UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Jonathan McGlothian; Tracy McGlothian; The Mt. Olivet Group, LLC, Plaintiffs, vs. W. Heywood Fralin, in his official capacity as Chair of the State Council of Higher Education for Virginia; H. Eugene Lockhart, in his official capacity as Vice-Chair of the State Council of Higher Education for Virginia; Henry Light, in his official capacity as Secretary of the State Council of Higher Education for Virginia; Ken Ampy, Rosa Atkins, Marge Connelly, Victoria D. Harker, Stephen Moret, William Murray, Carlyle Ramsey, Minnis E. Ridenour, Tom Slater, and Katharine M. Webb, in their official capacities as members of the State Council of Higher Education for Virginia; and Peter Blake, in his official capacity as Director of the State Council of Higher Education for Virginia, Defendants.	Civil Action No. 3:18-cv-00507-REP

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs Jonathan and Tracy McGlothian want to teach adults in Virginia how to earn an honest living. At the couple's vocational school, Jonathan contracts with companies and military units to prepare their students for project-management certification tests. Now, he would like to teach students solicited from the public there, too. Meanwhile, Tracy wants to teach vocational sewing at the school.

But the State Council of Higher Education for Virginia (SCHEV) will not let them do so without government certification.[1] Obtaining this permission would require Plaintiffs to pay thousands of dollars in fees, comply with a host of burdensome regulations, and get approval for their curricula from government bureaucrats.

These requirements are unconstitutional. Teaching, including vocational education, is fully protected speech. Because SCHEV singles out this speech based on its content—and because the requirements' purpose is to affect that content—these requirements are subject to strict scrutiny. SCHEV cannot possibly survive this (or even lesser) scrutiny.

In addition to violating the First Amendment, SCHEV's enforcement of these requirements violates Virginia law as applied to Plaintiffs' test-prep classes. These classes are statutorily exempt from SCHEV's requirements because they are "delivered and designed . . . to prepare an individual for an examination for professional practice." Va. Code Ann. § 23.1-226(B)(9). Yet SCHEV has incorrectly interpreted that exemption to apply only to examinations that qualify a person for a government-licensed occupation.

In short, Plaintiffs are likely to succeed on the merits of their challenge because SCHEV has gotten part of its law wrong, and the parts it has gotten right are unconstitutional. Because

[1] Plaintiffs have sued the members of SCHEV in their official capacities. For ease of reference, these defendants will be referred to throughout as "SCHEV."

Plaintiffs are likely to succeed on the merits, and because the other factors involved in issuing a preliminary injunction all weigh in Plaintiffs' favor, Plaintiffs request that this Court enjoin enforcement of SCHEV's requirements during this litigation.[2]

STATEMENT OF FACTS

Jon and Tracy McGlothian would be teaching job skills at their school to students solicited from the public if it were not for the challenged laws and SCHEV's interpretation of them. They have the classroom, and they have the books. The only thing they don't have is the government's permission.

Below, Plaintiffs describe their backgrounds and plans for speaking to new students. Next, Plaintiffs describe the regulatory hurdles that prevent them from doing so. Finally, Plaintiffs discuss the harm that these burdensome regulations have worked on them.

I. PLAINTIFFS MERELY WANT TO TEACH JOB SKILLS TO WILLING ADULTS.

Jonathan and his wife Tracy co-own a business—Plaintiff The Mt. Olivet Group ("TMOG")—through which they both teach their crafts. *See* Decl. of Jonathan McGlothian in Supp. of Pls.' Mot. for Prelim. Inj. ¶ 4, attached as Exhibit "A"; Decl. of Tracy McGlothian in Supp. of Pls.' Mot. for Prelim. Inj. ¶ 3, attached as Exhibit "B." Jonathan's expertise is in project management, and Tracy's is in sewing. Though they both teach classes now—Jon to companies and government agencies, Tracy to students who wish to learn sewing as a hobby—they'd like to teach project management and sewing to students, solicited from the public, as job skills. Plaintiffs' professional experience, current classroom instruction, and aspirations are discussed below.

[2] Plaintiffs bring two claims in this action, one constitutional and the other statutory. As a remedy for the constitutional claim, Plaintiffs seek to preliminarily enjoin SCHEV from prohibiting any of their classes. As a remedy for the statutory claim, Plaintiffs seek to preliminarily enjoin SCHEV from prohibiting the test-prep portion of their curricula.

A. Jonathan wants to teach project management to the public.

After leading an Army platoon in combat, Jonathan earned a master's degree in business administration and amassed 25 years of business-management experience. Ex. A ¶ 3. In recent years, he has focused on project management.

This profession includes starting, planning, executing, and monitoring projects, which are temporary endeavors undertaken to create a unique product, service, or result. *See* Project Management Institute, *What is Project Management*, https://www.pmi.org/about/learn-about-pmi/what-is-project-management (last visited Jul. 20, 2018). For instance, the building of a bridge or the development of new software is a project. *Id.* But project managers do not participate directly in bridge building or software programming. *Id.* Instead, they manage these projects' progress to meet deadlines, budgets, and other benchmarks. *Id*.

Project managers like Jonathan are generally certified by private bodies, the biggest of which is the Project Management Institute ("PMI"). And these certifications require significant training and experience.

PMI's primary certificate—for Project Management Professionals ("PMP")—is a case in point. To qualify for it, candidates must complete 35 hours of project-management education. Project Mangement Institute, *Project Management Professional (PMP)*, https://www.pmi.org/certifications/types/project-management-pmp (last visited Jul. 20, 2018). They must also have either a college degree and 4,500 hours of project-management experience or a high school diploma and 7,500 hours of this experience. *Id*. Once they've satisfied these requirements, candidates must pass a 200-question project-management test to become PMP-certified. *Id*.

Since earning this certification in 2010, Jonathan has been eager to share his project-management expertise. He has managed several projects for corporations and government entities, and taught project-management courses, including at two colleges between 2012 and 2016. Ex. A ¶¶ 5, 10.

Most of Jonathan's teaching has been at TMOG's vocational school—the TMOG Learning Center in Virginia Beach. At the school, he teaches courses on project management fundamentals, project management essentials, practical and advanced project management training, leadership skills, and other business topics. *Id*. ¶ 6. His goal is to teach students terminology, concepts, and strategies used by project-management professionals. *Id*. ¶ 6. To do so, he uses lectures, classroom discussions, and PMI publications. *Id*. ¶ 6.

Through his classes, Jonathan prepares students for PMI certification. For instance, he teaches a 35-hour week-long course covering material tested on the PMP exam. *Id*. ¶ 7. Since PMI recognizes TMOG as a registered educational provider, PMP candidates can use this course to satisfy PMI's requirement that they complete 35 hours in project-management education.[3] *Id*. ¶ 7.

Because several major companies, organizations, and government agencies[4] value project-management certification, Jonathan's classes are popular with these entities. *Id*. ¶ 9. Many Fortune 750 companies, military units, and other entities have contracted with TMOG for years. *Id*. ¶ 9. Through these contracts, Jonathan has taught project management to more than

[3] In addition to preparing students for the PMP exam, Mr. McGlothian's courses at the TMOG Learning Center prepare students for other PMI certification exams, including tests to become a Certified Associate in Project Management ("CAPM") and Agile Certified Practitioner ("PMI-ACP"). Ex. A ¶¶ 7–8.

[4] In fact, the Program Management Improvement and Accountability Act—enacted in 2016—created a formal career path for project managers in the federal government. *See* 31 U.S.C. § 1126.

500 employees, military officers, and other students, and qualified many for PMI certifications. *Id*. ¶ 9.

But the TMOG Learning Center does not teach students solicited from the public. *Id*. ¶ 11. Now, Jonathan wants to enroll these students in his TMOG Learning Center courses, including his PMI test-preparation course. *Id*. ¶ 11. And some prospective students have expressed interest in taking his classes directly. *Id*. ¶ 24.

B. Tracy wants to teach vocational sewing to the public.

Like her husband, Tracy also has several years of business experience. After earning her master's in business administration, she has managed Virginia Beach Sewing Solutions, a custom sewing and embroidery operation within TMOG. Ex. B ¶ 4. Among other responsibilities there, she trains employees on how to use commercial-grade sewing machines. *Id*. ¶ 6.

Tracy, like Jonathan, likes to teach her craft to others. Through TMOG, she currently teaches sewing classes to hobbyists using both lectures and practical demonstrations. *Id*. ¶¶ 7, 9. In these classes, her aim is to teach students basic sewing skills, like how to make pajama pants. *Id*. ¶ 7. In total, Tracy has taught sewing as a hobby to more than 400 students.

These days, she would like to teach a vocational sewing class as well—along with life-skills classes—at the TMOG Learning Center. *Id*. ¶ 8. In this class, she would like teach students solicited from the public how to use commercial-grade sewing machines. *Id*. ¶ 8. She is particularly interested in helping women with few or no job skills learn the craft of sewing so that they can find well-paying jobs to support themselves and their families. *Id*. ¶ 8.

II. SCHEV'S CERTIFICATION REQUIREMENTS BURDEN PLAINTIFFS' SPEECH.

Unfortunately, neither Jonathan nor Tracy can legally teach job skills to students solicited from the public. That is because SCHEV—enforcing Virginia's Vocational School Law[5]—will not give them permission to do so.

Plaintiffs' experience with SCHEV began in March 2016, when Jonathan attended a new school orientation workshop hosted by SCHEV. Ex. A ¶ 11. As Jonathan learned, *id*. ¶ 12, Virginia generally requires postsecondary schools, including vocational schools, to be certified by SCHEV before operating.[6] SCHEV has several categories of certified schools, including certified vocational schools that do not offer college degrees or credit, which are classified as "career-technical" schools. *See* 8 Va. Admin. Code § 40-31-10.

To provide non-college vocational education to students solicited from the public, Plaintiffs applied in November 2016 to have the TMOG Learning Center certified as a career-technical school by SCHEV.[7] Ex. A ¶ 13. The application proposed a 70-hour project-management program taught by Jonathan, including TMOG's 35-hour PMP test-prep course, a "practical applications" course, and an "essentials" course. *Id*. ¶ 13. The application also noted that Tracy sought to teach sewing, embroidery, and life-skill classes. *Id*. ¶ 13. Altogether,

[5] Va. Code Ann. §§ 23.1-213 to -228 and 8 Va. Admin. Code §§ 40-31-10 to -320 (collectively, "Vocational School Law").

[6] *See* Va. Code Ann. § 23.1-217(A) ("No person shall open, operate, or conduct any postsecondary school in the Commonwealth without certification to operate such postsecondary school issued by [SCHEV]."); *see id.* § 23.1-213 (defining "postsecondary school" to include vocational education); *see also* Va. Code Ann. § 23.1-219(A) (providing that non-exempt postsecondary schools may not enroll students without obtaining SCHEV certification).

[7] The TMOG Learning Center can currently offer project-management courses for military units and private employers without first being certified under an exemption for courses offered "solely on a contractual basis for which no individual is charged tuition and there is no advertising for open enrollment." Va. Code Ann. § 23.1-226(B)(6).

Plaintiffs' 2016 application totaled hundreds of pages, cost $2,500, and consumed hundreds of hours of Plaintiffs' time. *Id*. ¶ 14.

Plaintiffs incurred other costs applying as well. Because SCHEV physically inspects schools before approving them, Plaintiffs leased commercial property for their classroom space to secure SCHEV's approval. *Id*. ¶ 15. Altogether, Plaintiffs have spent more than $20,000 for this space's rent, fixtures, and furniture. *Id*. ¶ 15.

But SCHEV was not satisfied. In December 2016, SCHEV sent Jonathan a letter demanding several additional documents before Plaintiffs' application could proceed, including:

- an explanation about what adjunct-professor positions Jonathan had held;
- copies of official transcripts for Jonathan and Tracy;
- a copy of Jonathan's PMP certificate; and
- proof of Tracy's experience and training in the subjects she sought to teach.

Id. ¶ 16, Ex. A-1 at 2–3. Along with this letter, SCHEV sent a 7-page list of supposed deficiencies in Plaintiffs' application, including Plaintiffs' alleged failure to categorize their course offerings with the correct numerical codes. Ex. A-1 at 1–2.

In March 2017, Plaintiffs resubmitted their application and included supplemental information requested by SCHEV. Ex. A ¶ 17. In total, this application totaled hundreds of pages, and consumed dozens of hours of Plaintiffs' time. *Id*. ¶ 17. Yet SCHEV still told Plaintiffs that their application for SCHEV certification was unsatisfactory. *Id*. ¶ 17.

But Plaintiffs did not give up. In September 2017, Jonathan sent SCHEV a letter seeking a statutory exemption on behalf of the TMOG Learning Center. *Id*. ¶ 18, Ex. A-2. As he pointed out, Virginia exempts "[t]utorial instruction delivered and designed to . . . prepare an individual for an examination for professional practice or higher education" from SCHEV's certification

requirements. Va. Code Ann. § 23.1-226(B)(9); Ex. A-2. In Plaintiffs' view, since the TMOG Learning Center's project-management classes prepare students for PMI certification tests, they should qualify for this exemption. *Id*.

In a letter dated October 30, 2017, SCHEV denied Plaintiffs' exemption request. Ex. A ¶ 19, Ex. A-3. According to SCHEV's Assistant Director for Private Postsecondary Education—Sandra Freeman—"professional practice" must be connected to "achievement of a professional degree," which is "typified by completing a rigorous education in a specific field that leads to licensure by a State Board[.]" Ex. A-3 at 1. Under SCHEV's view, law and medicine are "professional practices" but project management is not. *Id*. Accordingly, SCHEV's October 30, 2017 letter told Plaintiffs that the TMOG Learning Center was "required to obtain a certificate to operate from SCHEV" to "offer programs that prepare individuals for Project Management certification tests." *Id*.

In November 2017, Jonathan again wrote to SCHEV requesting a statutory exemption on behalf of the TMOG Learning Center under a different provision of the law. Ex. A ¶ 20, Ex. A-4. But, in December 2017, SCHEV denied Plaintiffs' exemption request a second time, and reiterated that their school would need SCHEV certification before offering even test-prep classes to the public. Ex. A ¶ 21, Ex. A-5 at 1. And, to be certified by SCHEV, Plaintiffs must satisfy SCHEV's regulations.[8]

SCHEV's regulations impose arduous financial, curricular, and administrative burdens on prospective career-technical schools. For these schools, SCHEV's application process requires:

[8] *See* Va. Code Ann. § 23.1-220 ("[E]ach postsecondary school shall be evaluated by [SCHEV] in accordance with [its] regulations[.]"); *see id*. § 23.1-221(A)(2), (4), and (5) (authorizing SCHEV to refuse certification to a school that is noncompliant with its regulations or that fails to furnish requested information).

- A $2,500 application fee, and a surety instrument equal to total tuition collected;[9]

- A "school-plan report" that describes the applicant's institutional objectives, organization, and governance, academic programs, completion requirements, admission requirements, administration, faculty, student services, library resources, physical facilities, financial resources, and market analysis;[10]

- An explanation convincing SCHEV that the the applicant's courses are of the "quality, content, and length" to achieve their "stated objective," and an explanation convincing SCHEV that their class instructors hold an associate's degree in an area related to their area of instruction or "possess a minimum of two years" of experience in what SCHEV considers to be the "area of [their] teaching responsibility or a related area;"[11]

- "Evaluation" of their courses' "effectiveness" submitted on a regular basis, and an explanation convincing SCHEV that they have a "clearly defined process" for reviewing their curricula;[12]

- Either an annual audited, reviewed or compiled financial statement, or complicated accounting forms relating to their financial status;[13]

- Records of all of their students' applications for admission, records of each student's progress, transcripts for their students, and contracts to preserve them;[14]

- Assurance that students have access to a library that SCHEV determines to be "adequate and appropriate" for their programs;[15]

- Documents, brochures, catalogs, and policies detailing the applicant's:

    - history and development;

[9] *See* 8 Va. Admin. Code §§ 40-31-160(I), -180(B)(3), -260(D).

[10] *See* State Council of Higher Educ. for Va., Directions for Preparing School Plan Report, www.schev.edu/docs/default-source/institution-section/pope/new-school-certification-degree-granting/directions-for-preparing-school-plan-report517.pdf.

[11] *See* 8 Va. Admin. Code §§ 40-31-150(B) –(C).

[12] *See* 8 Va. Admin. Code § 40-31-160(G).

[13] *See* 8 Va. Admin. Code § 40-31-160(H)(1).

[14] *See* 8 Va. Admin. Code § 40-31-160(E).

[15] *See* 8 Va. Admin. Code § 40-31-160(M).

- mission statement and philosophy;
- purpose;
- statement showing that their program offerings fulfill their stated purpose;
- student attendance and absence policy;
- expected student conduct; controlling ownership;
- student enrollment and completion statistics;
- student employment statistics;
- owners' and managers' powers, duties, and responsibilities;
- admission requirements; students' "rights, privileges, and responsibilities;"
- formal process for expressing grievances;
- financial-aid opportunities;
- program content and length;
- probation, dismissal, and re-admittance policies;
- "career advising" services offered;
- "faculty accessibility" policy;
- and other information;[16] and

- Acquiescence to SCHEV's "random" audits of their programs.[17]

Additionally, SCHEV will not certify a school until it has conducted a physical examination of its facilities, meaning that applicants must comply with all the above requirements and lease or purchase teaching space before they even know whether they will receive SCHEV approval. *See* 8 Va. Admin. Code § 40-31-130(D).

These requirements do not apply to all teaching, only to particular speakers and particular subjects. For instance, they do not apply to avocational education—meaning education that is not intended to prepare a student for employment—such as yoga or karate classes. *See* Va. Code Ann. § 23.1-213 ("'Postsecondary school' does not include avocational and adult basic education programs."). Nor do they even apply to all schools that teach job skills. For example, schools that prepare students to teach avocational skills—such as schools that train yoga teachers—are

[16] *See* 8 Va. Admin. Code § 40-31-160(B), (C), (D), (F), (J); *see also* State Council of Higher Educ. for Va., School Catalog Checklist, www.schev.edu/docs/default-source/institution-section/pope/new-school-certification-degree-granting/school-catalog-checklist517.pdf.

[17] *See* 8 Va. Admin. Code § 40-31-200(A).

exempt from the law. The Vocational School Law also contains exemptions for theological education, nursing education, and several other types of courses. *See* Va. Code Ann. § 23.1-226(B); 8 Va. Admin. Code §§ 40-31-40 to -60. And, of course, according to SCHEV itself, courses preparing students for medical-licensure and legal-licensure exams need not be certified. Ex. A-3 at 1. Unfortunately for Plaintiffs, though, SCHEV thinks courses preparing students for project-management certification exams—or that teach other job skills—need to be.

III. BUT FOR VIRGINIA'S VOCATIONAL-SCHOOL REGULATIONS, PLAINTIFFS WOULD BE TEACHING STUDENTS OF THEIR CHOICE TODAY.

Plaintiffs learned firsthand how burdensome SCHEV's requirements are. Ex. A ¶ 22; Ex. B ¶ 11. Despite two expensive and time-consuming application attempts, they could not get SCHEV's permission to teach. And a third certification application would cost thousands of dollars, take dozens of more hours of work, and risk yet another rejection based on SCHEV's subjective criteria. Ex. A ¶ 22; Ex. B ¶ 11. Plaintiffs are thus no longer interested in obtaining SCHEV certification for the TMOG Learning Center. Ex. A ¶ 22; Ex. B ¶ 11.

Jon and Tracy still want to teach job skills to students solicited from the public, but are afraid to do so without SCHEV certification. Their reluctance is no surprise: Violations of Virginia's Vocational School Law can be Class 1 misdemeanors, which can entail up to one year in prison and up to $2,500 in fines. *See* Va. Code Ann. §§ 18.2-11(a), 23.1-228(A); 8 Va. Admin. Code § 40-31-230. Violations are also punishable by a civil fine of $1,000 per violation, up to a $25,000 maximum each year. *See* Va. Code Ann. § 23.1-228(B).

If Plaintiffs were not subject to Virginia's Vocational School Law, they would be teaching job skills to students solicited from the public right now. Ex. A ¶ 25; Ex. B ¶ 13. Both Jonathan and Tracy have the lesson plans, materials, and classroom space they need to teach what they want. Ex. A ¶ 25; Ex. B ¶ 13. Thus, if this Court enjoins SCHEV from enforcing the

Vocational School Law against Plaintiffs, Jonathan would, during this litigation, teach project-management classes to such students at the TMOG Learning Center, while Tracy would teach her professional sewing classes there.[18] Ex. A ¶ 27; Ex. B ¶ 14.

ARGUMENT

Under the First Amendment, people are allowed to talk about job skills (like almost anything else) without first getting the government's permission to do so. Yet SCHEV will not let Plaintiffs teach job skills to the students of their choice without SCHEV's permission. This permission is conditioned on satisfying SCHEV's onerous financial, curricular, and administrative burdens.

But these requirements cannot be squared with the First Amendment. They regulate teaching, a form of fully-protected speech. And they are based on the subject matter of Plaintiffs' speech and cannot be justified without reference to that speech. Thus, the requirements are content-based and subject to strict scrutiny. And they cannot satisfy strict (or even lesser) scrutiny—they burden far more speech than necessary for advancing any legitimate government interest. Thus, Virginia's vocational-school-licensing scheme is unconstitutional.

While these requirements violate the First Amendment as applied to teaching on any subject, SCHEV's application of these requirements to Plaintiffs' test-prep classes separately violates Virginia law. Under Virginia's Vocational School Law, these classes are exempt from SCHEV's certification requirements.

As discussed below, Plaintiffs satisfy the four requirements of a preliminary injunction for both their First Amendment claim and their statutory-exemption claim: (1) likelihood of

[18] If this Court rejected this motion on Plaintiffs' constitutional claim, but granted it on Plaintiffs' statutory claim, Jonathan would, during this litigation, teach test-prep classes to students solicited from the public. Ex. A ¶ 27; Ex. B ¶ 14.

success on the merits; (2) irreparable harm; (3) balance of equities; and (4) benefit to the public. *WV Ass'n of Club Owners & Fraternal Servs. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009). Plaintiffs therefore are entitled to a preliminary injunction allowing them to teach what they want, to whom they want, during this litigation. At minimum, Plaintiffs are entitled to a preliminary injunction on their statutory claim, which would stop SCHEV from prohibiting Plaintiffs' test-prep classes during this period. Finally, because there is no risk of any harm at all to SCHEV, Plaintiffs request that this Court either waive the bond requirement of Rule 65(c) or set bond in a nominal amount of one dollar.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR FIRST AMENDMENT CLAIM.

Virginia's vocational-school-licensing scheme triggers First Amendment scrutiny because it regulates teaching, a protected form of speech. Because the scheme cannot withstand First Amendment scrutiny, it is unconstitutional.

A. Because teaching is speech, SCHEV's certification requirements trigger First Amendment scrutiny.

Teaching is speech, so restrictions on teaching—including Virginia's restrictions on vocational schools—trigger First Amendment scrutiny. Both the Supreme Court and the Fourth Circuit have explained this point, Plaintiffs will address these precedents in turn.

The leading Supreme Court precedent is *Holder v. Humanitarian Law Project*, in which the Court held that teaching is speech. 561 U.S. 1, 28 (2010).[19] Though that case arose in a different factual context than the case at hand, its core holding is instructive. There, the Court

[19] *See also Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (declaring that academic freedom is "a special concern of the First Amendment"); *Barenblatt v. United States*, 360 U.S. 109, 112 (1959) ("[A]cademic teaching-freedom . . . [is within a] constitutionally protected domain."); *Sweezy v. New Hampshire*, 354 U.S. 234, 249–50 (1957) (plurality opinion) (holding that a "right to lecture" is a constitutionally protected freedom).

held that prohibitions on providing "training" to designated "foreign terrorist organizations"—such as the Kurdistan Workers' Party ("PKK") and Liberation Tigers of Tamil Eelam ("LTTE")—triggered First Amendment scrutiny. *Id*. at 8–9, 27. The law at issue in *Holder* defined "training" as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." *Id*. at 12–13. Because plaintiffs' conduct triggering coverage under this law—teaching—consisted of "communicating a message," the Supreme Court held that the law regulated "speech" and not "noncommunicative conduct." *Id*. at 28.[20]

The Fourth Circuit's precedents repeatedly confirm this point. For instance, in *Edwards v. City of Goldsboro*, the Fourth Circuit held that teaching a gun-safety course is speech. 178 F.3d 231, 245–49 (4th Cir. 1999). In that case, a police officer alleged that a police-department policy barring him from teaching a private gun-safety class in his free time violated his right to free speech. *Id*. at 237–40. This Circuit agreed, noting that his class—which consisted of "verbal as well as some written instructions accompanied by physical demonstrations"—constituted speech. *Id*. at 247.

Similarly, in *Goulart v. Meadows*, where parents challenged a restriction on their ability to use a community center for homeschooling purposes, this Circuit applied First Amendment scrutiny. 345 F.3d 239, 247–48 (4th Cir. 2003). This Circuit held that the parents' proposed uses—teaching a geography class and a fiber-arts class—involved the "transmission of knowledge or ideas by way of the spoken or written word" and was, consequently, speech.[21] *Id*.

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[20] In *Holder*, the Supreme Court ultimately upheld the challenged prohibition on training designated foreign terrorist organizations, but only after determining that the prohibitions survived strict scrutiny. 561 U.S. at 27–39.

[21] Based on the specific facts in *Goulart*, the challenged restrictions in that case survived First Amendment scrutiny, but First Amendment scrutiny was nonetheless applied. 345 F.3d at 246–60.

at 247.

Plaintiffs' vocational education is, just like every other type of teaching, a form of speech. To teach their classes at the TMOG Learning Center, Jonathan and Tracy must communicate messages to their students. Ex. A ¶¶ 6– 8; Ex. B ¶¶ 7–9. Moreover, their speech is analogous to the teaching at issue in *Holder*, *Edwards*, and *Goulart*. Like the plaintiffs in *Holder*, they seek to impart specific skills—the purpose of Jonathan's vocational classes is to teach students how to be project managers and take PMI exams, and the purpose of Tracy's vocational classes is to teach students how to sew. Ex. A ¶¶ 6– 8; Ex. B ¶¶ 7–9. Like the plaintiffs in *Goulart*, they aim to transmit knowledge through the spoken or written word. Ex. A ¶ 6; Ex. B ¶ 9. And, like the plaintiff in *Edwards*, they use verbal instructions or physical demonstrations to communicate messages.[22] Ex. A ¶ 6; Ex. B ¶ 9.

As in all of these cases, Plaintiffs' speech is also the "conduct" triggering coverage under Virginia's Vocational School Law. Jonathan and Tracy can legally work as a project manager and sewer, respectively, for clients who pay them directly. Ex. A ¶ 9; Ex. B ¶ 6. What Virginia's Vocational School Law prohibits them from doing is taking the additional step of *talking* to clients drawn from the public about *how* to be a project manager or sew.[23] For these reasons, it regulates speech and is, thus, subject to First Amendment scrutiny.

B. SCHEV's certification requirements fail First Amendment scrutiny.

As set forth below, Virginia's vocational-school-licensing regime cannot withstand First Amendment scrutiny. First, strict scrutiny applies to the scheme because it regulates speech

[22] Just as a gun safety instructor's non-verbal physical demonstrations constitute speech, so too DO Tracy's practical demonstrations. The goal of this practical instruction would be to communicate messages on how to sew. Ex. B ¶ 9.

[23] Of course, at set forth in more detail in Section II, Plaintiffs' PMI-test-prep classes are exempt from Virginia's Vocational School Law, even if their other vocational education isn't.

based on its content—some, but not all, vocational instruction. SCHEV cannot hope to overcome strict (or even lesser) scrutiny, because the government has no compelling or sufficiently important interest in prohibiting adults from learning from whomever they wish. And even if the Commonwealth had a compelling interest in regulating this speech, the enormous burdens that Virginia imposes on Plaintiff's speech are not narrowly tailored to serving that interest.

1. *SCHEV's certification requirements are subject to strict scrutiny because they are content-based.*

Strict scrutiny is the default setting for free-speech cases, and—with only a few well-established exceptions such as true threats and defamation—it applies to all content-based restrictions on speech. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, No. 16-1140, 2018 WL 3116336, at *7 (S. Ct. June 26, 2018). As relevant here, speech restrictions can be content-based in two different ways. First, as the Supreme Court recently reaffirmed in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), a law is content-based if it, on its face, "applies to particular speech because of the topic discussed." *Id*. at 2227. "[S]peech regulation targeted at specific subject matter is content-based even if it does not discriminate among viewpoints within that subject matter." *Id*. at 2230. Second, even if a law appears content-neutral on its face, the law is still content-based if the government cannot justify it without reference to the content of speech it regulates. *Id*. at 2227. Virginia's Vocational School Law triggers strict scrutiny under either standard.

First, the challenged requirements—like those at issue in *Reed*—discriminate based on the topic discussed, rendering them content-based on their face. In *Reed*, the Supreme Court held that a sign code that subjected "temporary directional signs," "political signs," and "ideological signs" to different restrictions was content-based on its face because it discriminated between different topics:

> If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government. More to the point, the Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. On its face, the Sign Code is a content-based regulation of speech.

135 S. Ct. at 2227. When enforcing restrictions like these, officials "examine the content of the message that is conveyed" to determine its legality. *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987); *see also Reed*, 135 S. Ct. at 2231 (noting that, because the challenged sign code required officials to determine whether a sign was "political" or "ideological," it was "obvious[ly]" content-based).

Just like the distinctions drawn in *Reed*, the SCHEV-certification requirement in Virginia's postsecondary-education statute discriminates based on topics discussed. It applies to schools providing vocational education, but not avocational education. *See* Va. Code Ann. §§ 23.1-213, -217(A). It also exempts certain vocational education, like religious education, nursing education, qualified test prep, and training people to be avocational teachers. *Id.* § 23.1-226. By licensing schools that speak on some topics—but not others—Virginia has singled out that speech for special burdens. *See, e.g.*, *Cahaly v. LaRosa*, 796 F.3d 399, 405 (4th Cir. 2015) (applying *Reed* to find anti-robocall statute content-based because it "applie[d] to calls with a consumer or political message" but not those "made for any other purpose"). Here, if someone is subject to SCHEV's requirements, it is because of the content of his or her speech, and thus strict scrutiny is appropriate.

Second, SCHEV cannot justify the challenged restrictions without reference to the speech they regulate. SCHEV does not regulate vocational schools because it believes their speech is too loud or that it occurs at inappropriate times or places. SCHEV regulates vocational education to

ensure that the content of that education meets SCHEV's standards. This is evident from the way SCHEV examines the content of schools' speech before issuing them licenses to speak. Before obtaining a license to speak, prospective vocational schools must apply to SCHEV, convincing the agency that their courses are of the "quality, content, and length" to achieve their "stated objective," along with proof of their teachers' qualifications. 8 Va. Admin. Code § 40-31-150(B)–(C). In fact, SCHEV-certified vocational schools must submit "evaluation[s]" of their courses' "effectiveness" on a regular basis, and an explanation convincing SCHEV that they have an adequate process for reviewing their curricula. *Id*. § 40-31-160(G). But ensuring that speech or speakers are "good enough" to satisfy the government is a quintessentially content-based concern, and thus SCHEV's regulations trigger strict scrutiny under this test as well.

2. *SCHEV cannot satisfy strict (or lesser) scrutiny*.

Having shown that SCHEV's restrictions on Plaintiffs' speech are content-based, the only remaining question is whether those restrictions survive strict scrutiny. As explained below, they cannot satisfy strict scrutiny or even lesser scrutiny.

Strict scrutiny is a "demanding standard" under which restrictions on speech are presumptively invalid. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011). It is the government's burden to prove that its restrictions are justified by a compelling government interest and are narrowly drawn to serve that interest. *Id*. Those infrequent cases where the government meets this burden involve weighty issues such as preventing terrorism or preserving the integrity of the judicial system. *See, e.g.*, *Holder*, 561 U.S. at 28; *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1662 (2015). This is not such a case. "It is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000). Here, SCHEV can never meet this standard.

Even if lesser scrutiny applied, however, Plaintiffs would still prevail on their First Amendment claim. After all, even if the challenged restrictions on Plaintiffs' speech were content-neutral they would still be subject to intermediate scrutiny. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014); *Reynolds v. Middleton*, 779 F.3d 222, 228 (4th Cir. 2015). While less demanding than strict scrutiny, intermediate scrutiny is still a rigorous form of judicial review that places the burden squarely on the government. Under this standard, government must prove that its speech restrictions are "narrowly tailored to serve a significant governmental interest," *McCullen*, 134 S. Ct. at 2534, by presenting "actual evidence." *Reynolds*, 779 F.3d at 229. To do so, "government must demonstrate that alternative measures that burden substantially less speech" are insufficient. *McCullen*, 134 S. Ct. at 2540. SCHEV cannot meet this burden either.

First, Virginia's law is not supported by any compelling or significant government interest. SCHEV may try to justify the challenged restrictions by asserting interests in regulating the quality of vocational education in Virginia, but policing the quality of teachers' speech is not even a legitimate government interest, much less a significant or compelling one. In the Supreme Court's extensive precedents discussing freedom of speech, it has never suggested that the government may require a permit to speak to improve (by its own estimation) the quality of the speech in question. *See, e.g., Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 164–69 (2002) (striking down law forbidding any door-to-door advocacy without first obtaining a permit); *Thomas v. Collins*, 323 U.S. 516, 539–40 (1945) (invalidating permit requirement for union recruitment speech); *see also Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 628–32 (1980) (summarizing cases).

In general, the government cannot regulate speech to improve the quality of that speech. *See, e.g., Davis v. Fed. Election Comm'n*, 554 U.S. 724, 743 n.8 (2008) ("[I]t would be dangerous for the Government to regulate core political speech for the asserted purpose of improving that speech."). After all, if SCHEV could license Plaintiffs' vocational education to improve its quality, then that same justification would allow the government to impose licensing requirements on authors writing vocational-education books, journalists penning vocational-education articles, and documentarians creating vocational-education films. That approach would gut the First Amendment.

Alternatively, SCHEV may argue that its certification requirements are necessary to ensure schools' financial viability and protect paying students from fraud, but this too is unconvincing. That is because, even if financial protection is a significant government interest, SCHEV could use less-restrictive alternatives to further this interest. For instance, Virginia could regulate vocational schools through its general anti-fraud statute. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (1988) (holding that North Carolina's professional-fundraising requirements were not narrowly tailored to prevent fraud where "North Carolina ha[d] an antifraud law" that law enforcement officers could enforce). This statute protects customers from bad business practices, including misrepresentations about one's services or refund policies. *See* Va. Code Ann. § 59.1-200. Similarly, Virginia could protect students from fraud through the attorney general's consumer-protection website, where consumers can complain about poor business practices and investigate businesses' reputations.[24] Or Virginia could counter the risk of fraud through speech of its own, such as by providing information to prospective students about what to look for in legitimate vocational education classes. And, unlike SCHEV's certification

[24] *See* Office of the Attorney Gen., Consumer Prot., https://www.oag.state.va.us/consumer-protection.

requirements, these anti-fraud protections do not prevent Plaintiffs, and other prospective vocational schools, from speaking. Given the availability of alternatives that restrict less speech than SCHEV's requirements do, these requirements are not narrowly tailored.

In fact, even if the alternatives above were somehow inadequate—which is SCHEV's burden to prove—SCHEV's requirements would still not be narrowly tailored. To protect students' finances, SCHEV could simply require that vocational schools each post a bond. But, in addition to its surety requirement, SCHEV imposes many other requirements on schools. It requires prospective schools to pay $2,500 application fees, prove the adequacy of their libraries, courses, and instructors, publish lengthy school-plan reports, and much more. By just requiring a bond instead, SCHEV could achieve any legitimate consumer protection interests without burdening the speech of Plaintiffs—and other prospective teachers—nearly as much. As a result, the challenged restrictions are not narrowly tailored and thus fail even intermediate scrutiny.

In short, SCHEV cannot satisfy their burden under any potentially applicable level of scrutiny, and Plaintiffs are thus likely to prevail on the merits of their First Amendment claim.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR STATUTORY CLAIM.

While Virginia's requirements for vocational schools violate the First Amendment, SCHEV's interpretation of those requirements separately violates Virginia statutes as applied to Plaintiffs' classes preparing students for PMI-certification tests. That is because, under Virginia's Vocational School Law, "[t]utorial instruction delivered and designed to . . . prepare an individual for an examination for professional practice or higher education" is exempt from these requirements. Va. Code Ann. § 23.1-226(B)(9). Since certified project management constitutes "professional practice," Plaintiffs' test-prep classes qualify for this exception. Unfortunately, SCHEV has told Plaintiffs that "professional practice" only includes state-

licensed professions, and that, thus, preparation for private-certification exams is non-exempt under the Vocational School Law. As set forth below, SCHEV is wrong.

In interpreting unambiguous language from Virginia's postsecondary-education statute, such as "professional practice," this Court should consider the "plain meaning of the words used in the statute." *Farhoumand v. Commonwealth*, 764 S.E.2d 95, 98 (Va. 2014). That is because, even where terms are undefined by the statute, the legislature's intent is "usually self-evident from the statutory language." *Id*. (quoting *Rutter v. Oakwood Living Ctrs. of Va., Inc.*, 710 S.E.2d 460, 462 (Va. 2011)). And dictionaries are the best place to find a term's plain meaning. *See, e.g.*, *Farhoumand*, 764 S.E.2d at 98 (consulting dictionaries to determine the plain meaning of "expose").

As several dictionaries show, Plaintiffs' interpretation of "professional" is correct, and SCHEV's is wrong. For instance, the American Heritage Dictionary defines professional as "of, relating to, engaged in, or suitable for a profession," and defines profession as "[a]n occupation . . . that requires considerable training and specialized study." *Profession*, American Heritage Dictionary (5th ed. 2018). Similarly, Black's Law Dictionary defines profession as "[a] vocation requiring advanced education and training; *esp.*, one of the three traditional learned professions – law, medicine, and the *ministry*." *Profession*, Black's Law Dictionary (10th ed. 2014) (emphasis added).[25]

Under this definition, PMI-certified project managers are, as Plaintiffs argue, professionals. Like other professionals, they must undergo significant training. For example, a college-educated project manager must complete additional project-management training,

[25] That Black's Law Dictionary identifies the term "profession" as applying *especially* to the ministry is significant, for no one would assume that ministers are licensed by the government even though they are universally acknowledged to be members of a traditional profession.

accumulate 4,500 hours of on-the-job experience, and study to pass a 200-question test. Project Mangement Institute, *Project Management Professional (PMP),* https://www.pmi.org/certifications/types/project-management-pmp (last visited Jul. 20, 2018). And if he succeeds, he earns the title Project Management Professional. Thus, Plaintiffs' PMI test-prep classes prepare students for professional-practice examinations.[26]

Because the common understanding of the word "professional" is not limited to people licensed by the government, this Court need go no further to determine that Plaintiffs are likely to prevail on the merits. But if there were any doubt, it is definitely resolved by the canon of constitutional avoidance. Under that canon, if a law is subject to two interpretations, one of which raises significant constitutional problems and the other of which does not, courts *must* adopt the interpretation that avoids the constitutional problems. *Commonwealth v. Doe*, 682 S.E.2d 906, 908 (Va. 2009) ("[W]hen a statute can be given two different interpretations, one that is within the legislative power and the other without, we are required to adopt the interpretation that conforms to the Constitution."). These concerns are particularly acute when a federal court reviews a state statute, as comity between the federal and state government requires that federal courts assume that states wish their statutes to be interpreted as being consistent with the Constitution. *Planned Parenthood of Blue Ridge v. Camblos*, 155 F.3d 352, 383 (4th Cir. 1998) (holding that "federal courts, as a matter of federalism and comity" should interpret state statutes to avoid conflicts with the Constitution "when a reasonable construction exists which would eliminate the constitutional infirmity").

[26] Although Virginia courts seem not to have addressed the issue, case law from other jurisdictions has rejected SCHEV's argument that "professional[s]" must be state-licensed. *See, e.g., E3 Biofuels, LLC v. Biothane, LLC*, 781 F.3d 972, 976 (8th Cir. 2015) (holding that, for purposes of Nebraska's two-year statute of limitations for professional negligence, unlicensed engineers were "professionals").

The canon of constitutional avoidance applies here straightforwardly. As discussed above, there are more than grave constitutional doubts about Virginia's content-based regulation of vocational education; Plaintiffs have shown that the laws are actually unconstitutional. Interpreting Virginia law to inject another content-based consideration—whether one is preparing students for a state-administered licensure exam versus a privately administered certification exam—only heightens those concerns. But this Court can avoid these concerns completely simply by interpreting "professional" according to its common meaning. Under that common meaning, PMI-certified project managers are in fact "professionals," and Plaintiffs are thus likely to succeed on the merits of their statutory claim.

III. PLAINTIFFS SATISFY THE REMAINING ELEMENTS FOR A PRELIMINARY INJUNCTION.

For both of Plaintiffs' claims, the remaining three elements of the preliminary-injunction analysis are also easily met: (1) the suppression of speech is always an irreparable harm; (2) the balance of equities favors Plaintiffs because SCHEV will suffer no harm, financial or otherwise, if Plaintiffs are allowed to speak during this case; and (3) the public interest favors Plaintiffs because the public has no interest in the suppression of their speech.

As to the irreparable-harm requirement, it is well established in this Circuit that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). Thus, this Circuit has held that, in the context of an alleged violation of First Amendment rights, a plaintiff's claimed irreparable harm is "inseparably linked" to the likelihood of success on the merits of that plaintiff's First Amendment claim. *Musgrave*, 553 F.3d at 298. Moreover, "the loss of valuable business opportunities" is also an irreparable injury. *Giovani Carandola, Ltd. v. Bason*, 303 F.3d

507, 521 (4th Cir. 2002). Here, Plaintiffs have shown that they are likely to prevail on their First Amendment claim. Plaintiffs also stand to lose valuable business opportunities during this litigation unless SCHEV is enjoined. Ex. A ¶¶ 24, 26; Ex. B ¶ 13. At the same time, Plaintiffs are paying rent on classroom space that SCHEV will not allow them to use for its intended purpose. Ex. A ¶ 15; Ex. B ¶ 13. Thus, Plaintiffs have satisfied the requirement of establishing irreparable harm.

The balance of equities also tips in Plaintiffs' favor. SCHEV has no legitimate interest in the continued enforcement of an unconstitutional law. *See Legend Night Club v. Miller*, 637 F.3d 291, 302-303 (4th Cir. 2011) ("[T]he State of Maryland is in no way harmed by issuance of an injunction that prevents the state from enforcing unconstitutional restrictions."). Even if the Commonwealth had an interest in the continued enforcement of the law, the Supreme Court has made clear that this Court must "give the benefit of any doubt to protecting rather than stifling speech." *Fed. Election Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 469 (2007); *see also id.* at 474 ("Where the First Amendment is implicated, the tie goes to the speaker, not the censor.").

As for Plaintiffs' statutory claim, the balance of equities also weighs in Plaintiffs' favor. That is because there is no risk of financial loss to SCHEV. An injunction will not compel them to take any action or obligate any resources. Thus, unlike the irreparable harm Plaintiffs will continue to suffer if this Court does not issue an injunction, SCHEV stands to suffer no harm at all.

Finally, an injunction will serve the public interest because "it is always in the public interest to protect First Amendment liberties." *Legend Night Club*, 637 F.3d at 303 (quoting *Joelner v. Vill. of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004)). Like SCHEV, "the public,

when the state is a party asserting harm, has no interest in enforcing an unconstitutional law." *Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010). An injunction on Plaintiffs' statutory claim would also further the public interest given that the public generally benefits from a marketplace of ideas that is "uninhibited, robust, and wide-open." *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). If this Court enjoins SCHEV, Plaintiffs could speak in this marketplace and, as a result, benefit the public.

IV. THIS COURT SHOULD SET A BOND AT EITHER ZERO DOLLARS OR A NOMINAL AMOUNT OF ONE DOLLAR.

Under Federal Rule of Civil Procedure 65(c), this Court may issue a preliminary injunction only if the applicant provides a bond in an amount determined by the Court. This Court, however, may set the bond in whatever amount it finds proper, and may even set the bond at zero dollars if there is no risk of financial harm to the enjoined party. *See Hoechst Diafoil Co. v. Nan Ya Plastics Corp*., 174 F.3d 411, 421 (4th Cir. 1999). Here there is no danger SCHEV will suffer any financial damage or incur any unrecoverable costs if Plaintiffs are permitted to communicate freely during this litigation. For these reasons, Plaintiffs request that, if their motion for preliminary injunction is granted, this Court set the bond at either zero dollars or in the nominal amount of one dollar.

CONCLUSION

For all these reasons, the Court should grant Plaintiffs' motion for preliminary injunction and enjoin the enforcement of Virginia's Vocational School Law against Plaintiffs during this litigation. At minimum, this Court should grant Plaintiffs' motion on their statutory claim, which would allow them to teach PMI test-prep classes while this litigation is pending. Plaintiffs also request that the Court waive the bond requirement under Federal Rule of Civil Procedure 65(c).

Dated this 23rd day of July, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of July 2018, a copy of these PLAINTIFFS' **MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** was sent to a third-party process server for service to the following Defendants:

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