starbucks Corp.*, 55 F. Supp. 3d 839, 848 (E.D. Va. 2014). Given that the Court already has jurisdiction to provide injunctive relief under Section 1983, no good reason exists to decline jurisdiction under the Declaratory Judgment Act here.

## VI

## PLAINTIFFS HAVE ADEQUATELY PLED THAT THE BAN ON "TWO-FOR-ONE" SPECIALS VIOLATES THE FIRST AMENDMENT AND THAT CLAIM SHOULD NOT BE DISMISSED

Plaintiffs allege that the ban on "two-for-one" specials is a restriction on speech because it regulates the way that businesses describe their specials. That claim is analogous to *Expressions Hair Design*, 137 S. Ct. 1144, where the plaintiffs challenged a law that prohibited businesses from imposing a surcharge on customers who chose to pay with a credit card instead of cash. There, the defendants argued that the law regulated conduct, not speech, because it controlled pricing. The Supreme Court disagreed and held that the law "regulate[d] how sellers may communicate their prices." *Id.* at 1151.

Under that law, a seller could price his products however he liked. He could charge $10 for a cash transaction, for example, and $10.30 for a transaction by credit card, but he could "not convey that price any way he pleases." *Id.* He could not say "$10, with a 3% credit card surcharge" or "$10, plus $0.30 for credit." *Id.* Instead, he could only say that the product cost "$10.30" and add some sort of "discount" for using cash.

As in *Expressions Hair*, the ban on "two-for-one" specials "tells merchants nothing about the amount they are allowed to collect," because a seller is free to offer two drinks at any amount so long as he phrases it a certain way. He could offer 50% off drinks—effectively permitting customers to purchase two drinks for the price of one—or he could offer a special of "buy any two, get half off." The law simply regulates the semantics of the transaction, prohibiting businesses from calling the transaction "two-for-one," and it therefore regulates speech. *See also Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (Even if the challenged statute "generally

functions as a regulation of conduct, as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message," and therefore regulated speech).

Like the defendants in *Expressions Hair Design*, Defendants argue that the ban on "two-for-one" specials regulates conduct, not speech, and that Plaintiffs' claim should therefore be dismissed. But as Supreme Court cases indicate, whether the law is a regulation of conduct or speech will largely come down to the way Defendants enforce it. Where the law permits businesses to price products a certain way, but only allows them to describe it another way, the law regulates speech. *Expressions Hair Design*, 137 S. Ct. at 1151. Or, where enforcement of a statute is "triggered" by speech, again the law regulates speech. *Holder*, 561 U.S. at 28. Plaintiffs have adequately pled that the law functions to prohibit speech, and are therefore entitled to discovery to gather evidence about how Defendants enforce the law, their rationales for it, and whether they have any evidence that shows that such specials lead to increased consumption.

## VII

## PLAINTIFFS VOLUNTARILY DISMISS THE DEPARTMENT AND THE AUTHORITY AS DEFENDANTS

Given Fourth Circuit precedent, Plaintiffs voluntarily dismiss the Board and Authority as defendants.

DATED: May 29, 2018.

Respectfully Submitted,

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