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

Reply 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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These proceedings should be dismissed and Virginia Code § 18.2-384 (hereafter, the "Law") should be declared unconstitutional for four reasons that cause unique harms to booksellers, librarians, authors, and publishers: (1) the Law fails to track the constitutional standard for obscenity; (2) the Law's temporary restraining order ("TRO") provisions create an unconstitutional prior restraint; (3) the Law purports to bind parties not before the Court to the result of the proceedings; and (4) the Law allows for state-wide relief on the basis of local community standards. Petitioner's opposition brief largely ignores these defects; where it offers responses, they either reinforce the existence of the constitutional violation, or are wrong on the law.

I. The Law fails to track the constitutional standard for obscenity.

The Law purports to empower a court to determine whether a book is obscene such that its publication or distribution violates Virginia Code §§ 18.2-372 through 18.2-378. *See* Va. Code § 18.2-384(K). These sections of the Virginia Code govern obscenity, *see, e.g.*, *id.* § 18.2-372 (defining "obscene"), one of the few "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Miller v. California*, 413 U.S. 15, 20 (1973) (quotation omitted). Obscenity is "limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray

sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 24.

Yet, the evidentiary guidelines of § 18.2-384(H) fail to track that definition. For example, the Law asks the Court to consider "[t]he degree of [local] public acceptance of the book," Va. Code § 18.2-384(H)(2), not whether "the average person, applying contemporary community 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. The Law also fails to contemplate evidence regarding the material's political value. *Id.*

In response to these concerns, Petitioner points to a federal district court case holding that "there can be little doubt of the constitutionality of" § 18.2-374, which governs the production, publication, sale, and possession of obscene items as defined in § 18.2-372—not § 18.2-384, the Law at issue here. *United States v. Pryba*, 674 F. Supp. 1504, 1511 n.24 (E.D. Va. 1987), *aff'd*, 900 F.2d 748 (4th Cir. 1990). *Pryba* concludes that § 18.2-374 "tracks closely the three part test announced in *Miller*," but Petitioner points to no case reaching the same conclusion for the Law.

Moreover, contrary to Petitioner's central argument, the Law is limited by its language to "obscenity"—a category of unprotected speech that is distinct from materials that are "harmful for minors." *Compare* Va. Code § 18.2-372 (defining "obscene") *with id.* § 18.2-390(6) (defining "harmful to juveniles"). Ignoring that

limitation, Petitioner urges this Court to consider "the obscenity standard under Virginia Code § 18.2-372 through the eyes of a minor," Opp. at 2, and claims that he is "not proceeding under [Virginia's 'harmful to minors' statute] in any capacity," *id.* at 25. But, to the extent that Petitioner believes the Law provides for any determination regarding materials that may be regulated with respect to minors but not adults (which Proposed Amici do not concede), that must be the relevant category.

"Obscene through the eyes of a minor" and "obscene to minors" are not recognized categories of unprotected speech under Virginia law. Rather, considering arguments akin to those raised by Petitioner regarding parental rights and the differences between minors and adults, the Virginia and U.S. Supreme Courts articulated a "tripartite test for the determination of material 'harmful to minors'" decades ago. *Commonwealth v. American Booksellers Ass'n*, 236 Va. 168, 175 (1988); *see also Ginsberg v. New York*, 390 U.S. 629 (1968).[1] And, even if the Law

[1] For example, the U.S. Supreme Court explicitly accounted for "the parents' claim to authority in their own household to direct the rearing of their children"—the interest that Petitioner contends should lead to a new standard that cedes all control to parents, *see* Opp. at 5–7. *See Ginsberg*, 390 U.S. at 639 (holding that the test "expressly recognizes the parental role in assessing sex-related material harmful to minors"). In addition, parents do not need this Court to deem the challenged books obscene in order to restrict their own children from accessing the books; to the contrary, as explained below, what Petitioner's requested relief would accomplish would be to bar the books from *all* households—including those consisting only of adults, and those in which parents *want* their kids to access these books.

could be read to allow it, the allegations in the Petition are insufficient for a "harmful to minors" determination, meaning that these proceedings must be dismissed.[2]

Harmful to minors material must "(1) predominantly appeal to the prurient, shameful or morbid interest of minors; (2) be patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors," *Am. Booksellers Ass'n*, 236 Va. at 175, and (3) "taken as a whole, lack[] serious literary, artistic, political, or scientific value," *id.* at 176 (quoting *Miller*, 413 U.S. at 24). With regard to the last prong, the focus is "not upon the youngest [kids],"

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[2] Proposed Amici intend to vigorously argue that the challenged books are not obscene as a factual matter should these proceedings continue beyond this stage. However, Petitioner's current attempt to introduce evidence regarding the impropriety of the books for minors, beyond his allegations in the Petition, is improper. *See* June 30 Scheduling Order 2(b) and (c) ("The Dispositive Motion Hearing shall be confined to the presentation of legal argument on dispositive motions" and "shall be conducted without the presentation of evidence.").

Among the most egregious attempts in Petitioner's brief to distract the Court are the false and scurrilous statements and innuendos with respect to the American Library Association ("ALA"), one of the Proposed Amici. For example, the ALA does not "stamp awards on books that are mentally harmful for children" and then maliciously encourage librarians to recommend those "harmful" books so that children purchase the books at retail, Opp. at 6; nor does it "demand that parents be removed of their decision-making power," *id.* at 5. Because these assertions are totally irrelevant, in order not to burden the Court unnecessarily we will not respond to them at this time. (If the Court believes any of them is relevant, Proposed Amici request an opportunity separately to respond to those purported factual assertions.)

It is also worth noting that Petitioner's purported sociological and scientific discussion either cites no sources, *see* Opp. at 6–7, or does nothing to establish the legitimacy or authoritativeness of the referenced sources and confusingly cites to "*id*." without clarifying what that refers to, *id.* at 17–18.

"the most sensitive [kids]," or "the majority of [kids]." *Id.* at 176. Rather, the question is whether a work has "a serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents," for "then it cannot be said to lack such value for the entire class of juveniles taken as a whole." *Id.* at 177. The difference between materials that are "obscene" for adults and those that are "harmful" to "a legitimate minority of normal, older adolescents" is minimal. Petitioner's repeated references to twelve- and sixteen-year-old children is not relevant under Virginia law. Rather the test is whether the book has serious value for a legitimate minority of normal seventeen-year-olds.

Rather than attempt to argue that the challenged books are "harmful to juveniles" under well-settled Virginia law, Petitioner contends that "[m]aterial may be found obscene for children even though the appeal is not to the prurient interest of the average person, the sexual content is not patently offensive, and only a portion of the whole is objectionable without regard to the totality of the item." Opp. at 20. In support, Petitioner cites *Ferber v. New York*, 458 U.S. 747 (1982)—a case considering child pornography, *not* obscenity or material that is harmful to minors. *See also* Opp. at 21 (making same argument without citation).[3]

[3] Relatedly, Petitioner improperly cites to statutes that govern child pornography. *See, e.g.*, Opp. at 8 n. 6 (citing Va. Code §§ 18.2-374.1, 18.2-374.4(B)). Petitioner's reliance on Virginia Code § 22.1-16.8, which governs public schools' instructional materials is equally misplaced. *See* Opp. at 8 n. 7.

As *Ferber* itself highlights, child pornography is distinct from obscenity or materials harmful to minors. *See* 458 U.S. at 756. "*Ferber*'s judgment about child pornography was based upon how it was made, not on what it communicated." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250–51 (2002). "Where the images are themselves the product of child sexual abuse, *Ferber* recognized that the State had an interest in stamping it out without regard to any judgment about its content." *Id.* at 249. In contrast, speech that, like the challenged books, "records no crime and creates no victims by its production" does not trigger that interest. *Id.* at 250. This holds even in the face of "assert[ion]s that the images can lead to actual instances of child abuse"—the extent of what Petitioner argues here—because "[t]he harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts." *Id.*

Equally, the U.S. Supreme Court has rejected the argument that materials—including materials that are available to and depict minors—can be prohibited as obscene on the basis that they "contain a single graphic depiction of sexual activity . . . without inquiry into the work's redeeming value." *Id.* at 248. "Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive." *Id.* at 249.

Thus, isolated "images that appear to depict a minor engaging in sexually explicit activity"—again, the extent of what Petitioner alleges here—cannot be

banned under the guise of obscenity or child pornography. To the contrary, such images "depict[ ] . . . an idea—that of teenagers engaging in sexual activity—that is a fact of modern society and has been a theme in art and literature throughout the ages." *Id.* at 246. "William Shakespeare created the most famous pair of teenage lovers, one of whom is just 13 years of age," *id.* at 247 (citing William Shakespeare, *Romeo and Juliet* act I, sc. 2, l. 9), and award-winning "[c]ontemporary movies pursue similar themes," *id.* at 247–48 (citing *Traffic* (Focus Features 2000) and *American Beauty* (Dreamworks 1999)). Indeed, "[a]rt and literature express the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach." *Id.* at 248. That is reason for their protection, not their prohibition.

Petitioner also argues that the Law is constitutional because the Federal Communications Commission ("FCC") can regulate television and radio broadcasts and because large portions of the video game, music, and film industries participate in voluntary rating procedures. Opp. at 27–30. None of these examples are parallel to the situation before the Court in this case.

The rating procedures (or "regulations," as Petitioner styles them) adopted by the Motion Picture Association ("MPA") for films, the Entertainment Software Rating Board for video games, and the Recording Industry Association of America

are, as Petitioner concedes, entirely voluntary. *See, e.g.*, Opp. at 5, 29, 30. Attempts to impose those same ratings systems through law would, like the Law in this case, violate the First Amendment by unconstitutionally restricting people's ability to access expressive material. *See, e.g.*, *Ent. Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065 (D. Minn. 2006) (striking down law that barred minors from buying or renting games that the video game industry had voluntarily rated "Mature" or "Adults Only"), *aff'd sub nom. Ent. Software Ass'n v. Swanson*, 519 F.3d 768 (8th Cir. 2008); *Engdahl v. City of Kenosha*, 317 F. Supp. 1133 (E.D. Wis. 1970) (enjoining enforcement of an ordinance that used MPAA ratings to bar minors from accessing certain films); *MPAA v. Specter*, 315 F. Supp. 824 (E.D. Pa. 1970) (enjoining enforcement of a Pennsylvania statute that penalized exhibitors showing movies that the film industry's voluntary rating system deemed unsuitable for family or child viewing); *Swope v. Lubbers*, 560 F. Supp. 1328 (W.D. Mich. 1983) (motion picture rating system was improper basis for determining constitutional protection); *Drive-In Theater v. Huskey*, 435 F.2d 228 (4th Cir. 1970) (sheriff enjoined from prosecuting exhibitors for obscenity based on "R" or "X" rating). Petitioner cannot rely on the ratings systems to save the constitutionality of the Law when courts have held those same ratings systems cannot legally be imposed by the government.

Equally, the FCC's power to regulate broadcast television and radio has no bearing on a court's ability to enjoin the circulation of books that are not legally

obscene. There are "special justifications for regulation of the broadcast media that are not applicable to other speakers," including "the history of extensive Government regulation of the broadcast medium, the scarcity of available frequencies at its inception, and its 'invasive' nature." *Reno v. ACLU*, 521 U.S. 844, 868 (1997) (citations omitted). In the absence of those special justifications—none of which are present here—precedent about the FCC is inapposite, even in a proceeding that is nominally aimed at protecting children from obscene material. *See id.* (holding that provisions of the Communications Decency Act attempting to regulate explicit material on the internet violated the First Amendment).

II. The Law's TRO provisions create an unconstitutional prior restraint.

In their opening brief, Prospective Amici cited numerous U.S. Supreme Court cases demonstrating that a court order removing books from circulation and binding parties not before the court was a prior restraint on speech in violation of the First Amendment. *See* Opening Br. of Prince Books et al. at 3–5, 7–8 (citing, inter alia, *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) & *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989)). Nowhere in his omnibus reply brief does Petitioner even acknowledge these cases, much less explain how the Law could be considered constitutional.

Rather, in a section labeled "due process claims," Petitioner cites to *Alexander v. Commonwealth*, 214 Va. 539 (1974), and the cases it cited. Opp. at 22–23. Yet

Prospective Amici already addressed how U.S. Supreme Court cases decided after *Alexander* have established a different rule for evaluating prior restraints of speech than the one used in that case. Opening Br. of Prince Books et al. at 5–7. As Prospective Amici demonstrated in their Opening Brief, this Court must follow the U.S. Supreme Court's precedent even in the face of a prior Virginia Supreme Court decision; Petitioner provides no argument to the contrary.

Petitioner also cites to a federal district court case from 1969, *Tyrone, Inc. v. Wilkinson*, 294 F. Supp. 1330, 1333 (E.D. Va.), *aff'd*, 410 F.2d 639 (4th Cir. 1969), to argue that "[t]he legal rules governing [allegedly obscene publications or movies] are different from [narcotics, gambling paraphernalia, and other contraband]." Opp. at 23. While the rules are indeed "different," the *Tyrone* court held *against* Petitioner's position on whether a prior adversary hearing is required before the seizure of First Amendment–protected material. The *Tyrone* court considered whether police could seize copies of allegedly obscene films pursuant to a search warrant issued by a magistrate judge and supported by affidavits of police officers who had seen the films in question. 294 F. Supp. at 1331–32. The court held that this procedure was unconstitutional because it violated the First Amendment, and "enjoined [law enforcement officers] from seizing allegedly obscene motion pictures without affording a prior adversary hearing to the possessors and exhibitors of

same." *Id.* at 1333. The procedure provided by the Law is similarly infirm and, for that reason, this Court should hold it unconstitutional.

III. The Law purports to bind parties not before the Court, thereby violating their rights to due process and free speech.

The Law fails to provide notice of obscenity proceedings to all who may be bound by them. Rather than argue to the contrary, Petitioner concedes that "[i]t is unrealistic for Petitioner to attempt to identify, locate, and serve by registered mail each of the 201 bookstores within the state of Virginia as well as an estimate at any other organizations that may be one of all other persons interested." Opp. at 11. The Law is constitutionally deficient, in part for precisely this practical reason. *See Walker v. City of Hutchinson*, 352 U.S. 112, 116 (1956) (holding that notice by publication did not comport with due process because "[i]t is common knowledge that mere newspaper publication rarely informs a [party] of proceedings [that impact his rights]"). Indeed, Proposed Amici—booksellers and others involved in the publication and circulation of books—were not notified by Petitioner at any stage of this case and thus their participation was not guaranteed, despite their manifest interest in the outcome of the litigation.[4]

[4] Petitioner also notes that these proceedings have garnered nationwide coverage, perhaps suggesting that the news cycle will simply solve the notice problem. But the fact that this extraordinary attempt to revive a decades-dormant law made national headlines in no way guarantees that future proceedings will too. Nor is that how the legal system deals with notice in any other context.

Petitioner equally fails to respond to Proposed Amici's argument that the Law violates the First Amendment by creating a strict liability scheme for the distribution of books and other materials. *See Wall Distribs., Inc. v. City of Newport News*, 228 Va. 358, 361 (1984); *Ginsberg*, 390 U.S. at 644; *Smith v. California*, 361 U.S. 147, 149 (1959). Instead, Petitioner concedes that a strict liability regime would create a "constitutional problem," but contends that "Virginia has corrected that constitutional deficiency by adding a scienter requirement." Opp. at 22. Though Petitioner does not offer a citation for this point, presumably he is referring to the "knowing" mens rea requirement of Virginia Code §§ 18.2-374–378. But this cannot save the Law, which *presumes* knowledge "[w]hile a [TRO] pursuant to subsection E is in effect, or after the entry of a judgment pursuant to subsection[s] G [or J]." Va. Code § 18.2-384(K). The Law thus erases the scienter requirement that Petitioner claims saves Virginia's obscenity law.

Similarly, Petitioner misapprehends Proposed Amici's concerns regarding the appealability of the proceedings. He argues that "[t]his argument need not be addressed comprehensively because Virginia law provides that all civil proceedings are appealable," Opp. at 24—but Virginia law does not provide a right of appeal to those who are *not* parties to a proceeding, even if they will be governed by the result. Indeed, the Law only gives "[a]ny *party* to the proceeding" the ability to "appeal from the judgment of the court to the Court of Appeals." Va. Code § 18.2-384(L)

(emphasis added). That remains a constitutional defect. *See McKinney v. Alabama*, 424 U.S. 669, 671, 673–74 (1976) (holding that a statutory scheme in 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).

IV. The Law provides state-wide relief, but relies on local community standards.

Petitioner correctly states that, in determining obscenity in the Commonwealth of Virginia, the applicable community standards are those of the locality—in this case the City of Virginia Beach or its metropolitan area. *Price v. Commonwealth*, 214 Va. 490, 491–92 (1974) (following *Alexander*, 214 Va. 539). Thereafter, however, his argument goes off the rails in two respects. First, he states that the Court should look only to the standards applied by the Virginia Beach School Board. Counsel has found no case in the Commonwealth which permits the delegation of the determination of community standards to an elected body. Rather, *Miller* asks what "the average person, applying contemporary community standards" would conclude about the material. 413 U.S. at 24. Nor is there any evidence that the School Board members were elected for this purpose. Rather, as Petitioner acknowledges, *see* Opp. at 13, the cases consistently provide that the fact finder—judge or jury—make that determination based on its knowledge, if necessary aided

by opinion proof. *See Hartman v. Commonwealth*, No. 0569-98-3, 1999 WL 1126627, at *2–3 (Va. Ct. App. Mar. 30, 1999).

Second, however the community standards of the locality are determined, they cannot be applied statewide. The purpose of basing the determination of obscenity in part on community standards is that, as Petitioner recognizes, *see* Opp. at 12, what may be considered obscene in one locality may be considered acceptable in another. As the Court of Appeals has stated, "It would be difficult, if not impossible . . . to formulate a statewide standard of obscenity, for our state comprises communities with a vast diversity of lifestyles. Materials which do not offend the community standards of our metropolitan areas might well be regarded as obscene by the standards of some of our rural communities." *Allman v. Commonwealth*, 43 Va. App. 104, 110 (2004) (quoting *Price*, 214 Va. 490).

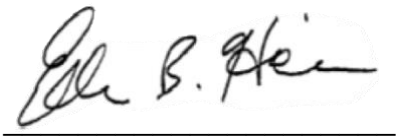
Given these facts, subsection K of the Law, which prevents bookseller amici and others from relitigating the issue of obscenity based on the community standards of their respective localities, is both unconstitutional under *Miller/Ginsberg* and in violation of the rulings of the Virginia courts.

CONCLUSION

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

Dated: August 16, 2022

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 16, 2022, an electronic copy of the foregoing Reply Brief of Proposed Amici Curiae or, in the Alternative, as Persons Interested in the Sale or Commercial Distribution of the Books 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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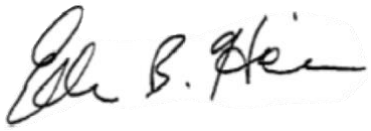

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