No. 21-1506

UNITED STATES COURT OF APPEALS
FOR THE FOURTH DISTRICT

ROBERT UPDEGROVE; LOUDOUN MULTI-IMAGES LLC, d/b/a BOB UPDEGROVE PHOTOGRAPHY,
Plaintiffs-Appellants,

v.

MARK R. HERRING, in his official capacity as Virginia Attorney General; R. THOMAS PAYNE, II, in his official capacity as Director of the Virginia Division of Human Rights and Fair Housing,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia (Alexandria)
The Honorable Claude M. Hamilton
No. 1:20-cv-01141-CMH-JFA

***BRIEF OF AMICI CURIAE*, TYNDALE HOUSE PUBLISHERS; THE BRINER INSTITUTE; AND WHITAKER PORTRAIT DESIGN, INC. d/b/a CHRISTIAN PROFESSIONAL PHOTOGRAPHERS**

SUPPORTING APPELLANTS AND REVERSAL

FILED WITH CONSENT OF THE PARTIES

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CORPORATE DISCLOSURE STATEMENT

The *amici curiae* provide the following disclosure pursuant to Federal Rule of Appellate Procedure 26.1:

Tyndale House Publishers is an operating division of Tyndale House Ministries, which is organized as a not-for-profit organization under the laws of Illinois. Tyndale House Ministries neither issues stock nor has a parent corporation.

Whitaker Portrait Design, Inc. is an Oklahoma corporation. It has no parent corporation. There is no publicly held corporation that owns 10% or more of its stock.

The Briner Institute is a Tennessee 501c3 corporation. It has no parent corporation. Briner Institute neither issues stock nor has a parent corporation.

INTEREST OF AMICI CURIAE

Tyndale House Publishers ("Tyndale House") was founded in 1962 by Dr. Kenneth N. Taylor as a means of publishing The Living Bible. Tyndale publishes Christian fiction, nonfiction, children's books, and other resources, including Bibles in the New Living Translation (NLT). Tyndale products include many New York Times best sellers. Its publications are sold in every state of the union, including approximately 2,000 commercial bookstores across the country, and also directly to individual consumers and through mass retailers.

Christian Professional Photographers ("CPP") is an arm of Whitaker Portrait Design, Inc. CPP's mission is to help Christian photographers become stronger in their Christian walk, be an example and witness to others, encourage excellence in the photography profession as an act of obedience to God, reach out to all who have an interest in photography, encourage fellowship with other Christian photographers, freely share successful photography techniques, and meet together in conference retreats and small groups in order to teach and learn scriptural truths and encourage the practical application of the Word of God.

The Briner Institute, Inc. ("TBI") is a network of like-minded individuals dedicated to improving culture. TBI is named in honor of author Bob Briner, whose vision was that people should live their lives attempting to do good and provide a positive influence on society. TBI provides financial support for

gatherings and talent development efforts through grants, donations and crowd sourcing, spotlighting "salt-and-light-inspired" people, projects, initiatives, and ventures. TBI hosts events that are focused on bringing together the best and the brightest minds in entertainment, media, and technology to develop new strategies for achieving its mission of cultural engagement and influence.

The issues in this case have serious implications for the First Amendment rights of those engaged in the communications and creative arts industries to choose the content and messages they publish. These amici have a common interest in protecting the First Amendment rights of publishers and artists to be free from compelled speech and to freely exercise their religion without undue government interference. Persons affiliated with these amici are diverse in their views, but the amici are united in their commitment that each publisher and artist should have the right to pursue his or her profession and exercise their artistic and editorial judgment in a manner consistent with their core convictions.

STATEMENT OF COMPLIANCE WITH RULE 29(a)(4) AND AUTHORITY TO FILE

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, the amici curiae state that no counsel for any party authored this brief in whole or in part. The amici curiae further state that no party or party's counsel or any other person, aside from the amici curiae and their respective counsel, made any monetary contribution toward the preparation or submission of this brief.

Pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure, counsel for all parties have consented on the parties' behalf to the filing of this brief.

ARGUMENT

I. THE FUNDAMENTAL DUTY OF THE COURT IS TO PROTECT SPEECH OVER THE OBJECTION OF THE MAJORITY

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Board of Education v. Barnette, 319 U.S. 624, 642 (1943).

A constant temptation for all involved with causes which are popular, or causes that seem to be matters of "commonsense" or good civic virtue is to whittle away at constitutional protections. We are all part of the world of "commonsense," and the general will by the sheer fact of it being "common" becomes part of our own thinking. When the majority have the same opinion, it begins to become "objective" and unquestionable. Those who differ are seen to be insufferable fools, or worse, dangerous bigots.

A. The Essence of the First Amendment is To Protect Speech Disfavored by the State or the Majority.

Our system of government specifically creates room and protection for that which is contrary to the general will.[1] We have created a space for liberty for the

[1] "This view of 'individual freedom of mind' makes eminent sense. Democracy and liberty in large measure rely on citizens' ability to preserve their integrity as speakers, thinkers, and creators—their sense that their expression, and the expression that they "foster" and for which they act as "courier[s]," is consistent with what they actually believe.

crank and for the prophet. We also create space for those who wish to simply go about their lives differently than "us." The Amish still drive buggies.

But this space is not made by the political branches: the general will drives the legislative branch and the executive branch; as it should. The one who is out-of-step cannot look for hope there. It is the unelected judiciary, a deliberately "undemocratic institution," that serves as a bulwark to preserve our democracy.

However much the individual judge sympathizes with one side in any debate, the duty remains, the obligation imposed by the judicial oath "to administer justice without respect to persons;" a duty to protect the speech and religion of those whom the judge personally finds disagreeable. *Nat'l Review, Inc. v. Mann*, 140 S. Ct. 344, 347-48 (2019) ("Our decisions protecting the speech at issue in that case and the others just noted can serve as a promise that we will be vigilant when the freedom of speech and the press are most seriously implicated, that is, in cases involving disfavored speech on important political or social issues.")

"This is why, in the dark days of Soviet repression, Alexander Solzhenitsyn admonished his fellow Russians to "live not by lies": to refuse to endorse speech that they believe to be false. [Citation] Each person, he argued, must resolve to never "write, sign or print in any way a single phrase which in his opinion distorts the truth," to never 'take into hand nor raise into the air a poster or slogan which he does not completely accept,' to never 'depict, foster or broadcast a single idea which he can see is false or a distortion of the truth, whether it be in painting, sculpture, photography, technical science or music.'" Motion for Leave to File Brief of Amici Curiae The Cato Institute, Prof. Dale Carpenter, And Prof. Eugene Volokh, *Elane Photography, LLC v. Vanessa Willock*, 2013-NMSC-040, 309 P.3d 53 (citation omitted).

The majority, being the majority, can always obtain legislation to compel or restrict speech. That is the power of majority rule. This does not mean the majority is always right. The history of this country has shown time-and-again that majority legislative determinations are not static. What is beyond-the-pale today is commonplace tomorrow. Today's majority is tomorrow's minority.

This change in public opinion is possible because the judiciary protects the minority opinion. The minority is given the right to respond, to critique, to object. At times this will be uncomfortable for many; but it is necessary for all. That is the genius of the First Amendment.

But this self-governing, self-correcting power can only continue to function if the judiciary strikes down laws which restrict or compel speech. Indeed, the history of our courts is the history of striking down laws which offend against the First Amendment. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977); *National Socialist Party v. Skokie*, 432 U.S. 43 (1977) (displaying Swastikas is protected speech) "[This is] the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation — and their ideas from suppression — at the hand of an intolerant society.…But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the

dangers of its misuse." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995)

It is the minority who most need protection before the Court. As Justice Stevens wrote, "[T]he federal courts . . . have primary obligation to protect the rights of the individual that are embodied in the Federal Constitution." *Harris v. Reed*, 489 U.S. 255, 267 (1989) (Stevens, J., concurring)

Where the political process will not act to protect fundamental rights to speech or to religion, it is the duty of the court to protect those rights even for those whose beliefs and opinions repel the majority. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015)[2]

B. No End Can Justify the Unconstitutional Means Chosen by the State of Virginia.

The Virginia Values Act (the "VVA") concerns speech and religious beliefs that touch upon the most fundamental human values and fundamental rights within the protection of the Constitution. *Obergefell*, 135 S. Ct. at 2599. That the VVA

[2] This Court has repeatedly affirmed the First Amendment's limitation on governmental power, especially content-based and viewpoint-based exercises of such power. *See*, *e.g.*, *Thonen v. Jenkins* 491 F.2d 722, 723 (4th Cir. 1973)(per curiam) ("But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *Mainstream Loudoun v. Board of Trustees of Loudoun*, 2 F. Supp. 2d 783, 795 (E.D. Va. 1998) ("We are therefore left with the First Amendment's central tenet that content -based restrictions on speech must be justified by a compelling governmental interest and must be narrowly tailored to achieve that end.")

may have a laudable goal is no basis upon which Virginia may suppress protected speech. *Billups v. City of Charleston*, 961 F.3d 673, 683–84, (4th Cir. 2020)

To achieve its stated end, the VVA resorts to unconstitutional means: it both forbids and compels speech based upon its content *and* viewpoint. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) [content-based restrictions offend the First Amendment]; *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (same); *see also Matal v. Tam*, 137 S. Ct. 1744, 1765–66 (2017) (viewpoint restrictions offend the First Amendment) [3] The law unconstitutionally favors one message and one viewpoint—the celebration of same-sex marriage—on a controversial topic of public importance while simultaneously forbidding all other speech on the same topic. Far from a trivial business regulation, the VVA impinges on the expression of religious speech and belief (marriage is an explicitly religious rite for many people and perhaps the majority of them), which is protected by *both* the Free Speech Clause and Free Exercise Clause. At bottom, the VVA demands adherence and fealty to a government-approved message and a

[3] "Above all else, the First Amendment means that government generally has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Barr v. American Assn. of Political Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020) (internal quotation marks omitted); *Holloman ex Rel. Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir. 2004) ("The Speech Clause of the First Amendment protects at least two separate, yet related, rights: (1) the right to freedom of expression, and (2) the right to be free from compelled expression.") (internal quotation marks and citation omitted)

government-approved viewpoint on what is a sacred, religious rite for many.[4] Worse still, to fail to speak as the government demands forces one from the public marketplace and threatens ruin with fines and litigation.

Obergefell recognized a right to same-sex marriage, but it did not eviscerate constitutional protections for those who disagree with the decision, whose religious beliefs or conscience conclude differently. Indeed, the very importance and sensitivity of the subject and the importance to all involved is precisely why this Court must protect all of the interests, not just those of what may be the majority at a given time:

> [T]here are some purported interests — such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas — that are so plainly illegitimate that they would immediately invalidate the rule. The general principle that has emerged from this line of cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.

[4] The First Amendment prohibits compelled speech. *See*, *e.g.*, *United States v. United Foods, Inc.,* 533 U.S. 405, 410 (2001); *Wooley*, 430 U.S. at 714–15. More than other sorts of restrictions, the act of government *compulsion* is especially demeaning and damaging to a culture of free speech. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31* 138 S. Ct. 2448, 2464 (2018) ("When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence.") (quoting *Barnette*, 319 U.S. at 633)

City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (collecting cases) In the act of protecting the minority position, the Court protects the dignity of those persons as human beings: "our basic concept of the essential dignity and worth of every human being [is] a concept at the root of any decent system of ordered liberty." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 769 (1985) (internal quotation marks and citation removed); *U.S. v. Haggerty,* 731 F. Supp. 415, 422 (W.D. Wash. 1990)

C. The First Amendment's Role in Our Constitutional Structure Underscores the Prohibition on Legislatively Compelled Speech.

"First Amendment freedoms are designed to insure the proper functioning of the democratic process and to protect the rights of individuals and minorities within that process." *West Virginians for Life, Inc. v. Smith*, 919 F. Supp. 954, 958 (S.D.W. Va. 1996)

First, the limitations on restrictions of the First Amendment exist because the minority will be disliked by the majority; because the majority will often find the speech of the minority offensive. Plainly, there is no need to limit the political minority's power; the minority, by definition, will not be the majority in the political branches. And so, the First Amendment *exists to protect speech most people don't like:* "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because

society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989)

Second, where citizens conclude that they cannot speak, that they cannot influence, they will begin to conceive of the government not as representative of them but as a tyranny that rules over them. *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1327(11th Cir. 2017) ("The First Amendment is a counter-majoritarian bulwark against tyranny. 'Congress shall make no law ... abridging the freedom of speech,' U.S. Const. Amend. I, cannot mean 'Congress shall make no law abridging the freedom of speech a majority likes.' No person is always in the majority, and our Constitution places out of reach of the tyranny of the majority the protections of the First Amendment.")

Third, the presupposition of a democratic system is that you have the same moral value as me: we are "created equal" and have equal merit, to have our voice and opinion heard, and to vote. When we have the power to shut-up or shut-down our fellow citizens *using the power of the government*, we undermine the legitimacy of the government. "Benjamin Franklin warned that '[f]reedom of speech is a principal pillar of a free government; when this support is taken away, the constitution of a free society is dissolved, and tyranny is erected on its ruins.'" *EMW Women's Surgical Ctr. v. Beshear,* 920 F.3d 421, 461 (6th Cir. 2019) (Donald, J., dissenting)

Fourth, the First Amendment protects the audience—it protects the right of the democratic polity to listen and consider ideas with which the public may currently disagree:

> The constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information.

Pacific Gas Elec. Co. v. Public Util. Comm'n (1986) 475 U.S. 1, 8 (1986); *see also Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 831 (1995) One hundred years ago we punished anti-war sentiment as sedition. In the 1950's Sen. Joseph McCarthy famously targeted the movie industry and its communists. More recently, students in Des Moines could not wear arm bands. The courts must go where legislators fear to tread: the necessity of the judiciary to protect First Amendment rights is most needed where it is most unwelcomed by the majority.

It is precisely because the issues raised by this appeal are of such importance to the people on all sides of the issues presented that the Court's obligation is to make room for speech and religious belief (even if we will hear things which cause distress):

> If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic

> perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.

Rosenberger, 515 U.S. at 831. The First Amendment is offended when anyone is kept from the "marketplace".

It is that public marketplace, unregulated by the government (in almost all circumstances), that provides the response to those who readily support the law in question. Rather than obtaining government power to forbid an opponent to speak, the sides are to go to their fellow citizens (however much they think the other wrong) and persuade them. Likewise, they can both go to the court of public opinion and persuade them: Do not patronize that photographer, do not buy books from that publisher, do not hire that painter:

> The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. 'To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.' *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

Johnson, 491 U.S. at 419–20 (finding burning a flag to be expressive conduct); *see also Whitney v. California*, 274 U.S. 357, 377 (1927)

D. If This Court Strikes the VVA, the Public has Recourse

If the people who are most supportive of the VVA and the principles it advances wish to protest or boycott those who disagree, they may. But what may not happen is for the government (no matter how great the majority) to stop speech. The State of Virginia crossed the First Amendment.

II. THE VVA INFRINGES UPON THE THREE DISTINCT ELEMENTS OF SPEECH PRESENT IN THE RELATIONSHIP BETWEEN THE CREATIVE PARTY AND THE CUSTOMER

One can see three distinct stages or elements of speech: (1) The speech between the creative party and the client. This goes well beyond bare contract negotiation (as is the case in true "public accommodations" contracts for non-expressive goods or services) and entails affirmative, agreement on ends and means, and often worldview. (2) The creation of a good or the provision of a service, which itself contains speech and is speech. (3) The communication of the completed good or service to the general public, and its relationship to the creative as an expression of the identity of the creative party.

The VVA, through the several applications of its accommodation and speech clauses offend upon each of these elements of protected expression in various ways, detailed below. *Since the state cannot justify either prohibition or compulsion of expression on constitutional grounds, this Court should return the instant action to the district court with appropriate instructions as argued herein.*

A. The VVA is a Content- and Viewpoint-based Restriction on Communication with the Customer

The "Speech Clause" of the VVA specifically dictates what must not be said to the public: Virginians cannot voice a public opinion as to the VVA's overreach, nor state an intention that one will not express viewpoints other than those dictated by the VVA: it is an unambiguous restriction on speech which cannot be justified under the Constitution.

The VVA also contains an "Accommodations Clause" which specifically dictates what must be said and done with respect to the formation of a contract and the provision of services. Thus, the VVA intrudes into the communication between the creative and the customer: restricting and compelling speech on the basis of its content for the purpose of controlling the viewpoint which may be expressed by all Virginians.

The power of the VVA thus persistently restricts and compels speech from the time prior to the initial meeting of the creative party and the customer, through the creation of the expressive good or service, and then the communication of that good or service to the public.

Prior to the offer and acceptance, creatives (such as amici) and potential clients meet together to speak about what will be done and why. The client will have ideas as to how photographs should be taken. The author will explain why the book is important. The work of a publisher, or a photographer, or an advertiser is

never a one-size fits all, take-it-or-leave it relationship (such as one might find from a common carrier). These contracts require specific knowledge and agreement about each individual project.

The VVA specifically seeks to regulate the conversation between the amici and their customers. Being a content-based viewpoint restriction, it is presumptively unconstitutional. *Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Department of Motor Vehicles*, 288 F.3d 610, 616 n.4 (4th Cir. 2002) ("Thus, viewpoint --based restrictions of private speech are presumptively unconstitutional")

But there is an aspect of this speech which goes beyond contract formation: there is necessarily a shared vision of the world, an approval, a willingness to participate in this wedding or this book being made available to the world. While this level of speech will often be unknown to the public at large, it is critical to the client and the creator, to the author and the publisher. First Amendment protections are not merely limited to mass media; the communications between two individuals in private are governed by the First Amendment when the state seeks to impose itself into this intimate space (as it has done here).

1. The State Fails to Rightly Distinguish True Public Accommodations

The state by glossing over the distinctions between a creative services provider and a true public accommodation, actually forces service providers to

make an offer: Under what conceivable ground can a state force someone to make an offer? To do so would impair the fundamental right to freedom of contract and would constitute involuntary servitude. If the contract requires travel, there would be an infringement upon the right of travel; and then upon arriving, the right to freedom of association.

But, under a proper view of a "public accommodation" and antidiscrimination law, such laws do not offend against either the First Amendment or the freedom of contract. A public accommodation is a physical location, open to the public, which has broadcast an offer to the general public for a common good or service.[5] Indeed, "To inflate the concept of a common carrier or public accommodation to apply to businesses such as amici's is far afield from the history and purpose of antidiscrimination law in this country." Richard A. Epstein, *Public*

[5] These negotiations which take place between the principals to the contract do not entail the sales provided by a public accommodation. "Public accommodations" which do little more than offer goods and services on a commercial basis. They are physical locations entered by the public, not the services of a photographer or a book publisher. *Parker v. Metropolitan Life Insurance Company*, 121 F.3d 1006, 1010 (6th Cir. 1997) ("As is evident by Section(s) 12187(7), a public accommodation is a physical place.") The concept itself is derived from a public inn or a public train. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000); *Welsh v. Boy Scouts of America*, 787 F. Supp. 1511, 1527 (N.D. Ill. 1992) ("[P]ublic accommodation statutes were derived from the common law duties of innkeepers and common carriers."). It is a place of bare commercial transaction. *See Levorsen v. Octapharma Plasma, Inc.,* 828 F.3d 1227, 1235 (10th Cir. 2016) (Holmes, J., dissenting)

Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right, 66 Stan. L. Rev. 1241, 1261–65 (2014)

2. The State Fails to Consider the Editorial Protections Amici Have Under the First Amendment

The decision to publish a book or not to do so; the decision as to whether to take a picture or not; the decisions concerning the composition of the picture; are all protected elements of speech. The government does not have the power to tell a publisher what it must publish, nor forbid it from publishing (except in very narrow circumstances). *U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n* 855 F.3d 381, 427 (D.C. Cir. 2017);[6] *Los Angeles v. Preferred Communications, Inc.*, 476

[6] The question of contractual rights has not been well-considered with respect to anti-discrimination laws and public accommodations. We must start with the general proposition that freedom of contract is a fundamental right. *ABT Building Products Corp. v. National Union Fire Insurance*, 472 F.3d 99, 135 (4th Cir. 2006). A state cannot force a person to make an offer to contract, nor can a state force a person to accept an offer to enter into a contract. *O'Gorman Young v. Hartf'd Ins. Co.* 282 U.S. 251, 267 (1931) ("That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause, [of the Fourteenth Amendment] is settled by the decisions of this court and is no longer open to question.") (internal quotation marks omitted). To conclude otherwise would mean the state could force people into performing expressive services against their will: that is involuntary servitude and is prohibited by the Constitution.

The trouble arises when the state confuses its power to enforce such a contract and instead seeks to use its strength to coerce the creation of a contract. In the true "public accommodation" enterprise, an enforceable offer is made to the general public in a place of general accessibility. The antidiscrimination law merely prohibits the public accommodation from withdrawing the offer or refusing to honor the acceptance.

That is not the case with amici: no offer has been made. The contract, if any, is negotiated client-by-client. In this situation, the state seeks to compel an offer to

U.S. 488, 494–95 (1986) ("Cable television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers. Respondent's proposed activities would seem to implicate First Amendment interests as do the activities of wireless broadcasters, which were found to fall within the ambit of the First Amendment."); *Comcast of Maine/N.H., Inc. v. Mills*, No. 1:19-cv-410-NT, at 26 (D. Me. Dec. 20, 2019)("[C]able operators' editorial discretion to choose what channels or programs to offer . . . is protected by the First Amendment.")

In *Miami Herald*, the Supreme Court considered a statute which provided political candidates the power to compel a newspaper to publish a contrary opinion when the politician was attacked by the paper. While showing much sympathy to the difficulty a politician might face if the only paper in town refused to accept the counterpoint, the Court was more concerned with the damage to the First Amendment rights of publishers. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254–55 (1974) In its decision to overturn the Florida statute, the Court explained:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper,

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be made or to coerce an acceptance to be given. This is a fundamentally different exercise of state power.

> and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment.

Id. at 258. That editorial judgment is to be protected by this court. Without question, the editorial decisions of a publisher lie beyond the power of the state to compel publication of any particular book or pamphlet. *See Jian Zhang v. Baidu.Com Inc.* 10 F. Supp. 3d 433, 436–37 (S.D.N.Y. 2014*); e-ventures Worldwide, LLC v. Google, Inc*. 188 F. Supp. 3d 1265 (M.D. Fla. 2016); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981 (S.D. Tex. 2017)

The state cannot reduce the decision to publish a book down to merely a contract for business with a publisher. The publisher's and the photographer's editorial rights are protected by the First Amendment.

B. The VVA is a Content- and Viewpoint-Based Restriction on Speech in Services Provided

The second level of speech derives from the services provided: the book published, the photograph taken, the media campaign. First, there is the speech which is necessary for the creation of the work.[7]

[7] The creative must do their best work. If the photographs are done poorly, or she does not take enough, or certain images are not captured, Virginia will contend that she has "attempt[ed] to refuse, withhold from, or deny any individual, directly or indirectly" the photography service. The pressure on the photographer to do a "good job" will be even greater than the normal threats of "We won't pay you."

Second, there is the product itself which contains and broadcasts speech[8].This is a critical aspect of this case: The state cannot compel speech. *Wooley*, 430 U.S. at 705 . If a book is speech, then compelling a publisher to produce the book is compelled speech. If a photograph is speech (which without

[8] There seems to be some reluctance on the part of the state to admit photographs constitute speech (amici assume the state does not dispute the contents and creation of a book or words and images in a media campaign implicate First Amendment protection). This court's consideration of whether conduct is expressive for purposes of the First Amendment is de novo. *Hurley v. Irish-American Gay, Lesbian Bisexual Group*, 515 U.S. 557, 567 (1965) ["There is no corresponding concession from the other side, however, and certainly not to the state courts' characterization of the parade as lacking the element of expression for purposes of the First Amendment. Accordingly, our review of petitioners' claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court."]

Without question, photographs constitute protected speech. *Kaplan v. California*, 413 U.S. 115, 119 (1973); *Regan v. Time*, 468 U.S. 641, 646–48 (1984); *Massachusetts v. Oakes*, 491 U.S. 576, 591 (1989) (Brennan, J., dissenting); *ETW Corp. v. Jireh Publ'g, Inc*., 332 F.3d 915, 924 (6th Cir. 2003); *Bery v. City of New York*, 97 F.3d 689, 696 (2nd Cir. 1996). This Circuit recently affirmed that photographs are "expression" and are entitled to "thick copyright protection." *Brammer v. Violent Hues Prods*., 922 F.3d 255, 267 (4th Cir. 2019) "As a basic matter, photographs are 'generally viewed as creative, aesthetic expressions of a scene or image' and have long received thick copyright protection." *Monge*, 688 F.3d at 1177.This is so even though photographs capture images of reality. See *id*. ["Simply because a photo documents an event does not turn a pictorial representation into a factual recitation . . . Photos that we now regard as iconic often document an event — whether the flight of the Wright Brothers' airplane, the sailor's kiss in Times Square on V–J Day, the first landing on the moon, or the fall of the Berlin Wall."]); *We The People Foundation, Inc. v. United States*, 485 F.3d 140, 148–49 (D.C. Cir. 2007) (collecting cases).) To this list, we could add dozens of examples where conduct was found to be expressive activity protected by the First Amendment.

question it is), then compelling the creation of a photograph is compelled speech.[9] If an advertisement is speech, *Suarez Corp. Industries v. McGraw,* 202 F.3d 676, 686 (4th Cir. 2000), then compelling one to sponsor an advertisement is compelled speech.

C. The VVA is a Content- and Viewpoint-Based Restriction on Communication to Third Parties

Finally, there is the communication of the thing produced to third parties: The book is put into the marketplace. The photographs are shown to friends. The communication of that book or that picture to the public is itself a third aspect of speech because it says something about the creator. The identity of the publisher, editor, and photographer is bound up in the final production in a way which cannot be distinguished. "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity." *Obergefell*, 135 S. Ct. at 2593. Indeed, the branding of one's identity is bound in his/her/its/their reputation to the thing created. *See, Matal*, supra

[9] The state claims that it does not dictate the content of the photograph. It merely outsources that power to certain members of the public. Issuing letters of marque does not wash the crown's hands from piracy. In fact, by putting amici at the mercy of the entire public, the potential for compelled speech – mandated and enforced by state power – increases the burdens on speech: the state can only have so many regulators. To deputize a hostile public seems intended to not merely restrict speech but to drive some from the public square altogether.

In this the state again compels speech, prohibits speech, and offends the First Amendment. The state has a stunted understanding of what takes place when a book is published, or a photograph is seen, or a video is viewed. There is the communication of the thing itself, and the communication of the thing in relationship to its creator.

Imagine a photograph of a pen on a table. Again, abstracted from all circumstances, the photograph may have limited value. But if the photograph is on the wall of an art museum and it is entitled, "Unfinished Novel." It has a different value. If the photograph bears the name of a famous photographer, it has yet another value.

A photograph acts to define the photographer. The photograph is about the people (or subject) displayed but it is also about the one who takes the photograph. There is a communication about the creator. The state's discussion about this issue simply misses the critical point about one's identity. The state writes, "Even leaving that aside, as the photographs in plaintiff's brief show, it is the couple and their guests who are celebrating, not the photographer. The fact that plaintiff may maintain "editorial control" and make decisions to 'tell a cohesive story about the love, intimacy, and sacrifice of marriage' (Mem. 14) does not somehow transform the couple's story into his own." (Defendants Combined Opposition to Preliminary Injunction and Memorandum in Support of Motion to Dismiss, at 15.)

This is a rather callow and callous understanding of what actually is at stake.

1. The state overlooks the two elements to the speech.

There are two elements to the communication: There is the story communicated inside the photographs, but there is also creator's relationship to those photographs. The state has reduced the speech content to merely one aspect of the speech. For someone like Mr. Updegrove, the marriage made in contradiction to his religious convictions is no bare event but is desecration of a religiously charged rite. For Tyndale, the decision on what books to publish are a matter of corporate integrity. The art created is what makes the artist an artist.

2. The State Fails to Acknowledge that Communication of the Completed Good or Service to the Public is Communication of the Creative Party's Identity

There is communication to the public not about the purchase of a book, but about integrity of the publisher: who the publisher is and what the publisher represents. Tyndale House Publishers, *Our Mission*, https://www.tyndale.com/our-mission. On the "splash page" for the Tyndale site, we see the words, "Your Trusted Source for Life-Changing and Inspirational Christian Books and Bibles." (https://www.tyndale.com.) When Tyndale selects and publishes a book it is interested in more than just making money from the publication, it is also concerned with (1) the propagation of a particular message, and (2) the

advancement of a particular religion, and (3) its reputation in that respect. Other publishers seek to establish themselves and their reputation in a different manner.

Would not an academic publisher care about the quality of scholarship it published? Wouldn't it refuse or withdraw a book known to be a fraud, *because it would make the press look bad?* The reputation of a business is a valuable property right which this Circuit has repeatedly protected. If a third-party without permission associated amici with causes or a person which they disapproved, this Court would vindicate their trademark and business reputation. How then is it permissible for Virginia to give individuals the power to do so to amici?

III. CONCLUSION

Historical precedent establishes that actions such as these by Virginia infringe upon and suppress speech. The very threat of enforcement unconstitutionally chills the speech of amici, which means that even if this Court were to refuse standing for Mr. Updegrove, the issue would merely return to district court tomorrow with another plaintiff: although this time, the party seeking redress may be one who has suffered an infringement of First Amendment guarantees and has suffered fines and legal expenses. The damage done – even if an economic recovery were possible – cannot be remedied. Therefore, amici join with Updegrove on the question of standing.

It is for these reasons that the 4th Circuit must reverse and remand: to protect the rights of the amici and those who are afraid to stand-up for fear of retribution.

DATED: July 21, 2021

LAW OFFICES OF MICHAEL S. OVERING, APC

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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2021, I electronically filed the foregoing Amicus Brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system, which will accomplish service on all counsel for all parties through the Court's electronic filing system.

DATED: July 21, 2021

/s/ *Michael S. Overing*
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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 21-1506 **Caption:** ROBERT UPDEGROVE; LOUDOUN MULTI-IMAGES LLC, d/b/a BOB UPDEGROVE PHOTOGRAPHY, Plaintiffs-Appellants, v. MARK R. HERRING, in his official capacity as Virginia Attorney General; R. THOMAS PAYNE, II, in his official capacity as Director of the Virginia Division of Human Rights and Fair Housing, Defendants-Appellees.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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