First Amendment — Religious Liberty in Virginia

You Can Believe, But Not Exercise It

A Constitutional Deep Dive

Defending the Foundation | Deep Dive Companion to Article 1

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Thesis: Virginia's constitution offers some of the strongest religious liberty protections in the nation. Virginia's statutes, however, increasingly restrict the *exercise* of those beliefs in professional, commercial, and institutional settings. This brief examines the constitutional text and founding intent, traces the Supreme Court's evolving doctrine from *Employment Division v. Smith* through *303 Creative LLC v. Elenis*, analyzes Virginia's current statutory regime, and explains why several of Virginia's laws cannot survive constitutional scrutiny. The opposing argument is presented fairly and in full before the constitutional refutation is applied.

Roadmap: Section I establishes the constitutional standard. Section II traces Supreme Court doctrine. Section III examines Virginia's statutes and cases. Section IV presents the steel-man. Section V delivers the refutation. Section VI draws practical implications. Section VII closes with a word about hope.

Section I: The Constitutional Standard

The Federal Text

The First Amendment to the United States Constitution reads, in relevant part:

> *"Congress shall make no law respecting an establishment of religion, or **prohibiting the free exercise thereof**; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."*

— U.S. Constitution, First Amendment

The operative phrase is *prohibiting the free exercise thereof.* The Founders did not write "prohibiting the free belief thereof." They wrote *exercise* — the outward, lived expression of religious conviction. This distinction is not accidental. It is the whole point.

Virginia's Stronger Standard

Virginia's Constitution, Article I, Section 16, provides:

> *"That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, **all men are equally entitled to the free exercise of religion, according to the dictates of conscience**; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other."*

— Virginia Constitution, Article I, Section 16

Two features distinguish Virginia's protection from the federal standard. First, it is affirmative: *all men are equally entitled.* The federal amendment restrains government; Virginia's constitution recognizes a pre-existing right. Second, it

explicitly acknowledges the duty owed to the Creator — grounding the right not in government permission but in the moral order itself. As the Supreme Court of Virginia confirmed in *Vlaming v. West Point School Board* (2023), Virginia's constitutional provisions have "a vitality independent of the Federal Constitution," and where state clauses are found to "offer more protection than the protections found in the Constitution of the United States," Virginia courts are duty-bound to honor them.

The Founding Intent

The framing of these protections was not incidental. George Mason drafted Virginia's Declaration of Rights in 1776. James Madison refined and expanded it into the federal First Amendment in 1789. Both men understood religious liberty as the foundation of all other freedoms — because a government capable of controlling conscience is a government with no principled limits.

Madison made this explicit in his 1792 essay "Property," published in the *National Gazette:*

> *"He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.* ***Conscience is the most sacred of all property;*** *other property depending in part on positive law, the exercise of that, being a natural and unalienable right."*

— James Madison, "Property," National Gazette, March 29, 1792

Note Madison's language carefully. He connects religious opinion to its *profession and practice* — not merely its private holding. Conscience, for Madison, encompasses both belief and the exercise that flows from it. To protect one without the other is to hollow out the right entirely. This is precisely the pattern Virginia's current statutes follow — and precisely why those statutes are constitutionally suspect.

Section II: The Supreme Court Framework

Four Supreme Court decisions establish the doctrinal framework for evaluating Virginia's laws. Each builds on the one before it.

1. Employment Division v. Smith (1990)

Smith is the starting point — and, for religious liberty advocates, the problematic one. In 1990, the Supreme Court held that the Free Exercise Clause does not exempt individuals from compliance with neutral, generally applicable laws, even when those laws burden religious practice. Justice Scalia, writing for the majority, stated:

> *"The right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."*

— Employment Division v. Smith, 494 U.S. 872 (1990)

Scalia was careful, however, to acknowledge that the Free Exercise Clause protects more than private belief:

> *"The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. … But the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation."*

Scalia also recognized the "hybrid rights" exception — strict scrutiny applies when a free exercise claim is combined with another constitutional protection, such as free speech:

> *"The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press."*

Smith's core rule: a law that is truly neutral and truly generally applicable may be enforced against religious objectors. The critical questions become: Is the law actually neutral? Is it actually generally applicable? The next three cases answer those questions — and they do not favor Virginia.

Notably, *Smith* itself has never been safe precedent. As Justice Alito later wrote in *Fulton*, the decision "has been embattled since the day it was decided." That context matters when evaluating any statute that depends on *Smith* for constitutional cover.

2. Church of Lukumi Babalu Aye v. City of Hialeah (1993)

Three years after *Smith*, the Supreme Court clarified that facial neutrality is not enough. Hialeah, Florida passed ordinances targeting the Santeria religion's practice of animal sacrifice. The ordinances were written in neutral language, but their actual object was suppression of a specific religious practice. Justice Kennedy, writing for the Court, established the governing test:

> *"Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality,' and 'covert suppression of particular religious beliefs.'* ***Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.****"*
>
> *— Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993)*

On general applicability:

> *"The Free Exercise Clause protects religious observers against unequal treatment, and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation."*

On strict scrutiny:

> *"A law burdening religious practice that is not neutral or not of general applicability must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests."*

Lukumi is directly applicable to Virginia's counseling ban. The ban does not prohibit all counseling that explores sexual orientation or gender identity with minors. It prohibits only counseling that *seeks to change* those characteristics. Only the viewpoint that change is possible — a viewpoint rooted in biblical conviction — is forbidden. That is not general applicability. That is targeted suppression.

3. Fulton v. City of Philadelphia (2021)

Fulton refined the *Smith* framework by establishing that a policy is not generally applicable — and must survive strict scrutiny — whenever it contains a mechanism for individualized exemptions. Chief Justice Roberts, writing for a unanimous Court on the judgment, held:

> *"The inclusion of a formal system of entirely discretionary exceptions renders the contractual nondiscrimination requirement not generally applicable."*

> *"A law also lacks general applicability if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions."*
>
> *"Once a system of exceptions is in place, the government may not refuse to extend that system to cases of religious hardship without a compelling reason."*

— Fulton v. City of Philadelphia, 593 U.S. ___ (2021)

Justice Alito, joined by Justices Thomas and Gorsuch, concurred and called directly for *Smith* to be overruled:

> *"Smith was wrongly decided. As long as it remains on the books, it threatens a fundamental freedom. And while precedent should not lightly be cast aside, the Court's error in Smith should now be corrected."*

— Justice Alito, concurring in judgment, Fulton v. City of Philadelphia (2021)

Five justices in *Fulton* signaled willingness to revisit *Smith*. That is not a minor doctrinal footnote. It is a warning to every state that has enacted religiously targeted statutes under the cover of *Smith's* neutral-law rule.

4. 303 Creative LLC v. Elenis (2023)

303 Creative addressed the intersection of religious liberty and compelled speech directly. Justice Gorsuch, writing for a 6–3 majority, held:

> *"The First Amendment prohibits Colorado from forcing a website designer to create expressive designs speaking messages with which the designer disagrees."*

The Court framed this as a general constitutional principle:

> *"The First Amendment's protections belong to all, not just to speakers whose motives the government finds worthy. … Consistent with the First Amendment, the Nation's answer is tolerance, not coercion."*

— 303 Creative LLC v. Elenis, 600 U.S. ___ (2023)

The significance for Virginia: a licensed counselor's speech in a counseling session is expressive. When the state prohibits a specific message — that sexual orientation or gender identity can change — it is compelling speech in one direction and prohibiting it in another. Under *303 Creative*, that is a First Amendment violation.

Justice Sotomayor, dissenting, offered the sharpest counter-framing:

> *"By issuing this new license to discriminate in a case brought by a company that seeks to deny same-sex couples the full and equal enjoyment of its services, the immediate, symbolic effect of the decision is to mark gays and lesbians for second-class status."*

— Justice Sotomayor, dissenting, 303 Creative LLC v. Elenis, slip op. at 36

That argument — that the ruling licenses discrimination rather than protects expression — is the foundation of the steel-man in Section IV and is addressed directly in Section V.

Section III: Virginia's Statutory Regime

§ 54.1–2409.5 — The Counseling Ban

Virginia Code § 54.1–2409.5 defines "conversion therapy" as:

> *"Any practice or treatment that seeks to change an individual's sexual orientation or gender identity, including efforts to change behaviors or gender expressions or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender."*

The statute then provides:

> *"No person licensed pursuant to this subtitle … shall engage in conversion therapy with a person under 18 years of age. Any conversion therapy efforts with a person under 18 years of age … shall constitute unprofessional conduct and shall be grounds for disciplinary action by the appropriate health regulatory board."*

— Va. Code § 54.1–2409.5

Critically, the statute explicitly permits counseling that "provides acceptance, support, and understanding," counseling that facilitates "identity exploration and development," and "sexual-orientation-neutral interventions." Only counseling that *seeks to change* orientation or identity is prohibited. One viewpoint is permitted. One is forbidden. That is viewpoint discrimination, not neutral regulation.

Discipline flows through § 54.1–2915, which authorizes health regulatory boards to suspend, revoke, or refuse to renew a license for "violating any provision of this chapter or any regulations of the Board." A counselor who offers change-oriented counsel to a willing minor, with full parental consent, faces these professional consequences regardless.

The Virginia Human Rights Act

VHRA § 2.2–3901 defines "sexual orientation" as "a person's actual or perceived heterosexuality, bisexuality, or homosexuality," and "gender identity" as "the gender-related identity, appearance, or other gender-related characteristics of an individual,

with or without regard to the individual's designated sex at birth." The VHRA prohibits discrimination on these bases in employment, public accommodations, and housing. It contains no broad religious conscience exemption for business owners whose work is expressive. The practical result: a business owner who declines, on religious grounds, to create content celebrating same-sex marriage or gender transition may face civil liability — the precise scenario the Supreme Court addressed in *303 Creative.*

Vlaming v. West Point School Board (Va. Dec. 14, 2023)

Peter Vlaming taught French at West Point High School for seven years. When a student identified as transgender and requested male pronouns, Vlaming — on sincere religious grounds — declined to use those pronouns, though he took extensive steps to avoid referring to the student by any pronoun at all. The school board terminated him. He brought claims under Virginia Constitution Article I, §§ 12 and 16, and the Virginia Religious Freedom Restoration Act.

The Supreme Court of Virginia reversed the circuit court's dismissal, reinstating his free-speech claims under Article I, § 12, his free-exercise claims under Article I, § 16, and his statutory claims under Virginia RFRA. Justice Kelsey, writing for the majority, grounded the decision in Virginia's independent constitutional tradition:

> *"In our opinion, the federal Smith doctrine is not and never has been the law in Virginia, and its shelf life in the federal courts remains uncertain."*

> *"Given Virginia's historic role in the protection of religious liberties, the provisions in the Constitution of Virginia have 'a vitality independent of the Federal Constitution.'" (quoting 1 A.E. Dick Howard, Commentaries on the Constitution of Virginia 303 (1974))*

> *"If, upon a careful inquiry, some of the clauses of our Declaration of Rights are found to offer more protection than the protections found in the Constitution of the United States, … we [must] do our duty and honor the original public meaning of those provisions." (quoting Palmer v. Atlantic Coast Pipeline, LLC, 293 Va. 573, 587 (2017) (McCullough, J., concurring))*

— Justice Kelsey, majority opinion, Vlaming v. West Point School Board, Record No. 211061 (Va. Dec. 14, 2023)

Vlaming is significant on two levels. First, it confirms that Virginia's own constitution provides more protective religious liberty and free speech guarantees than the federal floor — and that Virginia courts are bound to enforce them. Second, it demonstrates the pattern the subtitle of this series describes: Vlaming was not fired for his beliefs. He was fired for exercising them.

HB 131 (2026) — § 23.1–401.4

Virginia's General Assembly passed HB 131 in 2026, requiring each public institution of higher education to:

> *"[P]rovide reasonable accommodations for the religious beliefs and practices of individual students regarding such students' (i) admissions, (ii) class attendance, and (iii) scheduling of examinations and work assignments."*

— Va. Code § 23.1–401.4 (eff. July 1, 2026)

Institutions must also publish accommodation procedures and appeal processes in student and faculty handbooks. Effective July 1, 2026. The passage of HB 131 is simultaneously a protection and an indictment: the General Assembly had to mandate what should have been presumed. That tells you where religious liberty currently stands on Virginia's public campuses.

Section IV: The Steel-Man

The argument for Virginia's counseling ban deserves honest engagement. Its proponents are not arguing in bad faith.

The empirical foundation draws on statements from the American Psychological Association, the American Medical Association, and the American Academy of Pediatrics, all of which have characterized sexual orientation change efforts (SOCE) as ineffective and harmful to minors. The APA's 2009 Task Force Report on Appropriate Therapeutic Responses to Sexual Orientation concluded that SOCE practices were associated with increased rates of depression, anxiety, and suicidal ideation among minors subjected to them. These are not fabricated concerns.

On legal grounds, two federal appellate decisions upheld similar bans before the Supreme Court's more recent compelled speech jurisprudence. In *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014), the Third Circuit upheld New Jersey's counseling ban, treating it as regulation of professional conduct with only incidental impact on speech. The Ninth Circuit reached the same conclusion in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), upholding California's ban under the same reasoning.

The state's compelling interest argument runs as follows: licensed professionals operate under a state-granted privilege. The state may regulate that privilege to prevent harm to vulnerable clients, particularly minors who cannot fully consent to treatment. Just as a state may prohibit a licensed physician from administering unproven treatments, it may prohibit a licensed counselor from employing practices the professional consensus has deemed harmful.

Justice Sotomayor's dissent in *303 Creative* supplies the judicial foundation for this argument: public accommodation laws have historically required businesses open to the public to serve all customers, and the majority's ruling mischaracterizes conduct regulation as compelled speech. In her view, the ruling marks LGBT people for

"second-class status" by subordinating equal access to the expressive preferences of service providers.

> *Taken on its own terms, this argument deserves serious consideration. The state's interest in protecting children from harm is real. The medical associations' concerns are not fabricated. The Third and Ninth Circuit decisions represent genuine judicial reasoning, not mere political cover.*

Section V: The Refutation

The steel-man fails at three points.

First: The Law Is Not Neutral

Under *Lukumi*, a facially neutral law that targets religious viewpoints in practice cannot survive strict scrutiny. Virginia's counseling ban explicitly permits counseling that affirms gender transition, explores sexual orientation, and supports LGBTQ identity development. It prohibits only counseling that seeks change. The only population of counselors whose religious convictions require them to offer change-oriented counsel are those whose faith teaches that such change is possible and desirable — predominantly orthodox Christians, observant Jews, and conservative Muslims. The law does not restrict all counseling approaches equally. It restricts one viewpoint. Under *Lukumi*, that is targeting, not neutrality, and it triggers strict scrutiny.

Second: The Circuit Precedents Are Doctrinally Undermined

King and *Pickup* both relied on a "professional speech" doctrine — the theory that speech by licensed professionals receives reduced First Amendment protection. The Supreme Court expressly rejected that doctrine in *NIFLA v. Becerra*, 585 U.S. ___

(2018), holding that there is no "professional speech" exception to the First Amendment. Under current doctrine, a counselor's speech in a session is not stripped of constitutional protection merely because the counselor holds a license. *303 Creative* reinforced this conclusively. *King* and *Pickup* are in serious tension with the post-*NIFLA* and post-*303 Creative* doctrinal landscape and are doctrinally undermined by both decisions, though they remain formally on the books in their respective circuits.

Virginia's own Supreme Court went further. In *Vlaming*, the Court expressly held that "the federal *Smith* doctrine is not and never has been the law in Virginia." Statutes that depend on *Smith* for constitutional cover are on even weaker ground in Virginia courts than in federal ones.

Third: Narrow Tailoring Fails

Even if the state's interest in protecting minors from harm is compelling, the statute must be narrowly tailored to that interest. Virginia's ban applies to all licensed counselors, all clients under 18, and all forms of change-oriented counseling regardless of whether a specific approach poses any demonstrated harm to a specific client. A narrowly tailored statute would target demonstrably harmful practices — not an entire viewpoint across all professional settings.

The 2025 Henrico County Circuit Court consent decree in the case brought by John and Janet Raymond — owners of Associate Counseling Center in Front Royal — reinforced this conclusion. As reported by VPM, the court exempted voluntary talk therapy from the statutory ban, allowing licensed Virginia counselors to discuss sexual and gender identity through the lens of Christianity and other religions during talk therapy with minors. The statutory definition and board disciplinary authority remain intact for practices that go beyond voluntary, faith-based discussion. The decree is evidence that the statute, as written, is overbroad — sweeping in constitutionally protected speech that the state itself could not or chose not to defend when pressed.

Section VI: Practical Implications

For Licensed Counselors

Section 54.1–2409.5 is constitutionally vulnerable. After *NIFLA* and *303 Creative* eliminated the professional speech doctrine, and after the 2025 Henrico consent decree narrowed enforcement, a counselor whose sincerely held religious beliefs lead him to offer change-oriented counsel to a willing minor client — with parental consent — has a serious First Amendment and Virginia constitutional claim. No counselor should abandon a client or violate his conscience without knowing that the constitutional fight is actively ongoing and that the legal landscape is shifting in his favor.

For Business Owners

The VHRA, as applied to expressive services, is directly in tension with *303 Creative*. A business owner whose work is inherently expressive — writing, design, photography, videography — has constitutional grounds to decline assignments that compel speech she does not believe. The absence of a broad conscience exemption in the VHRA does not end the analysis. It begins it. Seek legal counsel before assuming the statute controls.

For Students

HB 131 is now law. As of July 1, 2026, public universities in Virginia are required to provide religious accommodations for attendance, examinations, and work assignments, and to publish formal procedures for requesting them. Students who have been denied such accommodations have a statutory remedy. Know your rights. Use them. If your institution fails to comply, that failure is actionable.

For Pastors and Churches

The conversion therapy ban does not, on its face, apply to unpaid pastoral counseling. The 2025 Henrico consent decree reinforced this distinction. Pastoral care offered outside the licensed professional context is not currently subject to § 54.1–2409.5. That line matters — and it may not survive future legislative sessions. Pastors should know where the line currently stands and be prepared for efforts to move it.

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Section VII: Conclusion

The constitutional framework is clear. A law that targets a specific religious viewpoint in practice — even if written in neutral language — must survive strict scrutiny under *Lukumi*. A law that creates a discretionary exemption system and denies exemptions to religious actors is not generally applicable under *Fulton*. A law that prohibits expressive speech because of the viewpoint it communicates violates the First Amendment under *303 Creative*. Virginia's counseling ban fails all three tests. And under *Vlaming*, it likely fails Virginia's own constitutional standard as well — a standard the Supreme Court of Virginia has confirmed is more protective than the federal floor.

But the constitutional argument, while necessary, is not sufficient. The deeper issue is the one Madison identified in 1792: conscience is the most sacred of all property, not because the law says so, but because the Creator made it so. Every statute that restricts the exercise of sincere religious conviction is, at its root, a claim by the state to sit in judgment over the soul — to determine which beliefs are acceptable and which exercises of those beliefs will be permitted.

That claim is one the Founders expressly denied to government. It is one Virginia's own constitution explicitly rejects. And when pressed to its logical conclusion, it leaves no freedom standing at all — because a government that can tell a counselor what words he may speak in a private session with a willing client has already decided that your conscience belongs to the state.

The battle is real. But so is our God. The same sovereign who ordained governments (Romans 13:1) also declared that there are limits to what governments may claim (Acts 5:29). Until those limits are honored in Virginia's statutes, they must be defended in Virginia's courts — by citizens who understand what is at stake, by counselors who will not abandon their clients, by business owners who will not abandon their convictions, and by voters who will hold accountable those who write these laws.

"Conscience is the most sacred of all property."

— James Madison, National Gazette, March 29, 1792

For the concise overview of this topic suitable for sharing with friends, small groups, or church bulletins, see the companion summary article: [Link to Short Article]

A note on sources: *All quotations of statutes and judicial opinions in this brief are taken from official government publications and primary court documents. The account of the 2025 Henrico County Circuit Court consent decree is based on reporting by VPM and is noted as secondary throughout. Readers seeking the full text of that decree are encouraged to contact the Founding Freedoms Law Center or the Virginia Family Foundation directly.*

Primary Sources Cited

- U.S. Constitution, First Amendment
- Virginia Constitution, Art. I, § 16
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- Va. Code § 54.1–2915
- Va. Code § 2.2–3901 (VHRA)
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- Employment Division v. Smith, 494 U.S. 872 (1990)
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