Virginia Beach Circuit Court
Civil Division

IN RE: GENDER QUEER, A MEMOIR (Case No. CL22-1985)

&

IN RE: A COURT OF MIST & FURY (Case No. CL22-1984)

BRIEF OF *AMICI CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION and WOODHULL FREEDOM FOUNDATION IN SUPPORT OF INTERESTED PARTIES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Other Authorities:

INTEREST OF *AMICI CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the rights of all Americans to the freedoms of speech, expression, and conscience—the essential qualities of liberty. Founded in 1999 as the Foundation for Individual Rights in Education, FIRE's sole focus before the expansion of our mission in June 2022 was defending student and faculty rights at our nation's colleges and universities. Given its decades of experience combating censorship on campus, FIRE is all too familiar with the constitutional, pedagogical, and societal problems presented by silencing minority viewpoints and dissent. In accordance with our newly expanded purview, FIRE strongly opposes attempts to ban books on the basis of subjective offense—both on- and off-campus. Informed by our unique organizational history, FIRE has a keen interest in ensuring that the censorship we have fought and continue to fight on campus does not take hold in society at large.

The Woodhull Freedom Foundation is a non-profit organization that works to advance recognition of sexual freedom, gender equality, and family diversity. The organization works to improve the well-being, rights, and autonomy of every individual through advocacy, education, and action. The suffragist and feminist Victoria Woodhull, the organization's namesake, was jailed repeatedly on "obscenity"

[1] This brief is filed pursuant to the Court's First Scheduling Order, issued June 30, 2022. Proposed *amicus* Woodhull Freedom Foundation's Notice of Appearance is pending with this Court.

charges for her advocacy. Accordingly, the Woodhull Freedom Foundation has a strong interest in ensuring the right to freedom of expression for all.

As obscenity is one of the few forms of speech unprotected by the First Amendment, *amici* seek to ensure that courts apply obscenity standards narrowly and consistently, lest works protected by the First Amendment—including *Gender Queer* and *A Court of Mist and Fury*—be unjustly classified as "obscene" and restrained from dissemination. If not checked by this Court, renewed enforcement of Virginia's obscenity-restraining statute will impede Virginians' constitutionally protected right to freely access literature with legitimate artistic, political, and educational value, such as the works challenged here.

SUMMARY OF ARGUMENT

Some readers will choose not to purchase or read the books at issue in this case. Some retailers and some librarians will decline to place them on the shelves. Our Constitution reserves these choices for individuals and forbids them from the state. In our pluralist democracy, the First Amendment prescribes a remedy for audiences offended by protected speech: those who seek to avoid "bombardment of their sensibilities" may do so "simply by averting their eyes." *Cohen v. California*, 403 U.S. 15, 21 (1971). Declaring books obscene because they include discussions or depictions of sex would reprise a discredited era of censorship repudiated by decades of Supreme Court precedent.

The current national push to ban books discussing sexuality, identity, and other controversial topics mirrors efforts to censor speech at colleges and universities across the country. For more than two decades, *amicus* FIRE has successfully

defended dissenting, critical, minority, or simply unpopular viewpoints in higher education, and has repeatedly vindicated the rights of students and faculty members facing investigations, discipline, and censorship for discussing sexuality and race. But FIRE has also seen the consequences of teaching students the unacceptable lesson that vigilante censorship—including newspaper theft and book-burning—can *ever* be a proper response to protected speech that one would rather not hear. FIRE's experience illustrates the corrosive harm of officially sanctioned and politically driven censorship—a poison that must be rejected on campuses and in communities alike.

Gender Queer and *A Court of Mist and Fury* are fully protected by the First Amendment. As one of the few categorical exceptions to the First Amendment, the Supreme Court has prescribed for "obscenity" a necessarily narrow and exacting definition. Neither book comes close to constituting obscenity for either adults or minors. Both possess serious literary, artistic, and political value. And neither depicts or describes sexual conduct in a patently offensive way, nor taken as a whole, appeals to the prurient interest.

Both longstanding First Amendment precedent and our larger cultural understanding of freedom of expression forbid banning books that, like *Gender Queer* and *A Court of Mist and Fury,* implicate political and social discussions that offend culture war partisans. This Court must find both works fully protected.

ARGUMENT

I. The Preservation of Our Pluralist Democracy Requires the Rejection of Censorship.

The First Amendment's vast and vital protection of speech reflects the truism that, in a pluralist democracy, "one man's vulgarity is another's lyric." *Cohen v. California*, 403 U.S. 15, 25 (1971). Efforts to ban books—like the attempt before this Court—are sharply at odds with the First Amendment because they seek to "prescribe what shall be orthodox" in the printed word within the Commonwealth. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Book bans seek to enlist the power of the state to dictate what each of us and our families may or may not read. This case is especially disturbing because it recalls the now-repudiated criminalization of "obscene" works that simply discuss sex, sexuality, or sexual minorities. Troublingly, this attempt to ban books also reveals the same increasing comfort with censorship that *amicus* FIRE has fought against for over twenty years on campuses nationwide.

A. Banning Books Is Antithetical to the First Amendment and Our Pluralist Democracy.

Life in a free society—composed of people with divergent views, interests, and beliefs—necessarily means that some will choose to write, publish, distribute, or read material that others will find objectionable. The petitioner here would enlist this Court in making that choice for others. But the First Amendment relieves the Court of the authority to do so, for "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house,

what books he may read or what films he may watch." *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

And for good reason. The First Amendment limits government authority over speech precisely because officials "cannot make principled distinctions" about what speech is sufficiently "distasteful" so as to outlaw it. *Cohen*, 403 U.S. at 25. To do otherwise would allow authorities to restrict speech they deem "hurtful," *Snyder v. Phelps*, 562 U.S. 443, 456 (2011), "without moderation," *Baumgartner v. United States*, 322 U.S. 665, 674 (1944), "inappropriate or controversial," *Rankin v. McPherson*, 483 U.S. 378, 387 (1987), "outrageous," *Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988), or "indecent," *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 667 (1973). In short, the government may not decide "that some speech is not worth it." *United States v. Stevens*, 559 U.S. 460, 470 (2010). First Amendment protection "does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." *Id.* at 460–61. Indeed, the "bedrock principle underlying the First Amendment" is that officials cannot limit expression "simply because society finds [it] offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

Because subjective offense is not a sufficient basis for suppressing speech, those opposed to an idea, a book, or a work of art may endeavor—as here—to expand the First Amendment's narrow exceptions to works they find objectionable. Were this court to stretch the obscenity exception to reach *Gender Queer* and *A*

Court of Mist and Fury, the effects of its order will not end with *these* books alone. If they are obscene as to minors, so too are many other works.

Without clarity from this Court, petitioners like the politicians here may prohibit parents from deciding what their children may read. Nor is this authority limited to books. Broad authority to prohibit or criminalize the availability of materials containing references to sexual content would enable the state to incarcerate a parent who allows a teenager to view an R-rated movie[2] or even to access the internet.

Nor would the effects of such an order be limited to this Court's territorial jurisdiction. Instead, it would embolden and invite further calls for censorship in school districts, libraries, and bookstores across the country—not only of these books, but of any now targeted by ambitious politicians nationwide.[3] The resulting chill will force libraries, bookstores, and publishers unable to bear the cost of litigation to choose the cheapest option: censorship. But state-enforced silence has a cost, too, and it will be borne by groups without the political power to defend speech of interest to their communities—those who most need the First Amendment and courts that will adhere to its narrow limitations.

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[2] States have, for example, attempted to "adopt and impose MPAA voluntary standards" of movie ratings (the familiar G, PG, PG-13, R, and NC-17 ratings) "as a government standard for the viewing of movies." State of Tenn. Office of the Attorney General Opinion No. 13-101 (Constitutionality of Criminal Statute Regarding Admission of Minors to Movies) (surveying cases), *available at* https://bit.ly/3zjsnRw.

[3] *See, e.g.*, Bill Chappell, *A Texas lawmaker is targeting 850 books that he says could make students feel uneasy*, NPR (Oct. 28, 2021, 1:00 PM), https://n.pr/3v8OyHL.

B. The Obscenity Exception Has Historically Been Wielded Against LGBTQIA+ People, Organizations, and Materials Discussing Sex.

The First Amendment's exception for obscenity, properly defined, reaches only an exceptionally narrow range of speech involving graphic depictions of "patently offensive 'hard core' sexual conduct." *Miller v. California*, 413 U.S. 15, 27 (1973). The *Miller* standard's strict limits are no accident. Rather, *Miller*'s tightly circumscribed scope recognizes that "courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression," lest the tyranny of the majority and power of the state combine to criminalize speech. *Id.* at 22–23. Because for decades, that is exactly what happened.

Expansive and inherently subjective statutory definitions of obscenity empowered crusaders like anti-vice Special Agent Anthony Comstock to censor and criminalize a vast range of literature, art, political argument, and even medical information involving sex. *See generally* Amy Sohn, *The Man Who Hated Women: Sex, Censorship, & Civil Liberties in the Gilded Age* (2021). For decades, an elastic legal conception of obscenity resulted in writers, artists, activists, medical practitioners, and far too many others being jailed for speaking about sex and sexuality. *See* Bob Corn-Revere, *The Mind of the Censor and the Eye of the Beholder: The First Amendment and the Censor's Dilemma* 14–54 (2021). For example, the feminist and suffragist Margaret Sanger was arrested for criticizing the criminalization of speech about birth control in the journal *The Woman Rebel*. *Id.* at 52. Dr. Edward Bliss Foote, publisher of *Medical Common Sense*, was convicted for

mailing copies of a pamphlet describing condoms. *Id.* at 50–51. Ezra Heywood was arrested and sentenced to two years' hard labor for mailing his publication *The Word*, which included an article by his wife advocating for the popular use of medical terms like "penis," "vagina," and "womb." *Id.* at 36.

In short, as Chief Justice Earl Warren once observed, the "history of the application of laws designed to suppress the obscene demonstrates convincingly that the power of government can be invoked under them against great art or literature, scientific treatises, or works exciting social controversy." *Roth v. United States*, 354 U.S. 476, 495 (1957) (Warren, C.J., concurring in result). And this history also demonstrates that the abuse of obscenity laws regularly targets minority or dissenting viewpoints. So while the First Amendment protects everyone in the United States, it is acutely important to those without the power to defend their expressive rights through the political process. At its core, the First Amendment is a "counter-majoritarian bulwark against tyranny." *Wollschlaeger v. Governor*, 848 F.3d 1293, 1327 (11th Cir. 2017). As such, the LGBTQIA+ community in particular has relied on First Amendment protection in the face of oppression and calls for censorship, including those invoking the obscenity exception.

Following World War II, for example, the federal government began to view homosexuals as threats to national security, leading to a wave of backlash against queer individuals through the renewed enforcement of morality laws. Carlos A. Ball, *The First Amendment and LGBT Equality: A Contentious History*, 17–18 (2017). In response, queer activists began to publish and disseminate magazines

designed to raise awareness of queer issues. *Id.* at 18. One such magazine, *ONE*, made extensive efforts to remain compliant with federal obscenity statutes, but the Post Office blocked the dissemination of issues of *ONE* due to its depiction of physically intimate homosexual relationships. *One, Inc. v. Olesen*, 241 F.2d 772 (9th Cir. 1957), *cert. granted and reversed*, 355 U.S. 371 (1958) (*per curiam*). The Ninth Circuit upheld the Post Office's censorship, citing the "moral sense of the public" and an article it labeled "nothing more than cheap pornography calculated to promote lesbianism," because a character "[gave] up her chance for a normal married life to live with the lesbian." *Id.* at 775–77. The court held it was of no moment that the actual readership didn't regard *ONE* as pornographic, as an "article may be vulgar, offensive and indecent even though not regarded as such by a particular group of individuals constituting a small segment of the population because their own social or moral standards are far below those of the general community." *Id.* at 777.

The Supreme Court summarily reversed. 355 U.S. 371. Justice Douglas, noting later that this summary reversal rested on *ONE*'s value to the LGBTQIA+ community, explained that:

> Man was not made in a fixed mould. If a publication caters to the idiosyncrasies of a minority, why does it not have some "social importance"? Each of us is a very temporary transient with likes and dislikes that cover the spectrum. However plebian my tastes may be, who am I to say that others' tastes must be so limited and that other tastes have no "social importance"? How can we know enough to probe the mysteries of the subconscious of our people and say that this is good for them and that is not? Catering to the most eccentric taste may have "social importance" in giving that

> minority an opportunity to express itself rather than to repress its inner desires[.]

Ginzburg v. United States, 383 U.S. 463, 491 (1966) (Douglas, J., dissenting) (citing *One, Inc.*, 355 U.S. 371) (citation omitted).

Four years after *One*, the Court rejected arguments that sexually suggestive magazines catering to the gay male community were obscene. In doing so, it highlighted the inconsistency that would result:

> Our own independent examination of the magazines leads us to conclude that the most that can be said of them is that they are dismally unpleasant, uncouth, and tawdry. But this is not enough to make them 'obscene' . . . [T]hese portrayals of the male nude cannot fairly be regarded as more objectionable than many portrayals of the female nude that society tolerates.

Manual Enterprises, Inc. v. Day, 370 U.S. 478, 489–90 (1962).

The Court's ruling would seem unremarkable today, but sharply departed from the prevailing negative attitudes towards homosexuality then commonplace in American society. Ball, *supra* at 17–25.[4] As a result of these decisions, LGBTQIA+ individuals were free to discuss and raise awareness of the issues their communities face, sparking a continued public dialogue that ultimately formed the basis for the

[4] As commentator James Kirchick recently wrote, "Only in a society committed to freedom of expression could a group of people stigmatized as sinners, prosecuted as criminals, and diagnosed as mental defectives improve their status so dramatically over such a relatively short period of time." James Kirchick, *'The First Amendment Created Gay America'*, Common Sense (May 31, 2022), https://www.commonsense.news/p/the-first-amendment-created-gay-america.

later gay liberation movement.[5] As the constitutional scholar Dale Carpenter has observed, the First Amendment "created gay America":

> For advocates of gay legal and social equality, there has been no more reliable and important constitutional text. The freedoms it guarantees protected gay cultural and political institutions from state regulation designed to impose a contrary vision of the good life. Gay organizations, clubs, bars, politicians, journals, newspapers, radio programs, television shows, web sites—all of these—would have been swept away in the absence of a strong and particularly libertarian First Amendment. It shielded gay political efforts when most of the country thought homosexuals were not just immoral, but also sick, dangerous, and criminal.

Dale Carpenter, *Born in Dissent: Free Speech and Gay Rights*, 72 SMU L. Rev. 375, 385 (2019).

But censorship is a perennially popular response to speech, and guarding against it requires constant vigilance. Recent developments both on- and off-campus demonstrate the persistence of the threat to freedom of expression.

C. The National Effort to Ban Books Mirrors Censorship on Campus.

Amicus FIRE has spent decades advocating for expressive rights in the higher education context, where the First Amendment has again been vital in defending LGBTQIA+ expression from censorship. For example, the United States Court of Appeals for the Eighth Circuit held that the University of Arkansas at

[5] *See, e.g.,* Jonathan Rauch, *The unknown Supreme Court decision that changed everything for gays*, Wash. Post (Feb. 5, 2014, 10:11 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/05/the-unknown-supreme-court-decision-that-changed-everything-for-gays.

Fayetteville's student government violated the First Amendment by denying the Gay and Lesbian Students Association funding because of its distaste for the group's beliefs. *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361, 368 (8th Cir. 1988). As the Eighth Circuit noted, the student government made their feelings plain: "When the group's representative stood up, one senator expressed surprise at how normal she looked." *Id.* at 364. A similar result played out in New Hampshire, where a court ruled that a university's ban on an LGBTQIA+ student group's social events violated the First Amendment. *Gay Students Org. of Univ. of N.H. v. Bonner*, 367 F. Supp. 1088, 1090 (D.N.H. 1974). In both Arkansas and New Hampshire, elected officials publicly pressured the universities' administrators to suppress the groups, introducing resolutions, holding meetings, and sending open letters to rein in "moral filth." *Gohn*, 850 F.2d at 363–64; *Bonner*, 367 F. Supp. at 1092. Censorship is often politically popular, representing an acute threat to those without the political capital to defend their expressive rights.

But despite these and other longstanding legal precedents, LGBTQIA+ expression is still regularly suppressed on campus. Recently, for example, Texas A&M University suddenly pulled support for Draggieland—an annual student-planned drag show—after alumni and donors objected to the event, some calling it "disgusting" and "abhorrent."[6] Texas A&M's action followed years of protests

[6] *See* Letter from Anne Marie Tamburro, Program Officer, FIRE to Katherine Banks, President, Texas A&M University, Apr. 22, 2022, *available at* https://www.thefire.org/fire-letter-to-texas-am-university-april-22-2022.

against the event, with critics characterizing drag performers as "needing prayers"[7] and petitioning to cancel the event on grounds that it "promotes the sexualization of the human person."[8]

Similarly, the state of Tennessee censored students at University of Tennessee – Knoxville when, in 2016, legislators banned it from funding Sex Week,[9] an annual event "where students can openly engage in comprehensive and academically informed discussion about all things related to sex, sexuality, relationships, and gender."[10] With some lawmakers calling Sex Week "disgusting" and "a national embarrassment," the legislature followed the funding ban with further attempts to limit the event, including contemplating an end to all student-fee allocations to campus organizations—which benefit many other student groups—simply to prevent Sex Week from collecting monies from students.[11]

And in Arkansas, after the state legislature adopted a commendable statutory protection of campus expression, one lawmaker successfully pressured the

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[7] Mitchell Beddingfield, *DRAGgieland 2020 Protests*, The Battalion (Feb. 21, 2020), https://www.thebatt.com/draggieland-2020-protests/video_3606ee52-54f1-11ea-bddb-f7c94c180463.html.

[8] Jacob Mangold, *Stop Draggieland*, Change.org, https://www.change.org/p/dr-michael-young-cancel-draggieland (last visited Jul. 20, 2022).

[9] Joe Cohn, *Tennessee Bill to Punish UT for Sex Week Becomes Law*, FIRE (May 23, 2016), https://www.thefire.org/tennessee-bill-to-punish-ut-for-sex-week-becomes-law.

[10] FAQs, Sex Week, http://sexweekut.org/about/faqs (last visited Jul. 20, 2022).

[11] Letter from Justin P. Wilson, Comptroller of the Treasury, and Jason E. Mumpower, Deputy Comptroller, to Randy McNally, Lieutenant Governor, and Glen Casada, Speaker of the House, *available at* https://bit.ly/3PCyBC2.

University of Central Arkansas to censor a sign placed outside of a library as part of its Pride Month display.[12] The sign featured a quote from Lady Gaga: "Being gay is like glitter. It never goes away." The university's president claimed not to have acted on pressure from a state lawmaker, but instead to have reacted to "several messages" from the public complaining about "interest politics" and the library "promoting an agenda"—yet the university also disavowed having any records of these complaints. *Id.*

In Texas, Tennessee, and Arkansas, authorities acted upon the sensibilities of some—often those with little or no connection to the university—to restrict on-campus speech related to sexual orientation and gender. In each instance, calls for censorship were politically popular. People demanded that the authorities impose their own subjective judgment about what speech is appropriate or worthwhile on groups without the political power to protect their expression through the ballot box.

Speech related to LGBTQIA+ issues or even sex writ large is not the only expression facing calls for censorship both on campus and in society at large. Both within and beyond the obscenity context, urges to silence speakers with whom one disagrees resound in today's culture. For example, at Georgia Southern University, students accusing author Jennine Capó Crucet of "dissing white people" during a

[12] Adam Steinbaugh, *University of Central Arkansas censored library's Pride Month sign after legislator complained*, FIRE (June 28, 2019), https://www.thefire.org/university-of-central-arkansas-censored-librarys-pride-month-sign-after-legislator-complained.

Q&A burned copies of her book *Make Your Home Among Strangers*,[13] and law students in California shouted down Ilya Shapiro—already suspended from his post at Georgetown University—after his comments criticizing President Biden's stated intention to nominate a black woman to the Supreme Court.[14] The desire to eliminate inconvenient headlines about, for example, a campus security officer facing impaired driving charges, or inefficient student government, has led to thefts of student newspapers on campuses across the country.[15] And state legislatures nationwide have proposed bans on "divisive concepts" at public colleges and universities, such as teaching critical race theory.[16]

All too often, college and university officials use public calls for censorship, or concerns for the sensibilities of others, to justify restrictions on unpopular or controversial speech of all political stripes on hotly contested issues such as race,

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[13] Daniel Burnett, *A closer look at Georgia Southern's response to students' book burning*, FIRE (Oct. 18, 2019), https://www.thefire.org/a-closer-look-at-georgia-southerns-response-to-students-book-burning.

[14] Nate Hochman, *Full Video Shows Law Students Heckling, Shouting Down Ilya Shapiro for 45 Minutes*, Nat'l Review (March 2, 2022), https://www.nationalreview.com/2022/03/full-video-shows-law-students-heckling-shouting-down-ilya-shapiro-for-45-minutes.

[15] *See, e.g.*, Alex Morey, *FIRE, SPLC write Virginia Commonwealth student government amid allegations that members — including the president — stole newspapers*, FIRE (Mar. 4, 2020), https://www.thefire.org/fire-splc-write-virginia-commonwealth-student-government-amid-allegations-that-members-including-the-president-stole-newspapers; Lindsie Rank, *Student editor on Capital University cop stealing paper: It's like someone saying 'All your work is trash.'*, FIRE (Nov. 7, 2019), https://www.thefire.org/student-editor-on-capital-university-cop-stealing-paper-its-like-someone-saying-all-your-work-is-trash.

[16] *See, e.g.*, Tyler Coward, *State legislatures continue efforts to restrict academic freedom*, FIRE (Apr. 29, 2021), https://www.thefire.org/state-legislatures-continue-efforts-to-restrict-academic-freedom.

public health, and politics.[17] For example, Polk State College banned from a faculty art exhibition a professor's piece that used images of Donald Trump and other politicians engaged in sexual acts to comment on "the morality of the Trump era," as administrators cited concerns for high school students who might happen to be taking classes on campus.[18] Meanwhile, administrators at Essex County College terminated a lecturer and claimed to have been "immediately inundated" by complaints over her remarks supporting Black Lives Matter on Fox News, but public records showed that only one person had complained.[19] In other words, administrators view public anger alone as an acceptable basis to fire faculty members—so much so that they're willing to cry wolf and hope nobody notices.

Censorship threatens speech off-campus, as well. For example, the national effort to ban books from public libraries—or, as in this case, even private bookstores—has reached an "unprecedented" pace, exemplifying a disturbing and dangerous comfort with censoring controversial speech.[20] Even *Everywhere Babies*, a book for

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[17] *See generally* FIRE, *REPORT: At least 111 professors targeted for their speech in 2021* (March 2, 2022), https://www.thefire.org/report-at-least-111-professors-targeted-for-their-speech-in-2021 (documenting incidents targeting faculty members' expressive and academic freedoms).

[18] Claire McNeill, *Polk State College deems explicit anti-Trump art "too controversial" for campus display*, Tampa Bay Times (Feb. 21, 2018), https://www.tampabay.com/blogs/gradebook/2018/02/21/polk-state-college-deems-explicit-anti-trump-art-too-controversial-for-campus-display.

[19] Adam Steinbaugh, *After FIRE lawsuit, Essex County College finally turns over documents about firing of Black Lives Matter advocate*, FIRE (Jan 23, 2018), https://www.thefire.org/after-fire-lawsuit-essex-county-college-finally-turns-over-documents-about-firing-of-black-lives-matter-advocate.

[20] Angela Haupt, *The rise in book bans, explained*, Wash. Post (June 9, 2022, 8:00 AM), https://www.washingtonpost.com/books/2022/06/09/rise-book-bans-

infants and toddlers that has been "a staple of family bookshelves, a common recommendation in new parent groups, and a celebrated title on Best Books lists" since its publication in 2001, is now targeted for censorship.[21]

Politically driven pushes to silence minority, dissenting, or unpopular voices may begin with allegedly "obscene" LGBTQIA+ speech. But, as we have seen on campus in recent years, they quickly threaten to expand to other controversial topics like race, vaccines, reproductive rights, and religion.

II. *Gender Queer* and *A Court of Mist and Fury* Are Fully Protected by the First Amendment.

"The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent." *Miller*, 413 U.S. at 34. Because *Gender Queer* and *A Court of Mist and Fury* possess such value, both are protected by the First Amendment.

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explained; *see also* Elizabeth A. Harris and Alexandra Alter, *Book Ban Efforts Spread Across the U.S.*, N.Y. Times (Feb. 8, 2022), https://www.nytimes.com/2022/01/30/books/book-ban-us-schools.html. *See also, e.g.*, PEN America, *REPORT: 1,586 School Book Bans and Restrictions in 86 School Districts Across 26 States* (Apr. 7, 2022), https://pen.org/press-release/report-1586-school-book-bans-and-restrictions-in-86-school-districts-across-26-states (documenting efforts to restrict 1,145 books since July 1, 2021).

[21] Caitlin Gibson, *'Everywhere Babies,' a picture book celebrating infants, on list of banning targets in Florida*, Wash. Post (Apr. 22, 2022, 8:52 AM), https://www.washingtonpost.com/parenting/2022/04/22/banned-books-everywhere-babies.

A. "Obscenity" Is a Legal Term of Art with a Narrow, Precise Definition.

As sex is "a great and mysterious motive force in human life," of intrinsic "human interest and public concern," its mere portrayal "in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." *Roth*, 354 U.S. at 487. To prevent obscenity laws from criminalizing discussion of sex or sexuality, the Supreme Court developed a precise, three-part test for obscenity. *Miller*, 413 U.S. at 24. A work may be banned as "obscene" only if "taken, as a whole," the "average person, applying contemporary community standards" would consider it to "appeal[] to the prurient interest," it depicts or describes "sexual conduct" in a "patently offensive" manner, *and* it lacks "serious literary, artistic, political, or scientific value." *Id.* (internal quotations omitted). Challenged works must meet all three prongs of this test to be obscene. *See id.* at 36–37; *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972).

Under Virginia state law, restrictions on the distribution of materials to minors must meet a modified version of this test for juveniles. Va. Code Ann. § 18.2-390. Virginia's Supreme Court has clarified that this definition of obscenity does not reach materials with "serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents." *Commonwealth v. Am. Booksellers Ass'n.*, 236 Va. 168, 177 (1988). In other words, it made clear the First Amendment protects even those books that may have "serious value" only for a small group of children, including older children. *Id.* The Court quoted Justice Blackmun's concurrence in *Pope v. Illinois* to make the point that even when the audience

includes minors, "the First Amendment does not permit a majority to dictate to discrete segments of the population . . . the value that may be found in various pieces of work." *Id.* at 176–77 (quoting 481 U.S. 497, 506 (1987) (Blackmun, J., concurring)). This standard appropriately recognizes that literature, art, political expression, and science are not the sole province of adults, and that the First Amendment protects the right of minors to access works having such value.

B. Neither *Gender Queer* Nor *A Court of Mist and Fury* Constitute Obscenity as to Adults or Minors.

Gender Queer and *A Court of Mist and Fury* do not meet the legal standard for obscenity. Even if their isolated references to or depictions of sexual conduct were found both to appeal to a prurient interest and to be patently offensive,[22] the books do not lack "serious value" for their audience. As a result, both are entitled to the protection provided by the First Amendment.

1. *Gender Queer* is not obscene as to minors.

Even if the isolated excerpts bandied about by *Gender Queer*'s critics were said to appeal to a prurient interest, the book as a whole has serious literary value for its audience. The book is a memoir in which the author, Maia Kobabe, struggles with gender identity and sexual orientation. Kobabe wrote the book for older

[22] Whether the works are patently offensive is a question constitutionally left for a jury. *See generally Smith v. United States*, 431 U.S. 291, 301–02 (1977). Because offense inherently involves subjective judgments of value and taste, *amici* take no position on whether these books or any particular expression is offensive. However, as both works here fail other prongs of the obscenity test, whether they are patently offensive is immaterial.

teenagers facing similar conflicts and experiences.[23] As a whole, *Gender Queer* largely describes *non*-sexual experiences that contributed to Kobabe's gender dysphoria[24] and sense of disconnection from femininity, such as feelings of confusion and shame after learning women are "supposed" to shave their legs,[25] the distress and anxiety Kobabe felt when having their hair cut,[26] and terror experienced during and after a gynecological exam.[27]

Gender Queer, like most books, will not appeal to or have value to *every* audience. In recognizing that the First Amendment protects it, however, this Court would not endorse its content, but instead recognize it has value to *an* audience. The Court would not be alone in doing so; *Gender Queer* has received the Alex Prize from the American Library Association—an honor bestowed on books intended for teen readers.[28] Awards and accolades earned by the work are indicia of its artistic or literary value. *See Jenkins v. Georgia*, 418 U.S. 153, 158 n.5 (1974).

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[23] Maia Kobabe, *Gender Queer: A Memoir* 124–132 (2019) (hereinafter "*Gender Queer*"); *see also* Alexandra Alter, *How a Debut Graphic Memoir Became the Most Banned Book in the Country*, N.Y. Times (May 1, 2022), https://www.nytimes.com/2022/05/01/books/maia-kobabe-gender-queer-book-ban.html.

[24] Gender dysphoria is defined as "a marked incongruence between one's experienced/expressed gender and assigned gender," often coupled with "clinically significant distress or impairment in social, school, or other important areas of functioning." Diagnostic and Statistical Manual of Mental Disorders 451–59 (5th ed. 2013).

[25] Kobabe, *supra*, at 40–41.

[26] *Id.* at 78–83.

[27] *Id.* at 124–32.

[28] Am. Lib. Ass'n, *2020 Alex Awards*, https://www.ala.org/yalsa/2020-alex-awards. *Gender Queer* was also recognized as one of four Stonewall Honor Books in

Further, the imagery commonly highlighted by *Gender Queer*'s critics does not, in context, appeal to a prurient interest. This prong, too, considers the work "as a whole"—not excerpts divorced from its broader context—to ascertain whether it *predominantly* appeals to the prurient interest. *Miller*, 413 U.S. at 24; *see also Kois*, 408 U.S. at 231–32 (evaluating a poem depicting "an undisguisedly frank, play-by-play account of the author's recollection of sexual intercourse" and, in considering its "dominant theme," citing "earmarks of an attempt at serious art" in concluding it does not appeal to prurient interest).

Even in isolation, *Gender Queer*'s excerpts do not appeal to the prurient interest, but instead support its broader narrative. For example, in depicting masturbation, Kobabe focuses not on the act itself but differences between Kobabe's experiences and the experiences of most cisgender people.[29] Kobabe describes lacking enjoyment in genital stimulation, as is illustrated by a drawing of a blushing Kobabe fully clothed on a bed while daydreaming about an "elaborate fantasy based on Plato's *Symposium*." This fantasy is itself represented by a thought bubble containing a drawing of a naked, bearded man touching the genitals of another,

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Non-Fiction in 2020. Am. Lib. Ass'n, *Stonewall Book Awards List*, https://www.ala.org/rt/rrt/award/stonewall/honored. The *School Library Journal*, a publication for librarians who work with children and teens, said *Gender Queer* would "resonate with teens" and was a "great resource for those who identify as nonbinary or asexual as well as for those who know someone who identifies that way and wish to better understand." Jenni Frencham, *Gender Queer: A Memoir*, School Lib. J. (June 30, 2019), https://www.slj.com/review/gender-queer-a-memoir.

[29] Kobabe, *supra*, at 136.

clean-shaven man.[30] Although this drawing invokes sex (and ancient art), it is a joke, and far from the graphic depictions of "'hard core' sexual conduct" contemplated by *Miller*. 413 U.S. at 27. This self-deprecation reflects Kobabe's intent *not* to prioritize the "prurient interest" over the book's literary and artistic aims.[31] Because *Gender Queer* does not appeal to the prurient interest and has serious artistic, literary, and educational value for minors, it does not meet two of the *Miller* test's three prongs and is protected by the First Amendment.

2. *A Court of Mist and Fury* is not obscene as to minors.

A Court of Mist and Fury—a fantasy novel that reimagines the Greek myth of Hades and Persephone in an imaginary universe of faeries—likewise has serious literary value considered as a whole, and its descriptions of sexual encounters do not strip it of First Amendment protection. The novel concerns social roles of women in its imaginary universe and the protagonist's efforts to challenge and overcome political and societal barriers those roles place on her. Two sexual encounters—one near the outset of the novel and the other near the conclusion—illustrate the distance between the protagonist's social role at the beginning of the novel and the social role she has achieved for herself at the end. In the first, she is informed during sex with her fiancé that she will effectively have no rights or legal

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[30] *Id.* The image is modeled after several historical examples of ancient Greek vases depicting homosexual acts. *See* Maia Kobabe, *Schools are banning my book. But queer kids need queer stories*, Wash. Post (Oct. 29, 2021, 6:00 AM) https://wapo.st/3zhEVZS

[31] *See* Dan Kois, *What to Do When Your Kid Is Reading a Book That Makes You Uncomfortable*, Slate (March 22, 2022, 5:40 AM) https://bit.ly/3v1tIdt (interview with Kobabe).

personhood after her impending marriage—a revelation that shocks the protagonist and drives the book's narrative. The second, set 53 chapters later, depicts the protagonist consummating a relationship with another love interest—this time as his social and political equal.

Even if these scenes are, in isolation, upsetting to some, they nevertheless achieve artistic and literary ends, serving as "earmarks of an attempt at serious art." *Kois*, 408 U.S. at 231–32. And, like *Gender Queer*, *A Court of Mist and Fury* has won or received nominations for multiple awards in the "young adult" genre,[32] evidencing serious artistic and literary value that receives First Amendment protection. Because *A Court of Mist and Fury* likewise does not appeal to the prurient interest and has serious artistic, literary, and educational value for minors, it does not meet two of the *Miller* test's three prongs and is protected by the First Amendment.

CONCLUSION

"Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. State of Alabama*, 310 U.S. 88, 102 (1940). If these words are to have meaning in

[32] *See* GoodReads, *Best Young Adult Fantasy & Science Fiction*, https://www.goodreads.com/choiceawards/best-young-adult-fantasy-books-2016; GoodReads, *Best of the Best*, https://www.goodreads.com/choiceawards/best-of-the-best-2018.

the Commonwealth of Virginia, this Court must find *Gender Queer* and *A Court of Mist and Fury* fully protected under the First Amendment.

Dated: July 25, 2022

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CERTIFICATE OF SERVICE

The undersigned certifies that, per the Court's First Scheduling Order, on July 25, 2022 an electronic copy of the Foundation for Individual Rights and Expression and Woodhull Freedom Foundation Brief of *Amici Curiae* was served electronically on the parties listed below. Copies of the brief were mailed via overnight delivery for submission to the Clerk of the Court for the Virginia Beach Circuit Court.

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