

NO. 26-1442

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

LUCINDA LC, on behalf of themselves and all others similarly situated;
JUNE WHEATLEY,

Plaintiffs-Appellants,

v.

JAY SOM, in his official capacity as Member of the Virginia Fair Housing Board; KEMPER FUNKHOUSER, in his official capacity as Member of the Virginia Real Estate Board; CAVELLE MOLLINEAUX, in his official capacity as Member of the Virginia Real Estate Board; JEREMY DALPIAZ, in his official capacity as Member of the Virginia Real Estate Board; AEKTA CHAWLA, in her official capacity as Member of the Virginia Real Estate Board; RENE FONSECA, in his official capacity as Member of the Virginia Real Estate Board; PIERI BURTON; in his official capacity as Member of the Virginia Real Estate Board; BERNICE TRAVERS, in her official capacity as Member of the Virginia Real Estate Board; RAJESH PATEL, in his official capacity as Member of the Virginia Real Estate Board; KIT HALE, in his official capacity as Member of the Virginia Real Estate Board; BARRY MOORE, in his official capacity as Member of the Virginia Fair Housing Board; BRIAN REAGAN, in his official capacity as Member of the Virginia Fair Housing Board; MORTON MARKS III, in his official capacity as Member of the Virginia Fair Housing Board; AMANDA BUYALOS, in her official capacity as Member of the Virginia Fair Housing Board; ANGELA WEST, in her official capacity as Member of the Virginia Fair Housing Board; STANLEY REID, in his official capacity as Member of the Virginia Fair Housing Board; SHION FENTY, in her official capacity as Member of the Virginia Fair Housing Board; STUART GILCHRIST, in his

official capacity as Member of the Virginia Fair Housing Board; ANGELO PHILLOS, in his official capacity as Member of the Virginia Fair Housing Board; ANIKA COLEMAN, in her official capacity as Executive Director of both the Virginia Fair Housing Board (VFHB) and the Virginia Real Estate Board (VREB); STEVEN RIVERA, in his official capacity as Member of the Virginia Fair Housing Board; JOHN SCOTT in his official capacity as Member of the Virginia Fair Housing Board; JAY JONES, in his official capacity as Attorney General of Virginia.

Defendants-Appellees.

On appeal from the United States District Court for the Eastern District of Virginia at Alexandria. Michael S. Nachmanoff, District Judge. (1:26-cv-252-MSN)

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Disclosure Statement

Plaintiff Lucinda LC is an LLC formed under Virginia law. Plaintiff June Wheatley is an individual. As previously disclosed to this Court, no party is a public held corporation or entity, no party has parent corporations, no party has more than 10% of its stock owned by a publicly held corporation or entity, no publicly held corporation or entity has a direct financial interest in the outcome of the litigation, no party is a trade association, this case does not arise out of bankruptcy, and this is not a criminal case in which there was an organizational victim.

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Jurisdictional Statement

The district court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343 because Plaintiffs Lucinda LC and June Wheatley (collectively “Lucinda” or “Plaintiffs”) bring constitutional claims against several Virginia officials (collectively “Defendants”), seeking an injunction against enforcement of the “source-of-funds” provision of the Virginia Fair Housing Law, Va. Code §§ 36-96.1:1, 36-96.3. JA63–80.¹

Lucinda moved for a preliminary injunction (Dkt. 24) and the district court denied that preliminary injunction on April 10, 2026. JA30–38. Lucinda timely appealed the order on April 13, 2026. JA98; Fed. R. App. P. 4(a)(1)(A). This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1) from the “interlocutory order[]...refusing [an] injunction[].”

The district court concluded that Plaintiffs lacked standing and ripeness. JA35–37. For the reasons discussed in Section II, *infra*, Plaintiffs have Article III standing to proceed, and their claims are ripe.

Statement of the Issues

1. The Supreme Court has “repeatedly held that searches conducted outside the judicial process, without prior approval by a judge or a magistrate judge, are *per se* unreasonable subject only to a few specifically established and

¹ “JA” refers to the Joint Appendix, and “Dkt.” to the docket below, No. 26-cv-252 (E.D. Va.).

well-delineated exceptions.” *City of Los Angeles v. Patel*, 576 U.S. 409, 419 (2015) (simplified). One notable exception is if the property owner provides voluntary consent to the warrantless search. *Id.* at 421–22. Another is if the search is administrative in nature and “afford[s]” “the subject of the search” “an opportunity to obtain precompliance review before a neutral decisionmaker.” *Id.* at 420. Statutes that authorize warrantless searches without satisfying an exception are “facially unconstitutional.” *Id.* at 412, 419.

The federal low-income housing assistance program, commonly known as Section 8, authorizes a wide swath of invasive governmental searches of landlords’ property, computers, and records without a warrant or an opportunity for precompliance review. 42 U.S.C. § 1437f[o][8]; JA65–66. Because “Section 8 makes landlord participation voluntary,” (JA31) such searches comport with the Fourth Amendment and its consent exception. But in 2020, Virginia amended its own Fair Housing Law to prohibit landlords from discriminating based on the “source of funds” that tenants use for rent payment, expressly including governmental subsidies like Section 8. By making Section 8 participation mandatory, that amendment compels Plaintiffs to choose between retaining Fourth Amendment rights and violating state law. Plaintiffs seek to enjoin enforcement of the source-of-funds non-discrimination provision as it pertains to non-acceptance of Section 8 vouchers. Dkts. 24, 31.

Did the district court err in concluding that Plaintiffs failed to demonstrate a likelihood of success on the merits of their Fourth Amendment claims?

2. When a plaintiff faces a credible threat of enforcement of a law infringing her constitutional rights, she has standing to seek an injunction without “wait[ing] for the government to take coercive action against [her].” *First Choice Women’s Research Ctrs., Inc. v. Davenport*, 146 S. Ct. 1114, 1122 (2026). “[T]he period between the threat of enforcement and the onset of formal enforcement proceedings” is a particularly “appropriate time for a litigant to bring its [constitutional] challenges in federal court.” *Telco Commc’ns, Inc. v. Carbaugh*, 885 F.2d 1225, 1229 (4th Cir. 1989).

Ripeness of preenforcement challenges often “boil[s] down” to the same issue. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 n.5 (2014) (“*S.B.A. List*”). Challenges are ripe if they raise “purely legal” claims and protect the plaintiff from being “force[d]...to choose between [forgoing constitutional rights] on the one hand or [exercising those rights] and risking costly [government enforcement action] on the other.” *Id.* at 167–68.

Here, Virginia’s source-of-funds non-discrimination provision forces Plaintiffs to choose between surrendering their Fourth Amendment rights in a contract with a Public Housing Authority and violating state law, risking professional and monetary penalties. Crystalizing that injury and compounding

the credible threat of enforcement, a private organization has filed a source-of-funds complaint against Plaintiffs with the Virginia Fair Housing Office.

Did the district court err in determining that Plaintiffs lacked standing and ripeness to bring an as-applied Fourth Amendment challenge because they had not yet been subjected to a search?

3. Federal courts have a “virtually unflagging” obligation to hear and decide cases within their jurisdiction. *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013). “[O]nly exceptional circumstances justify a federal court’s refusal to decide a case in deference to the States.” *Id.* at 70. Among these categories of *Younger* abstention include ongoing “state civil proceedings that are akin to criminal prosecutions.” *Id.* at 72. This category comprises “cases ‘brought by State in its sovereign capacity’ following an ‘investigation’ and upon ‘the filing of a formal complaint or charges.’” *Jonathan R. v. Justice*, 41 F.4th 316, 329 (4th Cir. 2022) (quoting *Sprint*, 571 U.S. at 79–80)).

Here, the district court acknowledged that Virginia did not initiate a complaint, bring charges, complete an investigation, or make a reasonable cause determination, and that conciliation was ongoing between the Complainant and Plaintiffs. JA32–34. And it explicitly concluded that there “is not currently an ongoing state judicial proceeding.” JA34. Still, it held that *Younger* abstention was appropriate based on a balancing of the other *Middlesex* factors including the state’s important interest in combatting

housing discrimination and the Plaintiffs' ability to raise their constitutional claims before the boards and in subsequent state proceedings. JA34.

Did the district court err in applying *Younger* abstention?

Statement of the Case

A. Virginia prohibits housing discrimination based on source of funds.

In 2020, Virginia enacted the “source-of-funds” provision of the Virginia Fair Housing Law (VFHL). Va. Code § 36-96.3. The provision bars discrimination based on the source of funds provided as payment. *Id.* “Source of funds” is defined as “any assistance, benefit, or subsidy ... administered by a governmental [] entity.” Va. Code § 36-96.1:1. Making federal Section 8 housing vouchers a protected classification was “the primary impetus for the bill.” Va. Real Estate Bd., GUIDANCE DOCUMENT: HOUSING DISCRIMINATION ON THE BASIS OF SOURCE OF FUNDS 2 (2021).²

Plaintiff Lucinda LC is a Virginia manager-managed LLC, with Plaintiff June Wheatley as the sole manager of the company. JA67. Wheatley is a licensed real estate salesperson with “exclusive charge and control” of Lucinda, which owns and administers a nine-unit rental property located at 2012 6th

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Available

at

https://townhall.virginia.gov/L/GetFile.cfm?File=C:\TownHall\docroot\GuidanceDocs\222\GDoc_DPOR_6978_v1.pdf [<https://perma.cc/2N6J-MK4L>].

Street South, Arlington, Virginia 22204 for Marital Trust, of which Wheatley's father is the trustee. JA67. Plaintiffs fall under the scope of the VFHL. JA70.

Plaintiffs have long made the property available to a variety of tenants, including those with government funding sources, but they do not accept Section 8 vouchers due to concerns over waiving their legal rights and associated compliance costs. JA66, JA70–71. Section 8 is a federally-funded, locally-administered housing program which funds housing in the private market for primarily low-income families. JA64. The Arlington Public Housing Authority (PHA) administers the Arlington Section 8 program, known as the Arlington “Housing Choice Voucher” program. JA69.

B. Section 8 requires landlords to waive Fourth Amendment rights.

By federal regulation, any landlord that accepts Section 8 vouchers must sign a Housing Assistance Payment (HAP) contract with the local Public Housing Authority, matching the form (Form 52641) dictated by the federal Department of Housing and Urban Development (HUD). JA65–66, JA69; 24 C.F.R. § 982.451 (“The HAP contract must be in the form required by HUD.”).

Plaintiffs decline to accept Section 8 vouchers because the HAP contract imposes burdens, including requiring them to waive Fourth Amendment rights and provide the Arlington Public Housing Authority warrantless access to their property, equipment, and records. JA64–66, JA70–71. For example, the current HUD Form 52641 requires that:

- “The owner must provide any information pertinent to the HAP contract that the PHA or HUD may reasonably require.” HUD Form 52641, Part B, ¶ 11(a); and
- “The PHA, HUD and the Comptroller General of the United States shall have full and free access to the contract unit and the premises, and to all accounts and other records of the owner that are relevant to the HAP contract, including the right to examine or audit the records and to make copies.” HUD Form 52641, Part B, ¶ 11(b);
- “The owner must grant such access to computerized or other electronic records, and to any computers, equipment or facilities containing such records, and must provide any information or assistance needed to access the records.” HUD Form 52641, Part B, ¶ 11(c);
- “The PHA may inspect the contract unit and premises at such times as the PHA determines necessary, to ensure that the unit is in accordance with the HQS [housing quality standards].” HUD Form 52641, Part B, ¶ 3(e);
- “The owner must give the PHA any information requested by the PHA on the rents charged by the owner for other units in the premises or elsewhere.” HUD Form 52641, Part B, ¶ 6(d); and
- “The owner must cooperate with the PHA and HUD in conducting equal opportunity compliance reviews and complaint investigations

in connection with the HAP contract.” HUD Form 52641, Part B, ¶9(b).

JA65–66. The HAP contract is but one source of warrantless searches inherent in the Section 8 program. Beyond the contract, the governing federal statutes and regulations permit and even mandate warrantless searches of the unit, equipment that services the unit, and the common areas of the building prior to the tenancy and not less than biennially during the term of the tenancy. *See* 42 USC § 1437f(o)(8)(A),(D); 24 CFR §982.405. These searches help determine whether the potential Section 8 unit meets applicable housing quality standards. *See* 42 U.S.C. §1437f(o)(8)(B); 24 CFR §5.703(a).

Plaintiffs have no intention to accept Section 8 vouchers or to sign a HAP contract with the Arlington Public Housing Authority. JA70–71. Plaintiffs’ choice to decline Section 8 vouchers was previously a non-issue: under federal law, the Section 8 program is voluntary; landlords need not participate should they not wish to. JA31, JA64–65. But after the 2020 VFHL amendment barred source-of-funds discrimination, Virginia landlords cannot decline Section 8 vouchers without violating the Commonwealth’s law. Va. Code § 36-96.3.

C. Third-party tester files private complaint with the Fair Housing Office

On June 10, 2025, a “tester” with the Housing Rights Initiative organization responded to an advertisement of Lucinda’s property, contacting Wheatley by phone. JA66, JA69. Presenting as prospective renters, testers

contact available properties to see if their management/rental teams will accept a renter based on certain legally protected characteristics. JA69. Without disclosing that he had no desire to rent the property, the tester asked if Plaintiffs would accept Section 8 vouchers as rental payment. JA69–70. While Lucinda’s rental properties are otherwise eligible for the Section 8 program, JA70, Wheatley politely noted that Plaintiffs did not accept Section 8 vouchers as payment. JA69–70.

Two months later, the organization filed a complaint with the Fair Housing Office, the administrative arm for the Fair Housing Board and the Real Estate Board (“Boards”). JA70, JA91. The complaint alleged source-of-funds discrimination by declining to rent to a Section 8 tenant. *Id.* The day after the Office accepted the complaint, a state investigator informed Lucinda of the complaint and that they may provide a response. JA71, JA91. The investigator also invited both parties to engage in conciliation, an alternative dispute resolution, to try and settle the complaint themselves. JA71; Va. Code § 36-96.13. Lucinda responded to the complaint and denied the allegations of discrimination. JA71.

Both parties participated in voluntary conciliation. JA71; Va. Code § 36-96.13. As a result of the third-party complaint, Plaintiffs face state investigation. JA33, JA91–92; Va. Code § 36-96.10. They also remain at risk of a reasonable cause determination as to the allegations and possible future charges issued by the Fair Housing Board for general complaints and the Real

Estate Board for real estate-license related complaints pertaining to Wheatley. Va. Code §§ 36-96.8; 36-96.14; 36-96.20. Plaintiffs face a possible future civil action brought by the Attorney General (Va. Code § 36-96.16-17), and the threat of a private suit by the complainant (Va. Code § 36-96.18) if the VFHL's source-of-funds provision is applied to Section 8 vouchers. JA71.

Under the VFHL, the Boards can “initiate and receive complaints, conduct investigations ... attempt resolution of complaints by conference and conciliation, and, upon failure of such efforts, issue a charge and refer it to the Attorney General for action.” Va. Code § 36-96.8. The Real Estate Board has additional authority to initiate an administrative hearing upon a reasonable cause determination to decide whether to “revoke, suspend, or fail to renew the license.” *Id.* § 36-96.20.

According to Defendants, the Real Estate Board was assigned jurisdiction over investigating the third party's complaint. JA91. The Board has not made a reasonable cause determination. JA33, JA92. Nor has it issued a charge, filed a complaint, or initiated an administrative hearing. JA33, JA92. Further conciliation remains available during “the period beginning with the filing of the complaint and ending with the filing of a charge or a dismissal by the Board.” Va. Code § 36-96.13.

D. Plaintiffs sue to enjoin enforcement of the statute and the district court declines to grant a preliminary injunction.

On January 27, 2026, Plaintiffs filed this litigation challenging the constitutionality of the VFHL's source-of-funds provision. Va. Code §§ 36-96.3. JA63–80.

On April 10, 2026, the district court held a hearing on Plaintiffs' motions for preliminary injunction and class certification. JA2–39. From the bench, the court denied Plaintiffs' motion for preliminary injunction and reserved ruling on class certification. JA38. First, the court determined that *Younger* abstention applied. JA33–34. The court held that the administrative action with the Real Estate Board was quasi-criminal because of “mandatory ongoing investigations prosecuted by state officials with an eye to sanction plaintiffs that may culminate in the filing of a formal complaint or charges...” JA33–34. The court then turned to the *Middlesex* factors and held there was “not currently an ongoing state judicial proceeding,” but that the second and third factors were met. JA34.

Next, the court held that Plaintiffs failed to establish sufficient likelihood of success on the merits because VFHL's “source of income [sic] provisions do not appear to be in conflict with the Fourth Amendment.” JA34. Additionally, it held that Lucinda could not raise a facial challenge to the source-of-funds provision. JA35. Considering Plaintiffs' as-applied challenge, the court determined that Lucinda lacked standing because they had not yet been

subject to a search. JA35–36. The court also concluded that the as-applied claims were unripe for review. JA36–37.

Summary of Argument

The Virginia Fair Housing Law mandates landlord participation in the Section 8 program by proscribing discrimination based on source of funds. Section 8, in turn, requires participating landlords to waive Fourth Amendment rights and authorize searches of their property, records, and equipment. Thus, the VFHL compels the Fourth Amendment waiver. The Supreme Court has long held that state and local regimes cannot force a property owner to choose between permitting warrantless entry and suffering legal consequences for refusal. *See Camara v. Mun. Ct. of City & Cnty. of San Francisco*, 387 U.S. 523, 533, 540 (1967). Virginia’s source-of-funds provision creates precisely that dilemma by compelling participation in a program that authorizes warrantless inspections and access to records.

Property owners like Lucinda may bring a facial challenge to secure their Fourth Amendment rights against warrantless inspections under the Commonwealth’s statutory scheme. *See City of Los Angeles v. Patel*, 576 U.S. 409, 418–19 (2015). Prior to the decision below, every court to confront this precise issue held that state and local “source-of-funds” or “source-of-income” non-discrimination laws must yield to the federal Fourth Amendment rights of property owners. *Jones v. City of Kansas City*, No. 4:24-cv-00649-RK, 2025 WL 4236642, 2025 U.S. Dist. LEXIS 121974 (W.D. Mo. Feb. 11, 2025); *People v.*

Commons West, LLC, 2026 NY App. Div. LEXIS 1351, 2026 WL 616282 (N.Y. App. Div. 3rd Dept. Mar. 5, 2026); *People v. Commons West, LLC*, 80 Misc. 3d 447, 452, 194 N.Y.S.3d 451 (N.Y. Sup. Ct. 2023).

Putting property owners to such a Fourth Amendment Hobson's choice—comply or else—is unconstitutional. *Patel*, 576 U.S. 409, 421 (citing *Camara*, 387 U.S. at 533). Facially so. *Id.* at 415–19. Declining vouchers exposes a landlord to a state investigation for discrimination, and civil penalties enumerated under the VFHL. Accepting vouchers means signing a contract that cedes Fourth Amendment rights by authorizing government officials to conduct warrantless searches.

Plaintiffs have standing to challenge the law. Virginia landlords and realtors are the very object of the regulation. They sustain an injury in fact when they face the coercive choice to comply or face penalties. Furthermore, because their constitutional rights are jeopardized, they need not wait for state enforcement of the law. Plaintiffs have declared their intention to decline Housing Choice Vouchers, contrary to the VFHL, and face a credible threat of enforcement, bolstered by the private complaint lodged against them with the Board. *See S.B.A. List*, 573 U.S. at 158–64.

Younger abstention is unjustifiable as, even the district court readily acknowledged, there is no ongoing state judicial proceeding to defer to. Not long ago, the Supreme Court reemphasized that civil proceedings warranting the imposition of such an exceptional doctrine must be truly “akin to a criminal

prosecution” in “important respects.” *Sprint Communs., Inc. v. Jacobs*, 571 U.S. 69, 78–79 (2013). The proceeding at issue here—a preenforcement conciliation and investigation into a private third-party complaint—does not rise to that level. Virginia has not made a reasonable cause determination, issued charges, or brought a formal complaint against Lucinda. The district court erroneously allowed the importance of state interests to obscure the threshold question of whether there exists an ongoing proceeding akin to a criminal prosecution. *Compare id.* at 81, *with* JA33–34. Moreover, even if the investigation were sufficiently akin to a criminal prosecution, there must be an ongoing judicial proceeding under the *Middlesex* factors. *Id.* at 81 (discussing *Middlesex Cty. Ethics Comm. v. Golden State Bar Ass’n*, 457 U.S. 423 (1982)). The embryonic stage of the investigation before the Board cannot be deemed an ongoing judicial proceeding for *Younger* purposes. Abstention cannot be “flatly compelled whenever the administrative process is even preliminarily underway.” *Telco Commc’ns Inc. v. Carbaugh*, 885 F.2d 1225, 1229 (4th Cir. 1989) (Wilkinson, J.). Such an approach fails to recognize “the role of federal courts in protecting from plain constitutional infringement the rights and liberties of citizens who properly invoke their jurisdiction.” *Id.*

This Court should reverse and remand with instructions to preliminarily enjoin enforcement of the source-of-funds provision of the VFHL, as it pertains to non-acceptance of Section 8 vouchers.

Argument

I. Virginia’s “source-of-funds” nondiscrimination provision violates the Fourth Amendment by coercing landlords into warrantless searches of their property.

Standard of Review:

The district court’s decision denying the preliminary injunction is reviewed for abuse of discretion, but legal conclusions within that determination are reviewed *de novo*. *Leaders of a Beautiful Struggle v. Baltimore Police Dep’t*, 2 F.4th 330, 339 (4th Cir. 2021) (*en banc*). “A court abuses its discretion in denying preliminary injunctive relief when it...misapprehends the law with respect to underlying issues in litigation.” *Id.* (internal quotations and alterations omitted).

A. The Fourth Amendment requires a warrant or consent, or, in the context of administrative searches, at least a concrete opportunity for precompliance review.

The Fourth Amendment of the federal Constitution provides that “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause.” Fourth Amendment protections extend to commercial property and business records. *Patel*, 576 U.S. at 419–21; *Marshall v. Barlow’s Inc.*, 436 U.S. 307, 311–13 (1978); *See v. City of Seattle*, 387 U.S. 541, 543–45 (1967); *Camara*, 387 U.S. at 528. “[T]he Fourth Amendment requires adherence to judicial processes ... searches

conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” *Katz v. United States*, 389 U.S. 347, 357 (1967).

One paradigmatic exception is when the government obtains the consent of the subject of the search. *Id.* at 358, n.22. But such consent is only valid if it is given freely and voluntarily under the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). Coerced consent violates the Fourth Amendment. *Id.* at 228. Business owners cannot be put to the choice of consenting to a search or facing legal penalties. *Patel*, 576 U.S. at 421 (citing *Camara*, 387 U.S. at 533). “When consent is the product of coercion or duress, such as when a person faces penalties if he refuses to consent to the search, the consent is invalid, and the search violates the Fourth Amendment.” *Jones v. City of Kansas City*, 2025 U.S. Dist. LEXIS 121974, 2025 WL 4236642 at *5 (W.D. Mo. Feb. 11, 2025) (citing *Schneckloth*, 412 U.S. at 227).

Another exception exists for warrantless administrative searches that afford “the subject of the search” an opportunity “to obtain precompliance review before a neutral decisionmaker.” *Patel*, 576 U.S. at 420; *but see Camara*, 387 U.S. at 531–39 (holding that a warrant is necessary for an administrative search, albeit under a more lenient standard for probable cause); *Marshall*, 436 U.S. at 320–24 (similar). In *Patel*, Los Angeles enacted an ordinance requiring hotel operators to produce guest logs to law enforcement. *Id.* at 412. Although

the Court declined to outline the “exact form” precompliance review before a neutral decisionmaker must take,³ it held that a silent ordinance that neglects to provide the operators any opportunity to seek precompliance review when presented with a search demand does not satisfy the Fourth Amendment. *Id.* at 421. Such an omission itself makes a statute “therefore, facially invalid.” *Id.*⁴

B. By compelling landlords to accept Section 8 federal housing vouchers, Virginia’s source-of-funds law coerces consent to warrantless searches.

The VFHL puts landlords to a fork: either accept Section 8 vouchers and the mandatory warrantless searches that are an inseparable part of the program, or decline vouchers and violate state law, with all the penalties that attend. Va. Code §§ 36-96.14 (issuance of a charge); 36-96.16-17 (attorney general enforcement penalties); 36-96.16-18 (civil action brought by private parties); 36-96.20 (real estate licensee-specific penalties). Therefore, the

³ *Patel* suggests that an administrative subpoena process, where the government would be required to issue an administrative subpoena, and where the scope of the search could be contested before an Administrative Law Judge, is the prototype of a compliant precompliance review regime. *Id.* at 421–23.

⁴ Other exceptions allow warrantless searches if the government can show exigent circumstances or if the business constitutes a “closely regulated industry.” *See Patel*, 576 U.S. at 423–24. The searches authorized by the Section 8 regime and the uniform HAP contract go far beyond such circumstances. *See Jones*, 2025 WL 4236642, at *7–*8 (finding “no caselaw...that extends [the closely regulated] exception to the rental housing industry”). In any event, Defendants did not preserve these defenses below.

source-of-funds provision of the VFHL coerces participation in the Section 8 program and precludes Plaintiffs from giving valid consent to searches authorized by the HAP contracts and the governing Section 8 statute and regulations. See *Jones*, 2025 WL 4236642, at *7; *Commons West* 2026 NY App. Div. LEXIS 1351, 2026 WL 616282, at *4. “[A] landlord cannot accept a Section 8 housing voucher as payment for rent without agreeing to participate in Section 8, which in turn, requires that the landlord authorize warrantless searches of the rental property and the landlord’s records.” *Commons West*, 80 Misc. 3d 447, 450, 194 N.Y.S.3d 451 (Sup. Ct. 2023), *aff’d*, 2026 WL 616282 (N.Y. App. Div. Mar. 5, 2026). *Patel* instructs courts to examine the searches a legal regime “actually authorizes.” 576 U.S. at 418. The district court’s focus (JA35) on whether the Virginia statute itself contains search language asks the wrong question. The relevant inquiry is whether the combined operation of the source-of-funds provision, the federally prescribed HAP contract, and the governing Section 8 regulations leaves landlords free to refuse the searches that Section 8 authorizes. It does not, so the searches are “actually authorized” by the statute.

The district court erred because it did not find the unconstitutional compulsion, reasoning that the “plain text” of “the VFHL source of income [sic] provisions do not appear to be in conflict with the Fourth Amendment,” because the text “do[es] not have anything to do with searches or the First Amendment on its face.” JA35. This is legal error for the exact reasons noted in *Commons*

West and *Jones*. *Contra* JA34–35 (stating that neither case “bears on the statutory interpretation...issue[.]”). “[A]lthough the source-of-income discrimination law does not, itself, require any searches, they are indirectly compelled through the terms of the Section 8 program and the HAP contract, which oblige landlords to make their premises and records available for searches.” *Commons West*, 2026 NY App. Div. LEXIS 1351, 2026 WL 616282, at *4; *see also Sokolov v. Village of Freeport*, 420 N.E.2d 55, 57 (N.Y. 1981) (finding ordinance that required rental permit unconstitutional because the incorporated permitting scheme mandated warrantless searches); *Dearmore v. City of Garland*, 400 F. Supp. 2d 894, 901 (N.D. Tex. 2005) (same); *Thompson v. City of Oakwood*, 307 F. Supp. 3d 761, 775 (S.D. Ohio. 2018) (same, with real estate sales permit).

Jones likewise recognized this as “the crux of the issue: Does the Ordinance mandate that landlords within the City participate in the Section 8 program?” 2025 WL 4236642 at *4. In determining this key “statutory interpretation” question, the court looked to the statute, and “taking the plain language of the provisions of the Ordinance together,” found that “the ultimate effect of the Ordinance is likely to mandate landlord participation in the Section 8 program.” *Id.* Because the ordinance defined “source of income” to include vouchers, “the likely effect of the Ordinance is to mandate landlord participation in the Section 8 program, or else risk investigation of and fines for engaging in an unlawful housing practice.” *Id.*

The same legal analysis applies here; the VFHL classifies discrimination based on source of funds as an illegal housing practice. Va. Code. § 36-96.3. “Source of funds” is defined as “any source that lawfully provides funds to or on behalf of a renter or buyer of housing, including any assistance, benefit, or subsidy program, whether such program is administered by a governmental or nongovernmental entity.” Va. Code. §36-96.1:1. No one disputes that this definition encompasses Section 8 vouchers. Therefore, a landlord cannot decline section 8 vouchers without risk of a complaint for discrimination based on source of funds under the VFHL. Conversely, if a landlord accepts vouchers to comply with the source-of-funds provision, then the landlord must sign a uniform HAP contract and subject themselves to Section 8 requirements. That contract expressly authorizes warrantless searches of units and business records.

For example, the HAP contract states “The PHA may inspect the contract unit and premises at such times as the PHA determine necessary...”; HUD-52641, Part B at 3(e); “the owner must give the PHA any information requested by the PHA on the rents charged...”; *Id.* at 6(d); “The owner must provide any information pertinent to the HAP contract that the PHA or HUD may reasonably require.” *Id.* at 11(a); “The PHA, HUD, and the Comptroller General of the United States shall have full and free access to the contract unit and premises, and to all accounts and other records of the owner that are relevant to the HAP contract...” *Id.* at 11(b); and, “[t]he owner must grant such

access to computerized or other electronic records, and to any computers, equipment, or facilities containing such records, and must provide any information or assistance needed to access the records.” *Id.* at 11(c). If a landlord signs a HAP contract and then breaches the contract by rejecting an authorized or mandated search, she is subject to monetary penalties in the form of “abatement or other reduction of housing assistance payments.” 24 CFR §982.453(b).

Moreover, the governing Section 8 statutes and regulations also authorize and even mandate warrantless searches, including inspections of the premises and related equipment administered by the local Public Housing Authority prior to occupancy and not less than biennially during the term of the tenancy. *See* 42 U.S.C. §1437f(o)(8)(A),(D); 24 CFR §982.405. Property owners must also make accessible for review any business records relating to the premises. 24 CFR §982.507.

Just as in *Patel*, nothing in the legal framework of Section 8—neither statute, nor regulation, nor a term of the uniform HAP contract—affords property owners an ability to seek precompliance review of proposed searches. Below, Defendants championed the absence of language *precluding* precompliance review, but that’s not the relevant constitutional question. What matters is what searches the statute “authorizes.” 576 U.S. at 418; *see also Skinner v. Ry. Labor Executives Ass’n*, 489 U.S. 602, 614 (1989) (reviewing administrative scheme that authorized but did not require searches). *Patel* did

not hold the Los Angeles ordinance unconstitutional because it forbade precompliance review, but because it “fail[ed] to provide” for it. *Id.* at 419. *Patel* repeatedly emphasizes that the statute must provide that “opportunity.” 576 U.S. at 412, 419, 428. Here, no provision “puts in place or identifies a mechanism for pre-compliance review.” *Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 493 (S.D.N.Y. 2019).

Even if the Section 8 framework contemplated notice (it does not seem to), that is not an adequate substitute for precompliance review, which provides Plaintiffs the invitation and forum to challenge administrative searches before a neutral adjudicator. *Patel*, 576 U.S. at 420–21. Any kind of general review procedure would be pragmatically “toothless” because the HAP contract “expressly consent[s] to all searches before any opportunity to challenge a search would arise. *Commons West*, 2026 WL 616282, at *5. And even if the Public Housing Authority or HUD unilaterally provided prior notice and sufficient time to object, “the landlord would be left in the untenable position of attempting to challenge in court a search to which he or she had already consented in writing.” *Id.*

The statutory interpretation inquiry can therefore be reduced to a single question: when a landlord who does not wish to participate in the Section 8 program is presented with a voucher in Virginia, is she improperly forced to choose between either accepting the voucher—along with the warrantless

searches required under the HAP contract—or declining the voucher and risking penalties under the VFHL? She is.

The district court offered one other reason for denying the Fourth Amendment coercion. Misinterpreting *Peyton v. Reynolds*, 955 F.2d 247 (4th Cir. 1992), the district court suggested that landlords who refuse to accept Section 8 vouchers because of Fourth Amendment objections would have a “colorable claim that they do not discriminate” based on source of funds. JA35. *Peyton* involved an objection collateral to voucher status (length of lease term) rather than objection to a mandatory feature of Section 8 participation itself. *Id.* at 251. The distinction matters because Plaintiffs’ objection here concerns requirements that federal law makes inseparable from participation in the voucher program. The district court’s reasoning founders for several reasons.

First, more than a “colorable” defense is necessary to ameliorate the coercive pressure created by the plain text of the VFHL’s source-of-funds provision. Plaintiffs seek class relief on behalf of landlords across the Commonwealth for this very reason. The plain language of the provision chills the exercise of constitutional rights: sign away your Fourth Amendment rights or risk penalties under the VFHL.

Second, *Peyton* does not provide landlords with a colorable defense for well-meaning or “good faith” discrimination. *Peyton* involved litigation arising out of the “take one, take all” policy in place during the late 1980s and early 1990s. 955 F.2d at 250; *see generally* Jenna Bernstein, *Section 8, Source of*

Income Discrimination, and Federal Preemption: Setting the Record Straight, 31 CARDOZO L. REV. 1407, 1414–16 (2010). Under that policy, a landlord who accepted any Section 8 vouchers was prohibited from discriminating against other prospective tenants on the basis of their use of vouchers. When Reynolds objected to the Housing Authority’s attempt to extend the tenants’ lease (as they transitioned to Section 8 vouchers), the tenants (including Peyton) sued for discrimination against voucher holders. 955 F.2d at 249–50. This Court concluded that Reynolds had not unlawfully discriminated because its objection to the lease extension was not discrimination on the basis of voucher holding status. *Id.* at 251–54. The reason was simple: “neither the statutes, the regulations, nor HUD's standard form contract mandates that the owner enter a housing voucher contract and leases for one-year terms.” *Id.* at 251. In other words, the extension of the lease was not an inherent, inseparable, or inextricable aspect of the Section 8 program. “The objection to the unilateral extension of the lease terms beyond the terms in the existing leases had no connection to the Tenants’ status as voucher holders; it could have been expected in the case of any tenants, voucher holders or not.” *Id.* at 254.

By contrast here, the searches mandated by the HAP contract and the governing regulations and statutes pertain *only* to the voucher holders. And they are inseparable aspects of the Section 8 scheme. Accordingly, there is nothing incidental about Plaintiffs’ objection. *See In re Smith, et al.*, Nos. 95-

H-159 & 98-H-44/63, 2000 CCHR Lexis 1 (Chicago Comm'n on Human Relations Oct. 6, 2000) (distinguishing *Peyton* and denying Defendant landlord's motion to dismiss based on fact that Defendant only acted based on "distaste for the required terms of the Section 8 program"). Plaintiffs here decline to accept vouchers because of their concerns with the fundamental terms of the Section 8 program, which puts them directly in the crosshairs of the source-of-funds antidiscrimination provision. *Peyton* is inapposite.

Additionally, the district court's interpretation of the VFHL's source-of-funds provision is out of step with how state courts have construed other "source-of-funds" provisions, and how other federal courts have construed other non-discrimination provisions. Take, for example, *Commission on Human Rights & Opportunities v. Sullivan Assocs.*, where the Connecticut Supreme Court rejected a proposed defense to liability for simply disagreeing with the uniform mandatory Section 8 lease terms. 739 A.2d 238, 247–51 (Conn. 1999). The Maryland Court of Appeals explained why this is so: "The general rule in housing discrimination enforcement cases is that intent to discriminate is not required, that it is the effect of the conduct that is relevant, and that a violation of a housing discrimination law may therefore be found without establishing a malevolent intent." *Montgomery Cty. v. Glenmont Hills Assocs.*,

936 A.2d 325, 342 (2007) (citing cases).⁵ Simply, “courts that have considered versions of the so-called administrative-burdens defense have rejected it.” *See Austin Apt. Ass'n v. City of Austin*, 89 F. Supp. 3d 886, 900 (W.D. Tex. 2015) (citing cases and rejecting a putative constitutional defense). Defendants’ own guidance likewise rejects the administrative burdens defense under the VFHL, stating that “[h]ousing providers that allow objections about administrative requirements ... to form the basis for refusal to rent ... risk liability for source-of-funds discrimination against HCV holders.”⁶ Thus, the district court’s interpretation of *Peyton* does not accord with the way that states, including the Defendants before this litigation, have interpreted their source-of-funds laws.

Similarly, the jurisprudence relating to federal non-discrimination statutes looks to whether there is an act of discrimination. Hostility toward the protected class is not a prerequisite: “[i]ntentionally burning down a neighbor’s house is arson, even if the perpetrator’s ultimate intention (or motivation) is only to improve the view.” *Bostock v. Clayton County*, 590 U.S. 644, 661 (2020). Thus, an employer could not escape liability by arguing it discriminated because of homosexuality or transgender status rather than sex itself, because

⁵ To be sure, there is dicta in *Montgomery Cty.* suggesting that a landlord’s constitutional objection might fare better, but there is no textual reason why that would be so. 936 A.2d at 342.

⁶ Va. Real Estate Bd., GUIDANCE DOCUMENT: HOUSING DISCRIMINATION ON THE BASIS OF SOURCE OF FUNDS 5–6 (2021) (citing additional authorities).

sex was “inextricably bound up” in the decision-making process. *Id.* at 660–61. Likewise, in *Los Angeles Department of Water & Power v. Manhart*, the Court rejected the argument that differential treatment based on sex was permissible because it rested on sincere actuarial judgments rather than hostility toward women. 435 U.S. 702, 707–11 (1978). And in *Phillips v. Martin Marietta Corp.*, the Court held that an employer could not evade Title VII by discriminating only against a subset of women defined by sex-linked characteristics. 400 U.S. 542 (1971).

The HAP contract and its mandatory terms are not collateral to Section 8 participation; federal law makes them an inseverable part of the statutory scheme. A landlord who refuses to participate in Section 8 because of objections to those mandatory terms therefore necessarily refuses to rent because of source of funds, whatever additional constitutional or policy concerns may motivate that refusal. Anti-discrimination law does not permit a defendant to evade liability by redescribing discrimination against protected status as discrimination against conduct or conditions inseparable from that status. *See Christian Legal Society v. Martinez*, 561 U.S. 661, 689 (2010) (“Our decisions have declined to distinguish between status and conduct in this context.”). Nor are anti-discrimination statutes limited only to the paradigmatic forms of bias legislators may initially have contemplated. *E.g.*, *Oncala v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).

By forcing landlords into a regime that authorizes warrantless searches without an opportunity for precompliance review, the source-of-funds provision is unconstitutional on its face. *Patel; Jones; Commons West*.

C. Under *Patel*, Plaintiffs appropriately bring a facial challenge to the source-of-funds provision.

Because the remedy Lucinda seeks goes beyond the particulars of the enforcement against them, they bring a facial challenge to the Virginia statute. *See Citizens United v. FEC*, 558 U.S. 310, 331 (2010) (“[T]he distinction between facial and as-applied challenges goes to the breadth of the remedy employed by the Court.”); *White Coat Waist Project v. Greater Richmond Transit Co.*, 35 F.4th 179, 203 (4th Cir. 2022) (similar). Facial challenges under the Fourth Amendment are not “especially disfavored.” *Patel*, 576 U.S. at 415. Rather, *Patel* emphasized that facial challenges occupy a distinct role in the Fourth Amendment context because statutes authorizing warrantless searches create constitutional injury through the authorization itself. *Patel* rejected the suggestion that facial-challenge principles prevent review of statutes that “authoriz[e] warrantless searches”: facial challenges can not only “be brought,” “they can succeed.” *Id.* at 418. Lucinda’s facial challenge should succeed; there is no “substantial ambiguity as to what conduct” the VFHL’s source-of-funds law requires, nor any ambiguity as to what searches Section 8 and its accompanying HAP contract authorize. *Id.* at 416.

Yet the district court held that Plaintiffs' facial challenge could not get airborne because they "do not plausibly allege that the VFHL is unconstitutional in all its applications or that it lacks any plainly legitimate sweep." JA35. The court may be correctly pointing out that the source-of-funds nondiscrimination law can be constitutionally applied if, for example, the tenant proposed to pay with cash from a bank account, or a private loan, or another governmental assistance program that does not require a waiver of the landlord's constitutional rights. But that is not Plaintiffs' burden because they do not seek to enjoin every application of the law; they seek only to enjoin enforcement regarding sources of funds, like Section 8, that require landlords to waive constitutional rights. For this type of challenge, where plaintiffs "do[] not seek to strike [a statute] in all its applications" but the relief sought "reach[es] beyond the particular circumstances of [the] plaintiffs," they must only "satisfy [the] standards for a facial challenge to the extent of that reach." *Doe v. Reed*, 561 U.S. 186, 194 (2010); accord *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 826 (1st Cir. 2020) (following *Doe* and denominating this a "half-fish, half-fowl" constitutional challenge).

Once properly framed with the correct denominator, there are no constitutional applications of the source-of-funds law within the scope of Lucinda's challenge. Of course, sometimes a Public Housing Authority's warrantless search of a landlord's premises might be justified by exigent circumstances or genuine consent of the property owner. But those aren't

“actual applications of the statute.” *Patel*, 576 U.S. at 419. In determining “whether a law is unconstitutional in all of its applications,” courts “consider[] only applications of the statute in which it actually authorizes or prohibits conduct.” *Id.* at 418 (internal quotation omitted). In other words, “when addressing a facial challenge to a statute authorizing warrantless searches, the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant.” *Id.* Therefore, it does not “save[]” the provision that a landlord could provide consent, or that a warrant could be obtained in theory. *Id.* at 419 n.1. The Fourth Amendment infraction occurs because the statute authorizes warrantless searches by incorporating the Section 8 program. To that extent, it is unconstitutional. *See Commons West*, 2026 WL 616282, at *4–*5 (following *Patel* and rejecting the “not all applications” defense to a facial challenge).

II. Plaintiffs suffered an injury in fact when put to the impermissible dilemma of waiving their rights or complying with the statute; their claims are ripe for review.

Standard of Review:

Whether a plaintiff possesses Article III standing is reviewed *de novo*. *Md. Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 209 (4th Cir. 2020).

A. The district court erred in holding that Lucinda and Wheatley did not suffer an injury.

A plaintiff seeking judicial review “must have suffered an ‘injury in fact’—an invasion of a legally protected interest...” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (simplified). Such injury must be “concrete and particularized” and “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Id.* The injury-in-fact requirement “helps to ensure that the plaintiff has a ‘personal stake in the outcome of the controversy.’” *S.B.A. List*, 573 U.S. at 158 (internal quotation omitted). But a plaintiff whose constitutional rights are threatened need not wait for “an actual arrest, prosecution, or other enforcement action.” *Id.*

“[W]hen an individual who is the very object of a law’s requirement or prohibition seeks to challenge it, he always has standing.” Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983). Or at least, there is “little question” he has standing. *West Virginia v. EPA*, 597 U.S. 697, 719 (2022) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992)); accord *Mirabelli v. Bonta*, 146 S. Ct. 797, 803 (2026) (plaintiffs “protected by the injunction very likely have standing because they are the objects of the challenged...policies”). Lucinda and Wheatley are not only the regulated objects of the VFHL, they are the objects of a private third-party complaint under that regulatory scheme. Thus, there should be little question of their standing. Indeed, Defendants below did not even raise the issue of standing before the district

court, which *sua sponte* held that Plaintiffs lack injury to bring their as-applied challenge. JA35–36. Plaintiffs suffered a concrete and particularized injury the moment they were forced to choose between participating in the Section 8 program, thereby waiving their Fourth Amendment rights, or violating Virginia law by declining vouchers. *Patel*, 576 U.S. at 421 (citing *Camara*, 387 U.S. at 533). Because the source-of-funds provision compels entry into the Section 8 program that provides “no express warrant procedure or...opportunity for pre-compliance review,” Plaintiffs have “standing to challenge the constitutional validity of Defendant’s [statute]”. *Halpern 2012, LLC v. City of Center Line*, 404 F. Supp. 3d 1109, 1118 (E.D. Mich. 2019).

Additionally, it is well established that a plaintiff may sue upon a “credible threat” of enforcement that affects their constitutional rights. *S.B.A. List*, 573 U.S. at 158–59. A credible threat exists if plaintiffs allege “fears of state prosecution that are not imaginary or speculative and are actual and well-founded enough to establish that the statute will be enforced against them.” *Md. Shall Issue*, 971 F.3d at 217 (simplified). “[L]aws that are recent and non moribund typically do present a credible threat of enforcement.” *Bryant v. Woodall*, 1 F.4th 280, 286 (4th Cir. 2021) (internal quotation omitted). A threat is especially credible when the plaintiff has been previously subjected to private complaints under the state agency’s reporting system, *S.B.A. List*, 573 U.S. at 164, and when enforcement authorities have declined to disavow enforcement.

Id. at 165; *Mobil Oil Corp. v. Att’y Gen. of Com. of Va.*, 940 F.2d 73, 76 (4th Cir. 1991).

Plaintiffs have stated an intention to decline Section 8 vouchers due to their Fourth Amendment concerns. JA71. As described in Section I.B. above, the 2020 VFHL source-of-funds amendment proscribes their choice by defining source of funds to be “any assistance, benefit, or subsidy ... administered by a governmental [] entity” (Va. Code §§ 36-96.1:1), including Section 8 vouchers.

An especially pointed credible threat of prosecution under the source-of-funds provision exists because Plaintiffs are the targets of a possibly imminent enforcement proceeding. When the Board received a third-party complaint alleging Plaintiffs engaged in source-of-funds housing discrimination for non-acceptance of Section 8 housing vouchers, the Board didn’t immediately dismiss it. “At no point has the Board, or any other State actor, suggested that the [] law will not be enforced.” *Miller v. Brown*, 462 F.3d 312, 321 (4th Cir. 2006). Rather, upon receiving that third-party complaint, the Board invited a response (itself a burden),⁷ conciliation proceedings, and are investigating the complaint. JA33, JA71. As such, Plaintiffs now are at risk of charges brought by the Board and a future civil action brought by the attorney general. Va. Code

⁷ *McGee v. Township of Conyngham*, 2021 WL 4315936 (3d Cir. Sept. 23, 2021) (unpublished) (recognizing chilling effect of governmental investigation on ordinary individuals).

§§ 36-96.14 (issuance of a charge); 36-96.16 (civil action brought by attorney general).

Plaintiffs have standing to bring their claims.

B. The claims are ripe for review.

Ripeness evaluates “the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967). Ultimately, Article III standing and ripeness issues “boil down to the same question.” *S.B.A. List*, 573 U.S. at 157 n.5.

The district court erred in finding the case was unripe for review. JA36–37. First, the constitutionality of a law is fit for review where there is a credible threat that the government will enforce it against a party. *S.B.A. List*, 573 U.S. at 159. As discussed above, the Board is investigating a third-party complaint concerning Plaintiffs and if it determines reasonable cause exists, then the Board can issue a charge and refer the matter to the attorney general for a civil action. Va. Code §§ 36-96.14, 36-96.16. Accordingly, the government’s threat of enforcement is not only credible, it is crystalized in the form of a preenforcement investigation. In *Commons West*, the court determined the “question of whether the source-of-income law passes constitutional muster qualif[ied] as a justiciable controversy” even though the respondents challenging the law had not been accepted into the Section 8 program and no searches yet occurred. *See Commons West*, 2026 NY App. Div. LEXIS 1351, 2026 WL 616282, at *3. Based on these facts, the risk of future enforcement

cannot be characterized as “imaginary or speculative.” *S.B.A List*, 573 U.S. at 165 (quoting *Babbitt*, 442 U.S., at 298).

Moreover, this case is fit for adjudication; it presents a ripe “purely legal” issue that “will not be clarified by further factual development.” *S.B.A List*, 573 U.S. at 167–168; *contrast Telco Commc’ns, Inc.*, 885 F.2d at 1234–35 (challenge not ripe where plaintiff had failed to describe “particularized” effect of an unclear and broad-reaching statute). The central question is whether the source-of-funds provision of the VFHL violates the Fourth Amendment. The district court disagreed that a purely legal question exists because “the scope of the search requested by the government entity is not known.” JA37. But the scope is known, as the HAP contract spells out in detail the sweepingly broad searches authorized, in addition to the governing regulations and statutes. Again, the “proper focus” is what searches the statute authorizes, not the specifics of how a search will be applied in a given case. *Patel*, 576 U.S. at 418–19. Put simply, the authorization—which “devolves almost unbridled discretion upon executive and administrative officials”—*is* itself the problem. *Marshall*, 436 U.S. at 323–24. The Constitution “does not leave us at the mercy of *noblesse oblige*.” *United States v. Stevens*, 559 U.S. 460, 480 (2010). Courts may not uphold an unconstitutional rule just because defendants “promise[] to use it responsibly.” *Id.* The provision at issue does not provide for the necessary warrant or precompliance review procedure. The Court has all the information necessary to resolve the constitutional question presented.

The district court also found that the second prong of the ripeness inquiry—hardship—was not established. JA37. Notably, the Supreme Court has cast doubt on the “continued vitality” of the prudential ripeness inquiry into the development of the factual record and hardship to parties. *S.B.A. List*, 573 U.S. at 167. It “is in some tension with [the Court’s] recent reaffirmation of the principle that a federal court’s obligation to hear and decide cases within its jurisdiction is virtually unflagging.” *Id.* (simplified).

In any event, Plaintiffs would undoubtedly face hardship without judicial review. The district court found that hardship was not met “because the threat of their Fourth Amendment claim focus is not immediate, nor is the burden associated with the proceedings undue...” JA37. But again, Plaintiffs face the impermissible choice of surrendering their rights, or violating state law thereby subjecting themselves to state investigation and potential civil action. For ripeness purpose, hardship cannot require more. *See S.B.A. List*, 573 U.S. at 167–68 (hardship established where the party was forced to choose between their constitutional rights and risking commission proceedings and criminal prosecution.).

Further, denying judicial review would impose a substantial hardship on the Plaintiffs as they are forced to confront this impermissible choice, and even answer a private complaint alleging an illegal housing practice. They live under the looming threat of a future civil suit and penalties. Va. Code §§ 36-96.14 (issuance of a charge); 36-96.16 (civil action brought by attorney general); 36-

96.18 (civil action by private parties); 36-96.20 (real estate licensee-specific penalties).

III. *Younger* does not bar the federal court from exercising its “virtually unflagging” “obligation” to decide this case.

Standard of Review:

This Court has applied differing standards for reviewing whether a district court properly abstains from adjudicating a case. Some panels review it *de novo*. *Jonathan R. v. Justice*, 41 F.4th 316, 327 (4th Cir. 2022) (citing *VonRosenberg v. Lawrence*, 781 F.3d 731, 734 (4th Cir. 2015)). Others review it for abuse of discretion. *Sonda v. W. Va. Oil & Gas Conservation Comm'n*, 92 F.4th 213, 219 (4th Cir. 2024) (*Pullman*); *Air Evac EMS, Inc. v. McVey*, 37 F.4th 89, 95 (2022) (*Younger*). Either way, “[a] district court *per se* abuses its discretion when it makes an error of law or clearly errs in its factual findings.” *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 317 (4th Cir. 2006); *see also Sonda*, 92 F.4th at 219. It also abuses its discretion when it fails “to take into account judicially recognized factors constraining its exercise.” *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993).

A. *Younger* is reserved for exceptional circumstances that satisfy strict criteria.

A federal court’s “obligation’ to hear and decide a case is ‘virtually unflagging.’” *Sprint*, 571 U.S. at 77 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). In *Sprint*, the

Supreme Court demarcated the scope of *Younger* abstention by adopting a framework first considering whether the proceeding at issue falls into three “exceptional” categories: (1) state criminal prosecutions, (2) “certain ‘civil enforcement proceedings’” that are “akin to a criminal prosecution in important respects,” and (3) “pending civil proceedings involving certain orders ... uniquely in furtherance of the state courts’ ability to perform their judicial functions.” *Id.* at 73. If none of the categories apply, it is the court’s “strict duty” to “exercise [its] jurisdiction and address the matter before it.” *Sonda*, 92 F.4th at 219 (Pullman abstention). Abstention is the “exception, not the rule.” *Sprint*, 571 U.S. at 82 (internal quotation omitted).

If one of the narrow categories applies, then courts must consider whether the *Middlesex* factors are satisfied: (1) whether there is “an ongoing state judicial proceeding”; (2) whether the state proceeding “implicates important state interests”; and (3) whether the state proceeding provides “an adequate opportunity ... to raise constitutional challenges.” 457 U.S. 423, 432 (1982).

Without recognizing the exceptional nature of *Younger*, the district court abstained. JA33–34. It acknowledged that Virginia had not made a cause determination or filed a complaint and that the Commonwealth was overseeing conciliation, but it allowed those facts to be outweighed by the “mandatory ongoing investigations prosecuted by state officials” that may lead to future charges. JA33–34. And it admitted that there was “not currently an ongoing

state judicial proceeding,” but it allowed that fact to be outweighed by the other *Middlesex* factors. JA34. Treating these fundamental elements as balancing tests is incompatible with *Sprint*, and more generally with *Younger* as an exceptional doctrine.

B. *Younger* presupposes an existing state proceeding.

A threshold prerequisite to any *Younger* abstention is a pending state proceeding for the federal court to defer to. *E.g.*, *Courthouse News Serv. v. Schaefer*, 2 F.4th 318, 324 (4th Cir. 2021)co; *Telco Commc’ns, Inc.*, 885 F.2d at 1228. “*Younger* is not a bar to federal court action when state judicial proceedings have not themselves commenced.” *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 238–39 (1984). “*Younger*’s main concern has always been whether federal jurisdiction will ‘unduly interfere’ with pending state proceedings.” *Jonathan R.*, 41 F.4th at 332 (internal quotation omitted). Without a pending state proceeding, the interests of equity, federalism, and comity underlying the doctrine are not implicated. *Steffel v. Thompson*, 415 U.S. 452, 462 (1974).

A state may not piggyback on the possibility of future proceedings to justify abstention before initiating those proceedings. *Midkiff* is directly on point. There, Hawaii sought abstention in a February 1979-filed federal action on the basis of a September 1979-filed state court action. 467 U.S. at 238. The Court refused, holding that the only existing state proceeding—non-judicial administrative hearings—did not suffice. *Id.*

This Court too has long recognized that *Younger* only bars pending state proceedings, not merely the threat of such actions. *Telco* is dispositive: “[T]he period between the threat of enforcement and the onset of formal enforcement proceedings may be an appropriate time for a litigant to bring its [constitutional] challenges in federal court. Indeed, if this time is never appropriate, any opportunity for federal adjudication of federal rights will be lost.” 885 F.2d at 1229. Accordingly, *Telco* declined to abstain where a Commonwealth agency notified the party by letter of the claimed violations filed through a private complaint and invited the party to attend a factfinding conference after the agency commenced an investigation into the allegations. *Id.* at 1227.

Telco mirrors the posture here. In determining that abstention was unwarranted, *Telco* looked to the fact that the agency never initiated a formal hearing, nor requested a formal prosecution. *Id.* 1228. Here, the Commonwealth has yet to even make a reasonable cause determination, issue charges, or initiate a hearing. *See* Section III.C, *infra*. Abstention is not required “whenever a state bureaucracy has initiated contact with a putative federal plaintiff. Where no formal enforcement action has been undertaken, any disruption of state process will be slight.” *Id.* at 1229.

C. *Younger* abstention does not apply because the investigation before the Board is not a certain civil enforcement proceeding akin to a criminal prosecution in important respects.

The district court erred in holding that the proceeding before the Board falls within *Sprint*'s second category. JA33–34. This category comprises “cases ‘brought by the State in its Sovereign capacity’ following an ‘investigation’ and upon ‘the filing of a formal complaint or charges.’” *Jonathan R.*, 41 F.4th at 329 (citing *Sprint*, 571 U.S. at 79–80). Such civil enforcement proceedings must be “akin to a criminal prosecution” in “important respects.” *Sprint*, 571 U.S. at 79.

None of these prerequisites have been established as they relate to Plaintiffs. First, the Commonwealth did not bring this case in its sovereign capacity. Instead, a private third party lodged an administrative complaint. This is a critical distinction from a criminal prosecution—here, there is no sovereign initiation. *See Sprint*, 571 U.S. at 80 (concluding that an Iowa Utility Board Proceeding did not warrant abstention because, *inter alia*, it was initiated by a private corporation and no state actor lodged a formal complaint against Sprint). Both before and especially after *Sprint*, state initiation is central to *Younger*. *See, e.g., Borowski v. Kean Univ.*, 68 F.4th 844, 852 (3d Cir. 2023) (“a proceeding that is not initiated by a state in its sovereign capacity cannot be quasi-criminal.”); *ReadyLink Healthcare, Inc. v. State Compensation Ins. Fund*, 754 F.3d 754, 758–60 (9th Cir. 2014) (reconciling and tightening Ninth Circuit doctrine after *Sprint*); *Guillemard-Ginorio v.*

Contreras-Gomez, 585 F.3d 508, 522 (1st Cir. 2009) (“proceedings must be coercive, and in most-cases, state-initiated, in order to warrant abstention.”).

Second, there exist no proceedings brought “following an ‘investigation’ and upon ‘the filing of a formal complaint or charges.’” *Jonathan R.*, 41 F.4th at 329. The investigation has not concluded. The Defendants concede, “the Board has not issued a reasonable cause determination or prepared a final investigative report.” JA92. The Board is still conducting its review of the allegations. Accordingly, without a determination of wrongdoing, the existing proceeding cannot be conducted to sanction Lucinda. In the criminal analog, the state initiates a prosecution in its sovereign capacity to enforce its laws by filing a complaint *after* determining probable cause. Here, the Board has not determined reasonable cause exists as to the allegations contained in the third party’s complaint. By analogy, the current proceeding has not reached the “indictment” stage of the proceedings. Finally, the Board has not brought a formal complaint or charges. Without sovereign initiation through charges or a complaint, it cannot be said that the circumstances are “akin to criminal prosecution” in “important respects.” *Sprint*, 571 U.S. at 79 (simplified).

In the existing administrative proceeding, the Commonwealth is not even a party. Instead, two private parties are involved in conciliation efforts. And as

conciliator, the Commonwealth “is a neutral participant.”⁸ The fact that the state could become a party if it levies charges in the future is irrelevant to the present analysis. *See, e.g., Midkiff; Telco*. At this juncture, a private organization seeks to have the source-of-funds provision of the VFHL enforced against Lucinda. “[P]rivate citizens as a general matter lack executive authority to enforce state laws...” *Potrero Hills Landfill, Inc. v. County of Solano*, 657 F.3d 876, 885 (9th Cir. 2011) (examining state law).

Sprint explained that *Middlesex* fit within the second category of *Younger* cases because it was “indeed ‘akin to a criminal proceeding.’” *Sprint*, 571 U.S. at 81. The Court specified, “an investigation and formal complaint preceded the hearing, an agency of the State’s Supreme Court initiated the hearing, and the purpose of the hearing was to determine whether the lawyer should be disciplined for his failure to meet the State’s standards of professional conduct.” *Sprint*, 571 U.S. at 81 (citing to *Middlesex*, 457 U.S. at 433–35). None of these indicia are present here: no hearing has been scheduled, no investigation completed, and no formal complaint brought by the Commonwealth. Distilling the doctrine after *Sprint*, the Third Circuit observed that all of the cases where the Supreme Court applied *Younger* “involved a state entity that commenced civil or administrative proceedings by filing some

⁸ Va. Dept. of Prof. & Occupational Reg., VIRGINIA REAL ESTATE BOARD AND VIRGINIA FAIR HOUSING BOARD FACT SHEET, <https://www.dpor.virginia.gov/10conciliation>.

type of formal complaint or charge.” *Acra Turf Club, LLC v. Zanzuccki*, 748 F.3d 127, 140 (3d Cir. 2014) (collecting cases).

The district court’s reliance (JA33, JA34) on *Ohio Civil Rights Comm’n v. Dayton Christian Schools* was misplaced. 477 U.S. 619 (1986). The district court noted that “Plaintiffs take issue with what they deem as the insufficiently formal nature of the current proceedings,” finding “they are not materially different from that in *Dayton Christian Schools* ...” JA34. Yet formality does matter; only state-initiated *formal* proceedings indicate that a court may take the exceptional step of abstaining. *Telco*, 885 F.2d at 1228–29. Beyond this, *Dayton Christian Schools* is materially distinguishable.

Telco distinguished *Dayton Christian Schools* as requiring abstention because “[the commission] had initiated formal administrative proceedings.” *Telco*, 885 F.2d at 1228. There, the plaintiff’s employee filed a complaint with the commission, which conducted a preliminary investigation and warned the party that failing to settle could “result in a formal adjudication of the matter.” *Dayton Christian Schools*, 477 U.S. at 624. The commission then determined that there was probable cause and again warned plaintiff that failure to accept a settlement “would result in formal administrative proceedings being initiated against it.” *Id.* Thereafter, the commission “initiated administrative proceedings against it by filing a complaint.” *Id.* All of this occurred *before* the plaintiff filed in federal court. *Id.*

State initiation of the proceeding came with the filing of the state’s formal complaint in *Dayton Christian Schools*. The Supreme Court did not describe the proceeding as initiated by the state’s investigation of the third-party complaint. That is because mere investigation of a private complaint is not state initiation. So too here. Without a reasonable cause determination by the Board, and without a formal complaint or charge brought by the Commonwealth, the Commonwealth has yet to initiate enforcement proceedings that warrant abstention.

Nor was the district court’s reliance on *216 East 29th St.* justified. JA33, 34. There, the parties only contested—and the court only analyzed—whether the third *Middlesex* factor applied (*i.e.* whether that the party had an adequate opportunity to raise its claims). *216 E. St. Tr. v. City of New York*, 2025 U.S. Dist. LEXIS 15267, 2025 WL 315380, *8–*9 (S.D.N.Y. Jan. 28, 2025), *aff’d* 2025 U.S. App. LEXIS 30697, 2025 WL 3264312 (2d Cir. Nov. 24, 2025). On appeal, “the [t]rust [did] not dispute that there is a pending state enforcement proceeding that implicates an important state interest.” 2025 WL 3264312 at *3. Accordingly, both courts scrutinized only whether the proceeding afforded an adequate opportunity for the party to raise its challenge. Neither court’s analysis bears on the threshold questions presented here: whether there is a pending proceeding, and whether that proceeding is akin to a criminal prosecution.

This Court's recent precedents further support Lucinda's position. In *Air Evac*, the state agency filed an administrative complaint—thereby satisfying *Sprint's* state involvement mandate—and the parties agreed that the proceedings were both ongoing and quasi-criminal. *Air Evac EMS, Inc.*, 37 F.4th at 94, 97. Conversely, the Commonwealth did not initiate any action here, is not presently a party, nor has it levied charges or brought a formal complaint.

In *Sprint*, Justice Ginsburg reaffirmed the importance of the threshold *Younger* categories. “Divorced from their quasi-criminal context, the three *Middlesex* conditions would extend *Younger* to virtually all parallel state and federal proceedings, at least where a party could identify a plausibly important state interest.” *Id.* at 81. This Court has followed *Sprint*, reversing a district court's decision to abstain where the proceeding did not fit within *Sprint's* precise framework and instead “would mean expanding the bounds of either the civil-enforcement or the judicial-process categories—exactly what *Sprint* said we may not do.” *Jonathan R.*, 41 F.4th at 331–32. It should do so again here.

D. *Younger* abstention does not apply because there is no ongoing judicial proceeding.

The Court erred in abstaining *even after* acknowledging that “there is not currently an ongoing state judicial proceeding.” JA34. *See* Section III.B, *supra*. This predicate for all *Younger* abstention finds specific expression as the first *Middlesex* factor, which requires an ongoing state judicial proceeding. *Sprint*,

571 U.S. at 81. There are two aspects to this inquiry: first, whether the proceeding is ongoing and second, whether it is judicial in nature.

Invoking *Younger* was unjustifiable here because there was not an ongoing judicial proceeding for the district court to defer to. “[I]f a judicial proceeding is only *imminent*, *Younger* abstention is inappropriate because that proceeding is not *pending* or *ongoing*.” *PDX N., Inc. v. Comm’r N.J. DOL & Workforce Dev.*, 978 F.3d 871, 886 (3d Cir. 2020) (reversing decision to abstain). The audit at issue in *PDX* “did not involve judicial oversight and cannot be considered an ongoing judicial proceeding for *Younger* purposes.” *Id.* Here too, the investigation before the Board is not an ongoing judicial proceeding. Without an act of commencement, a proceeding cannot be deemed ongoing, let alone judicial.

Several Circuits agree that abstention is unjustifiable when a proceeding is still embryonic. Following *Telco*, the Seventh Circuit acknowledged that proceedings may be “at too preliminary a stage to warrant federal deference.” *See Mulholland v. Marion County Election Board*, 746 F.3d 811, 817 (7th Cir. 2014) (internal citation omitted). Reversing the district court’s decision to abstain, the court noted that abstention is not warranted “merely because a state investigation has begun.” *Id.* Likewise, the First Circuit was “persuaded that the agency’s investigation of the plaintiffs was at too preliminary a stage to constitute a ‘proceeding’ triggering *Younger* abstention.” *Guillemard-Ginorio*, 585 F.3d at 519. Drawing on *Telco*’s distinction between “the

commencement of ‘formal enforcement proceedings’” and the “‘threat of enforcement,’” the First Circuit articulated a “rule[] requiring the commencement of ‘formal enforcement proceedings’ before abstention is required.” *Id.* at 519–20 (quoting *Telco*, 885 F.2d at 1229). Also following *Telco*, the Fifth Circuit similarly distinguished *Dayton Christian Schools* and *Middlesex* on this basis. *La. Debating & Literary Ass’n v. City of New Orleans*, 42 F.3d 1483, 1490–91 (5th Cir. 1995). In those cases, the state had already “investigated the allegations, made determinations that probable cause existed, and served formal charges.” *Id.*

The Defendants cannot point to the state action initiating an “ongoing” judicial proceeding, because there is none. Instead, this embryonic preenforcement phase is an appropriate time to seek redress in federal court. “It has long been established that the mere threat of state enforcement is insufficient to justify federal court abstention.” *Seattle Pac. Univ. v. Ferguson*, 104 F.4th 50, 64 (9th Cir. 2024) (citing *Steffel*, 415 U.S. at 454, 462); *Potrero Hills Landfill, Inc.*, 657 F.3d at 885 (providing that “*Younger* does not apply” where a party is “the subject merely of *prospective* enforcement”).

Nor is the investigation before the Board judicial in nature. The district court agreed! JA34. Presently, there is only an investigation and voluntary conciliation between the parties, neither of which resemble a judicial proceeding. *See Telco*, 885 U.S. at 1228 (declining to find that the “informal fact-finding conference” was “judicial in nature” where “participants were not

sworn nor was a record maintained,” and “[n]o opportunity was provided to examine or cross-examine”). *Younger* does not apply merely because a judicial proceeding could later arise—it must be ongoing. An investigation that may or may not “culminate” (JA33–34) in charges does not suffice.

Moreover, the Boards are only authorized to conduct investigations, attempt resolution through conciliation, make a reasonable cause determination and issue a charge. Va. Code. §§ 36-96.8, 11-13. If the Boards issue a charge, then they must refer the case out for initiation of a civil action. Va. Code. § 36-96.14. The Boards lack the requisite authority to initiate a civil action in state court in the first instance; rather they must refer the matter to the attorney general.⁹ *See* Va. Code § 36-96.16 (state attorney general vested with authority to bring civil action).¹⁰ Without an ongoing judicial proceeding, abstention is unjustifiable and a federal court is required to exercise its “virtually unflagging” “obligation” “to hear and decide a case.” *Sprint*, 571 U.S. 69, 77 (simplified).

Applying *Younger* before the inception of formal state action would render Plaintiffs’ ability to seek redress in federal court illusory. Prior to a

⁹ With respect to real estate licensees like Plaintiff Wheatley, the Virginia Real Estate Board also has the authority to “initiate an administrative hearing” after a reasonable cause determination. Va. Code. § 36-96.20.

¹⁰ Private parties may also commence a civil action. Va. Code. § 36-96.18.

threat of enforcement, a plaintiff would lack standing. But after the threat arises, *Younger* abstention would bar access to federal courts. “Indeed, if there were no daylight between the invocation of pre-enforcement standing and the start of *Younger* abstention, then litigants would have virtually no opportunity to seek federal review of state laws infringing on constitutional rights.” *Ferguson*, 104 F.4th at 64. This Court spearheaded the consensus rejecting *Younger* abstention “whenever the administrative process is even preliminarily underway.” *Telco*, 885 F.2d at 1229. Undoing *Telco*’s rule would “convert[] a doctrine of comity into a blanket permission for the prolonged commission of unconstitutional acts.” *Id.*

Conclusion

The source-of-funds provision of the VFHL infringes landlords’ Fourth Amendment right to be free from warrantless searches. The district court erred in denying the preliminary injunction against unconstitutional enforcement in these circumstances and in denying standing to Plaintiffs facing an imminent enforcement risk by the Commonwealth. Further, the district court improperly invoked *Younger* to close the courthouse door.

This Court should reverse the denial of a preliminary injunction and remand with instructions to enjoin enforcement of the source-of-funds provision as it pertains to non-acceptance of Section 8 vouchers. Even if the Court does not find plaintiffs meet the standard for a preliminary injunction, it should reverse the determinations of non-justiciability.

Dated: June 12, 2026

Respectfully submitted,

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Dated: June 12, 2026

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