VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

In re: A Court of Mist and Fury — Case No. CL22-1984

In re: Gender Queer, A Memoir — Case No. CL22-1985

Brief of Main Street Books, LTD d/b/a Prince Books; KatMac LLC d/b/a Read Books; One More Page, LLC, d/b/a One More Page Books; Two Knikkers, LLC d/b/a bbgb tales for kids; American Booksellers for Free Expression; Association of American Publishers, Inc.; Authors Guild, Inc.; American Library Association; Virginia Library Association; and Freedom to Read Foundation as Proposed Amici Curiae or, in the Alternative, as Persons Interested in the Sale or Commercial Distribution of the Books

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INTRODUCTION

These cases threaten the right of booksellers, librarians, authors and publishers, including Proposed Amici, to create, curate, and provide access to First Amendment–protected material, and the right of their customers, patrons, and readers to obtain and consume such material. Proposed Amici and their members write, create, publish, produce, distribute, and sell literary works of all types, including scholarly, educational, artistic, scientific, and entertaining materials. They practice and promote free expression and the free exchange of ideas.[1] Reflecting these interests, they file this brief to highlight the constitutional deficiencies of these cases—and the statute under which these cases are brought, Virginia Code § 18.2-384 (hereafter, the "Law")—that cause unique harm to them.[2]

The Law purports to authorize a prior restraint in violation of the First Amendment because it permits pre-emptive bans on the distribution of expressive material without a prior adversarial hearing and without a final adjudication of obscenity, in violation of binding U.S. Supreme Court case law. In addition, the Law fails to provide adequate notice to all affected persons, raising both due process and First Amendment concerns. Furthermore, the Law's standard for holding books

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[1] Proposed Amici are more fully described on Attachment A hereto.
[2] Proposed Amici will not duplicate the arguments made in the other parties' briefs, except to the extent they particularly relate to the perspective of Proposed Amici. Should this case proceed to the merits, Proposed Amici also intend to vigorously dispute that the challenged books are obscene under any relevant standard.

obscene does not comply with the controlling test for obscenity under the First Amendment. Lastly, the law plainly contemplates the restriction of the books throughout Virginia, while the Virginia Supreme Court has made clear that the standard for finding obscenity is local, not state-wide.

Because the statute under which these cases are filed suffers from numerous constitutional deficiencies, this Court should dismiss both cases and hold that the statute is unconstitutional.

A. The Law's TRO Provisions Create an Unconstitutional Prior Restraint.

The Law is an unconstitutional prior restraint of speech because it purports to authorize a court to issue a "temporary restraining order against the sale or distribution of the book alleged to be obscene" only four days after the issuance of the show-cause order and upon a mere probable cause finding that a book is obscene. Va. Code Ann. § 18.2-384(C), (E). The Law authorizes this temporary restraining order (hereafter, "TRO") to enjoin "any person who publishes, sells, rents, lends, transports in intrastate commerce, or commercially distributes or exhibits the book, or has the book in his possession with intent to publish, sell, rent, lend, transport in intrastate commerce, or commercially distribute or exhibit the book" from doing so. *Id.* § 18.2-384(K). In addition, the Law provides that the existence of such a TRO will establish scienter for a criminal prosecution of anyone who distributes the book in any way. *Id.* § 18.2-384(M).

A TRO issued pursuant to this provision is a prior restraint. "The term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'" *Alexander v. United States*, 509 U.S. 544, 550 (1993) (emphasis omitted) (quoting Melville B. Nimmer, *Nimmer on Freedom of Speech* § 4.03, at 4–14 (1984)). "Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints." *Id*. As a court order directing private parties to stop circulating books, any TRO authorized by the Law would fall squarely into the category of prior restraints.

Under the First Amendment, any prior restraint of expression bears "a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). "[T]he burden of supporting an injunction against a future [circulation of expressive material] is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication." *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315–16 (1980). The U.S. Supreme Court has repeatedly made clear that, unless a law requires an adverse hearing and a final adjudication of obscenity before authorizing a restraint on distribution of expressive materials, it fails to satisfy this heavy burden.

Until a court has made a "judicial determination of the obscenity issue in an adversary proceeding," "books or any other expressive materials" cannot be restrained. *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63 (1989) (quoting *Heller v. New York*, 413 U.S. 483, 492 (1973)). "While a single copy of a book or film may be seized and retained for evidentiary purposes based on a finding of probable cause, the publication may not be taken out of circulation completely until there has been a determination of obscenity after an adversary hearing." *Id.* (citing *Heller* at 492–93).

Vance v. Universal Amusement Co. makes even clearer that the Law's TRO provisions do not comply with the First Amendment. In *Vance*, the challenged statute—much like the Law at issue here—authorized a state court judge to issue "a temporary injunction prohibiting the exhibition of specific named films [to] be entered on the basis of a showing of probability of success on the merits of the obscenity issue." *Vance* at 312 n.4. Noting that "the regulation of a communicative activity . . . must adhere to . . . narrowly drawn procedures," the Court held that the law was unconstitutional because "it authorizes prior restraints of indefinite duration on the exhibition of [expressive materials] that have not been finally adjudicated to be obscene." *Vance*, 445 U.S. at 316. Where the "special safeguards" required by the First Amendment are lacking, the fact that a ruling is issued by a state trial court judge "does not change the unconstitutional character of the restraint if erroneously

entered" and accordingly does not justify a trial court judge in enjoining the exhibition of expressive material without an adversarial hearing. *Id.* at 317. Instead, such procedural deficiencies "preclude[] the enforcement of" a law allowing such prior restraints. *Id.* By authorizing the issuance of a TRO enjoining all circulation of the challenged book on a finding of probable cause and without a prior adversarial hearing, the Law suffers from exactly the same structure—and the same flaws—as the statute found unconstitutional in *Vance*.

The Virginia Supreme Court's 1974 decision to the contrary, *Alexander v. Commonwealth,* does not bind this Court because it was decided without the benefit of subsequent U.S. Supreme Court cases, including *Vance* and *Fort Wayne*. The Virginia Supreme Court "is, of course, bound by the decisions of the Supreme Court of the United States which is the final arbiter of the proper interpretation of the Federal Constitution." *House v. Commonwealth*, 210 Va. 121, 124 (1969). Accordingly, where U.S. Supreme Court decisions state rules of federal law directly in conflict with Virginia Supreme Court precedent, lower courts must follow the rule set down by the U.S. Supreme Court. *See Commonwealth v. Washington*, 38 Va. Cir. 116, at *4 (1995). Applying that rule here, this Court must hold that the Law is unconstitutional.

In *Alexander*, the Virginia Supreme Court rejected the argument that the Law's TRO provision was an unconstitutional prior restraint. In doing so, as

subsequent caselaw has made clear, the *Alexander* Court misread two U.S. Supreme Court cases concerning the seizure of books. First, the *Alexander* Court considered *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973). The *Alexander* Court itself noted the principal reason why *Paris Adult Theatre I* was inapposite: the state government in *Paris Adult Theatre I* "placed no restraint on the exhibition of [the expressive material] until an adversary hearing had been held and a final determination of obscenity had been made." *Alexander v. Commonwealth*, 214 Va. 539, 540 (1974); *Paris Adult Theatre I*, 413 U.S. at 55. In contrast, neither an adversarial hearing nor a final determination of obscenity is required by the Law before the court can issue a TRO. As noted above, subsequent U.S. Supreme Court case law has illuminated the constitutional significance of those deficiencies.

The *Alexander* Court relied even more explicitly on the U.S. Supreme Court's decision in *Heller v. New York*, quoting its statement that there is no "absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized." *Alexander*, 214 Va. at 540–41 (quoting *Heller*, 413 U.S. at 483). The *Alexander* Court failed to quote the following sentence in *Heller*, however, which explained and qualified the previous statement: "In particular, there is no such absolute right where allegedly obscene material is seized, pursuant to a warrant, *to preserve the material as evidence in a criminal prosecution*." *Heller*, 413 U.S. at 488 (emphasis added). Despite the difference

between seizing a small amount of expressive material as evidence in a specific court case in *Heller* and the TRO's power to remove a book entirely from circulation, the *Alexander* Court seemingly relied on *Heller* for the proposition that a statute was constitutional so long as "nothing on the face of the statute . . . denies a prompt adversary hearing on the issue of obscenity after temporary seizure or restraint." *Alexander*, 214 Va. at 541.

Subsequent decisions of the U.S. Supreme Court have shown repeatedly that the Virginia Supreme Court's broad interpretation of *Heller*—and, therefore, its holding on the constitutionality of the Law—conflicts with the requirements of the First Amendment. Even in the criminal context, the U.S. Supreme Court has held that widespread seizures of expressive material—the equivalent of a ban on distribution, in terms of effect on the public's access to that expression and a speaker's right to engage in it—are disallowed without an adversarial hearing and final adjudication of obscenity. "[S]eizing [materials] to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy . . . for the bona fide purpose of preserving it as evidence in a criminal proceeding, particularly where . . . there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film." *New York v. P.J. Video, Inc.*, 475 U.S. 868, 874 (1986) (quoting *Heller*, 413 U.S. at 492–93).

The *Alexander* Court's 1974 holding that the Law is constitutional because "nothing denies" affected parties a prompt adversarial hearing after the widespread ban on distribution of the challenged book gets the constitutional rule exactly backwards—the First Amendment requires that a law affirmatively provide the safeguards of an adversarial hearing and adjudication on the merits *before* a court can remove expressive material from circulation. While the Virginia Supreme Court did not have the benefit of U.S. Supreme Court precedents such as *Vance*, *Fort Wayne Books*, and *P.J. Video* when it issued *Alexander*, the U.S. Supreme Court case law now leaves no doubt that a TRO such as that authorized by the Law requires a prior adversarial hearing and a final adjudication of obscenity.

B. By purporting to bind parties not before the court, the Law violates the First and Fourteenth Amendments.

i. <u>The Law fails to provide fair notice, in violation of due process.</u>

The Law is unconstitutional for an independent reason: its notice requirements—which apply to the TRO provisions, as well as all subsequent aspects of the proceedings—do not comply with the requirements of due process. The Law only requires that notice of the obscenity proceedings be directed to the author, publisher, and all other persons interested in the sale or commercial distribution of the book "[i]f their names and addresses are known," which seemingly permits a petitioner who is ignorant of those facts to proceed without direct notice to anyone.

Va. Code Ann. § 18.2-384(D)(3).[3] In addition, the author may have died and the publisher gone out of business such that the most obvious people who are entitled to direct notice do not exist. In such cases, the only notice given to anyone would be two notices in a newspaper in the city or county where the case is brought. *Id.* § 18.2-384(D)(2). Indeed, in this case, Petitioner did not provide the four Proposed bookseller Amici, the other booksellers in Virginia, as well as Virginia libraries and librarians with notice, even though they will be directly governed by the results of these proceedings. This violates the constitutional right to due process.

Due process requires that laws give people of ordinary intelligence fair notice of what is prohibited. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Where, as here, notice by publication is not reasonably calculated to reach all those whose rights are affected, it is unconstitutional. See *Walker v. City of Hutchinson*, 352 U.S. 112, 116 (1956) (holding that notice by publication of a compensation hearing did not comport with due process because "[i]t is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property."). Here, although the Court is empowered to issue statewide relief both in the form of a TRO and through a final adjudication of obscenity, the Law only

[3] This appears to the be the case regardless of whether any due diligence would have been sufficient to obtain any of the information.

requires that the notice by publication be placed in the local paper. As such, many who are impacted by the Court's proceedings may have no notice of them at all.

The fact that, as discussed above,[4] the obscenity finding from these proceedings can then be used in later criminal proceedings only compounds the due process error. This set-up unconstitutionally "eliminate[s] the safeguards of the criminal process," pursuant to which "a determination of obscenity [must be] made in a criminal trial hedged about with the procedural safeguards of the criminal process." *Bantam*, 372 U.S. at 69–70.

This lack of notice has one further effect: no one in Virginia can know whether, at any time, a book that they intend to share with someone else is being or has been adjudicated obscene pursuant to the Law (or enjoined under the TRO provision). The lack of certainty about the application of a law governing expression "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. A.C.L.U.*, 521 U.S. 844, 871–72 (1997). Vague laws force potential speakers to "'steer far wider of the unlawful zone'. . . than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). To remove this uncertainty—about what books are where in the process of being challenged and when either a TRO or final order will issue about them—would require every

[4] *See* the discussion of Va. Code Ann. § 18.2-384(K) *supra* Section A.

Virginian to avoid distributing (or creating) books of any kind, and especially unpopular books that are likelier to be challenged by members of the public. The First Amendment cannot abide this kind of chilling effect and, accordingly, the Law is unconstitutional.

ii. The Law creates a system of strict liability for distributing books, in violation of the First Amendment.

Relatedly, the Law allows for strict liability based "solely o[n] the possession, in [a] bookstore, of a certain book found upon judicial investigation to be obscene"—a scheme that the Supreme Court has held violates the First Amendment. *Smith v. California*, 361 U.S. 147, 149 (1959). Pursuant to the Law, once a judge deems a book to be obscene as part of a 18.2-384 proceeding, "any person who publishes, sells, . . . lends, . . . commercially distributes or exhibits the book . . . is presumed to have knowledge that [it] is obscene[.]" Va. Code Ann. § 18.2-384(K).[5] The proceeding thus suffices "to establish scienter" for any violation of a temporary restraining order issued pursuant to subsection (E), or in a future criminal prosecution pursuant to subsection (K). *Id.* § 18.2-384 (M).

As the U.S. Supreme Court has recognized, "if [a] bookseller"—such as, here, Proposed Amici booksellers and the Virginia members of amicus American Booksellers for Free Expression—"is criminally liable without knowledge of the

[5] On its face, the Law applies to a person loaning a book to a member of his or her book club, since "lends" is not modified by "commercially."

contents [of the books he sells] . . . he will tend to restrict the books he sells to those he has inspected," and this will tend to "deplete[] [the contents of bookshops and periodical stands] indeed." *Smith*, 361 U.S. at 153. As the Virginia Supreme Court has recognized, to avoid this result, "[i]t has long been established that no statute regulating the distribution of obscene materials can withstand constitutional scrutiny absent a scienter requirement." *Wall Distribs., Inc. v. City of Newport News*, 228 Va. 358, 361 (1984) (citing *Smith*, 361 U.S. at 152–54). *See also Ginsberg v. New York*, 390 U.S. 629, 644 (1968) (quoting *Mishkin v. New York*, 383 U.S. 502, 511 (1966) (recognizing the "necessity [of a scienter requirement] 'to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity'").

The Law violates this constitutional requirement. Much like the law deemed unconstitutional in *Smith*, the Law creates liability "even . . . [for those distributors who have] not the slightest notice of the character of the books they sold." 361 U.S. at 152. These distributors thus run the risk of any book on their shelves, or in their distribution stream, having been found obscene without their knowledge or involvement.

iii. The Law violates the First Amendment by failing to require that all affected parties are part of the proceeding.

In addition to falling afoul of the right to due process and creating a system of strict liability for protected expression, the practical effect of the lack of notice also

means that there may be no one aware of the petition and, therefore, no adversarial hearing at all before the court proceeds to adjudicate the obscenity of the book. In fact, the Law affirmatively provides that "[i]f no one appears and files an answer on or before the return date specified in the order to show cause, the court, upon being satisfied that the book is obscene, shall order the clerk of court to enter judgment that the book is obscene." Va. Code Ann. § 18.2-384(G).

As explained at length above, this violates the First Amendment's strong distaste for prior restraints. *McKinney v. Alabama*, 424 U.S. 669 (1976) is particularly instructive on this point. There, the Supreme Court considered an Alabama law that empowered a district attorney to "seek[ ] an adjudication of the obscenity of certain mailable matter" from a court and to rely on such a declaration as binding in all future prosecutions for distribution of the matter—including against those who, as here, "had not been [] part[ies] to the earlier [obscenity] proceeding." *Id.* at 671, 673. The Supreme Court held that, "insofar as [the law's procedures] precluded [a distributor] from litigating the obscenity vel non [of a book] as a defense to his criminal prosecution,' the law "violated the First and Fourteenth Amendments." *Id.* at 673. Here too, it appears that non-parties cannot relitigate the issue of obscenity, even when—as discussed *infra* Sections C and D—different community standards apply.

The Court explained that "[w]hile there can be no doubt . . . that obscene materials are beyond the protection of the First Amendment, . . . the procedures by which a State ascertains whether certain materials are obscene must be ones which ensure 'the necessary sensitivity to freedom of expression.'" *Id.* at 673–74 (quoting *Freedman v. Maryland*, 380 U.S. 51, 58 (1965)). And it concluded that a statutory scheme pursuant to which a distributor "received no notice of [an obscenity] proceeding," and "therefore had no opportunity to be heard," but to which "the State nevertheless seeks to finally bind him, as well as other potential purveyors of [the material]" violates the First Amendment. *Id.* at 674. Such a decree could "have the same effect as would the ex parte determination of a state censorship authority which unilaterally found material offensive and proscribed its distribution"—which "would clearly be constitutionally infirm." *Id.* It is no different where, as here, notice is given to a publisher, author, and one bookseller, but not to others subject to criminal liability throughout the state.

Though Alabama highlighted the fact that its procedure "was presided over by a judge rather than an administrative official," the Supreme Court nevertheless held that it was unconstitutional because, like the Law, it involved the naming of some—but not necessarily all—parties interested in the distribution of the challenged material. *Id.* at 675. The Court explained that "the named parties' interests are [not necessarily] sufficiently identical to those of [all other interested

parties] that they will adequately protect [their] First Amendment rights." *Id.* Those who are not parties to a proceeding "may assess quite differently the strength of their constitutional claims and may, of course, have very different views regarding the desirability of disseminating particular materials." *Id.* at 676. As a result, "they must be given the opportunity to make these assessments themselves, as well as the chance to litigate the issues if they so choose." *Id.* Any other "procedure fails to meet the standards required where First Amendment interests are at stake." *Id.* That is all the more true where, as here in Virginia, the test of obscenity will differ from jurisdiction to jurisdiction as the result of differing community standards.[6]

C. The Law Provides Evidentiary Guidelines to Determine Obscenity which are Vague, Confusing, and Contravene *Miller v. California*.

Va. Code Ann. § 18.2-384(H) provides that, as to the determination of obscenity, the court shall receive evidence, including the testimony of experts, if such evidence be offered, pertaining to:

1. The artistic, literary, medical, scientific, cultural and educational values, if any, of the book considered as a whole;

[6] As Justice Brennan explained in his concurrence, these risks are only heightened when the initial obscenity determination is made in an earlier civil proceeding but then used in a future criminal proceeding. *McKinney*, 424 U.S. at 685–86 (Brennan, J., concurring). That is for two reasons. First, applying the "preponderance-of-the-evidence standard rather than proof beyond a reasonable doubt could cause affected persons to be overly careful about the material in which they deal." *Id.* at 686. Second, "[c]ommunity standards are inherently in a state of flux, and there is a substantial danger that a civil proceeding declaring given printed matter obscene will

2. The degree of public acceptance of the book, or books of similar character, within the county or city in which the proceeding is brought;

3. The intent of the author and publisher of the book;

4. The reputation of the author and publisher; and

5. The advertising, promotion, and other circumstances relating to the sale of the book.

The Law was passed before the Supreme Court set the governing standard for obscenity in *Miller v. California*, 413 U.S. 15, 24 (1973) (defining obscenity as material that (a) taken as a whole, the average person, applying contemporary community standards, would find appeals to the prurient interest; (b) depicts sexual conduct in a patently offensive way under contemporary community standards; and (c) taken as a whole, lacks serious literary, artistic, political, or scientific value).

Because the Law only requires a court to consider the evidence listed in Va. Code Ann. § 18.2-384(H), the Law's evidentiary requirements violate the First Amendment. Several of the evidentiary categories listed in § 18.2-384(H) have no relevance to—or, worse yet, contravene—the *Miller* test. *See, e.g.*, Va. Code Ann. § 18.2-384(H)(2) (considering "[t]he degree of [local] public acceptance of the book" rather than whether "the average person, applying contemporary community

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forever preclude its introduction into the community[.]" *Id.* at 689–90. This would be a significant loss for the public, as '[s]ome of the most celebrated works of our generation would likely have been the pornography of a prior generation." *Id.* at 690. An adverse finding here could result in books being taken out of distribution not only in Virginia but throughout the country.

standards, would find that the work, taken as a whole, appeals to the prurient interest" and depicts sexual conduct "in a patently offensive way," *Miller*, 413 U.S. at 24 (internal quotation marks and citations omitted)). Similarly, the "reputation of the author and publisher," Va. Code Ann. § 18.2-384(H)(4), is irrelevant to the merits of the work itself "taken as a whole," *Miller*, 413 U.S. at 24. If the author's or publisher's reputation[7] is poor and the work would otherwise be First Amendment-protected under the *Miller* test, it would violate the First Amendment to restrict the work.

In addition, the third prong of the *Miller* test protects material which has serious literary, artistic, *political*, or scientific value. *See Miller*, 413 U.S. at 24. Va. Code Ann. § 18.2-384(H)(1) does not provide for evidence regarding the work's political value. If, as appears, this means that the Court is not required to (or more likely, may not) consider the book's political value, it is yet another example of the unconstitutionality of the Law—and an acutely concerning one, as "[c]ore political speech occupies the highest, most protected position" in the "hierarchy . . . [of] constitutional protection of speech." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring).

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[7] Even if it were potentially relevant, "reputation" is unconstitutionally vague. A publisher's reputation for creating beautiful books or for publishing books where the pages start falling out after a few readings? An author's reputation for not paying her bills or not mowing her lawn?

D. The Law Disregards the Fact that Virginia Applies Local Community Standards to Determine Obscenity.

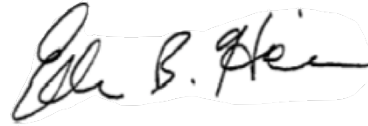
The Virginia Supreme Court has made clear that, in determining whether a work is obscene, a court must consider local—not statewide or national—community standards. *Price v. Commonwealth*, 214 Va. 490, 491–92 (1974). This means that a book can be legally obscene in one community and not in another. Yet under the Law, a book found obscene in one Virginia community—a community arbitrarily or strategically chosen by the petitioner—will suffice to bind retailers, publishers, and others in all Virginia communities, including ones where the book would likely not be held obscene. This is obviously of great concern to Proposed Amici and their members, who do business throughout Virginia.

CONCLUSION

For these reasons, the Court should dismiss these petitions and hold that the Law is unconstitutional.

Dated: July 26, 2022

Respectfully submitted,



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ATTACHMENT A

Main Street Books, LTD d/b/a Prince Books has for forty years been a general independent bookstore in Norfolk, Virginia.

KatMac LLC d/b/a Read Books is a small, independent bookshop carrying new books of all genres, for all ages, located in the ViBe Creative District within Virginia Beach, Virginia.

One More Page, LLC, d/b/a One More Page Books is an independent bookstore in Arlington-Falls Church, Virginia. It provides a place for its community to come together to share a love of reading and books through author talks, book clubs, wine and chocolate tastings, and conversation. One More Page engages with the community where they are—whether in the store or beyond its walls.

Two Knikkers, LLC d/b/a bbgb tales for kids has for twelve years been a children's bookstore in Richmond, Virginia. It is a place where minors of all ages—from birth to eighteen—can find themselves represented in books.

The **American Booksellers for Free Expression** ("ABFE") is the free speech initiative of the American Booksellers Association ("ABA"). ABA was founded in 1900 and is a national not-for-profit trade organization that works to help independently owned bookstores grow and succeed. ABA represents 1,900 member companies operating in 2,400 locations. ABA's core members are key participants in their communities' local economy and culture. To assist them, ABA provides

education, information dissemination, business products, and services; creates relevant programs; and engages in public policy, industry, and local-first advocacy. The forty-eight ABA members located in the Commonwealth of Virginia, including some who currently sell *A Court of Mist and Fury*, will be subject to any injunction granted in this action.

The **Association of American Publishers, Inc**. ("AAP"), a not-for-profit organization, represents the leading book, journal, and education publishers in the United States on matters of law and policy, advocating for outcomes that incentivize the publication of creative expression, professional content, and learning solutions. AAP's members range from major commercial book and journal publishers to small, non-profit, university, and scholarly presses, as well as leading publishers of educational materials and digital learning platforms. AAP's members publish a substantial portion of the general, scholarly, educational, and religious books produced in the United States, some of which include depictions of nudity or sexual conduct. Its members are active in all facets of print and electronic media, including publishing a wide range of electronic products and services. AAP represents an industry whose very existence depends on the freedom of expression guaranteed by the First Amendment.

The **Authors Guild, Inc**. (the "Guild") was founded in 1912 and is a national non-profit association of more than 12,000 professional, published writers of all

genres, 378 of whom are located in Virginia. The Guild counts historians, biographers, academicians, journalists, and other writers of non-fiction and fiction as members. The Guild works to promote the rights and professional interest of authors in various areas, including copyright, freedom of expression, and taxation. Many Guild members earn their livelihoods through their writing. Their work covers important issues in history, biography, science, politics, medicine, business, and other areas; they are frequent contributors to the most influential and well-respected publications in every field.

The American Library Association ("ALA"), established in 1876, is a nonprofit professional organization of more than 50,000 librarians, library trustees, and other friends of libraries dedicated to providing and improving library services and promoting the public interest in a free and open information society. ALA upholds, promotes, and defends the right to free thought and free expression and resists all efforts to censor library resources. ALA values our nation's diversity and strives to reflect that diversity by fostering the conditions that permit libraries to provide a full spectrum of resources and services to the communities they serve.

The purpose of the **Virginia Library Association ("VLA")** is to develop, promote, and improve library and information services, library staff, and the profession of librarianship in order to advance literacy and learning and to ensure access to information in the Commonwealth of Virginia. Since its founding in 1905,

VLA has: grown to represent more than 5,000 librarians, library workers and library staff; expanded the scope of its organization; engaged legislatively at the state and federal level; provided its members with newsletters, scholarly journals, and a website; and supported library education, training, and outreach. VLA is committed to its Core Organizational Values, which include support for: all types of libraries; all library staff, friends, trustees, and other individuals and groups working to improve library services; intellectual freedom for all members of our communities; and diversity, inclusion, equity, and accessibility in our profession and in library practice.

The Freedom to Read Foundation is an organization established by members of the American Library Association to promote and defend First Amendment rights, foster libraries as institutions that fulfill the promise of the First Amendment, support the rights of libraries to include in their collections and make available to the public any work they may legally acquire, establish legal precedent for the freedom to read of all citizens, protect the public against efforts to suppress or censor speech, and support the right of libraries to collect and individuals to access information that reflects the diverse voices of a community so that every individual can see themselves reflected in the library's materials and resources.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 26, 2022, an electronic copy of the foregoing Brief of Proposed Amici Curiae or, in the Alternative, as Persons Interested in the Sale or Commercial Distribution of the Books and appended Attachment A were served by e-mail on the parties listed below and that copies of the same were mailed by courier to the Clerk of Court for the Virginia Beach Circuit Court.

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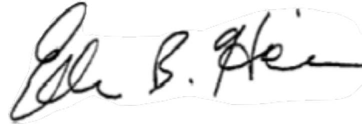
Dated: July 26, 2022

Respectfully submitted,



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