

No. 17-124

IN THE
Supreme Court of the United States

VISTA-GRAPHICS, INC.; RANDAL W. THOMPSON,
Petitioners,

v.

VIRGINIA DEPARTMENT OF TRANSPORTATION;
VIRGINIA TOURISM CORPORATION;
AUBREY L. LAYNE, JR., in his official capacity as
Secretary of Transportation; CHARLES A. KILPATRICK,
P.E., in his official capacity as Commissioner of the
Virginia Department of Transportation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

**BRIEF OF THE RUTHERFORD INSTITUTE AS
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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QUESTIONS PRESENTED FOR REVIEW

- I. Did the United States Court of Appeals for the Fourth Circuit (“Fourth Circuit”) and the United States District Court for the Eastern District of Virginia (“district court”) err in concluding, on the basis of a FRCP 12(b)(6) motion, that speech that occurs at Virginia’s interstate and highway welcome centers and rest areas is “government speech” that is not subject to First Amendment protection?

- II. Did the Fourth Circuit and district court err in concluding, on the basis of a FRCP 12(b)(6) motion, that the Petitioners failed to state a claim for relief based upon due process rights in the context of broad, vague and contradictory content restrictions imposed at Virginia’s interstate and highway welcome centers and rest areas?

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INTEREST OF THE *AMICUS CURIAE*¹

The Rutherford Institute is an international non-profit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues.

Amicus is interested in this case because the fundamental constitutional guarantee of the right to engage in free speech is threatened by the lower courts' drastic and unwarranted expansion of the "government speech" doctrine. Although U.S. Const. amend. I, clearly protects the rights of persons and businesses to express their opinions on matters of local and regional interest, including reviews of tourist attractions, religious and political messages, this speech may be banned at Virginia rest areas and welcome areas under the fiction that publications placed there by private parties is the Commonwealth's own expressive conduct. Virginia's ban on any negative reviews of in-state destinations and reviews of any kind couched in a religious or political perspective is more than a disservice to vacationers throughout the Commonwealth, it is an affront to the free speech

¹ Pursuant to Supreme Court Rule 37.2(a), counsel of record for the parties were timely notified of *amicus*' intent to file this brief in support of Petitioner and both counsel of record consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amicus* hereby states that no counsel for either party authored any part of this brief or made a monetary contribution funding the preparation or submission of this brief.

protections the First Amendment is meant to guarantee. Granting review is crucially important to properly define and protect the First Amendment rights of the reviewers and commentators of tourist sites throughout Virginia.

INTRODUCTION AND SUMMARY OF ARGUMENT

Noteworthy landmarks and attractions have since the earliest iterations of mankind been not just a way to pass the time, but a way to communicate values and beliefs. The locations a person chooses to visit, and which ones he chooses not to visit, will inform not just his opinion of a new destination and its people, but also his future opinions on a myriad of different issues. Travelers base their decisions on where to visit on information gained through word of mouth, the press, commercial advertising campaigns, and more recently through guidebooks and other materials distributed by third party reviewers.

By pointing out contextual facts, trivia, and any amount of other noteworthy information, guidebooks can impact not only which venues we may visit but also our experiences at those venues. Politically, two different guidebooks could persuade visitors to Monticello that Thomas Jefferson was alternatively a revolutionary thinker that enshrined our rights against oppression of a tyrannical government or an entitled slave owner who cemented his upper-class status at the expense of women, minorities, and lower-class whites. Similarly, guides taking different religious

perspectives on Park51², a.k.a. the “Ground Zero Mosque,” could leave readers believing that it is either a building constructed for adherents of a religion of peace to promote interfaith dialog, or a slap in the face intended to humiliate Christians following a deadly act by the enemies of God in a religious war.

Because travel guides have an inherent ability to persuade, and because they typically are written by a third party with no direct commercial interest in the success of the subject destinations, they should be viewed not simply as commercial speech but as partaking of core political and religious speech. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) (acknowledging the difficulty in drawing “bright lines” between commercial and political speech). Virginia recognizes the possibility that tourist pamphlets contain the types of powerful political or religious messages that the First Amendment was written to protect, yet targets them *specifically on this basis*.³

Virginia’s legitimate government interest in censoring this kind of speech is minimal, if it can be said to exist at all. The stated goals of the Sponsorship, Advertising, and Vending Enhancement (SAVE) and Partnership Marketing and Advertising (PMA) programs are (1) to raise money for Virginia’s Department of Transportation (through usage fees)⁴ and (2)

² JavierHernandez, *Planned Sign of Tolerance Bringing Division Instead*, N.Y. Times, July 13, 2010, <http://www.nytimes.com/2010/07/14/nyregion/14center.html>.

³ 1st Am. Comp. Exhibit G, pp. 2-4.

⁴ 1st Am. Compl. Exhibit E, VDOT Maintenance Division Directive dated March 29, 2013.

to increase tourism within the state⁵. Banning political and religious brochures advances neither of these goals. By limiting the content and genres of distributed materials Virginia ensures that they have fewer participants in the SAVE and PMA programs and therefore collect fewer fees. Additionally, there is no rationally conceivable connection by which the distribution of political or religious brochures could negatively impact tourism within the state. To the contrary, these materials may well attract travelers who would not otherwise visit.

In its ruling below, the Court of Appeals sidestepped this analysis by declaring the privately authored, printed, and funded brochures distributed at public travel stops to be government speech reasoning that “the public will associate the plaintiffs’ guides with the Commonwealth of Virginia, regardless whether the government itself produces the guides.” Pet. App. 12a. This conclusion is remarkable given that the regulations specifically prevent brochures from claiming, even implicitly, that they are endorsed by the Commonwealth of Virginia. Pet. App. 4a. Indeed, the district court went so far as to state that “a non-lawyer confronted with the resulting displays would be unlikely to conclude that they were government speech,” Pet. App. 48a, but nevertheless decided they were government speech.

The Court should grant review to correct the Fourth Circuit’s dangerous expansion of government speech doctrine to censor core First Amendment speech.

⁵ 1st Am. Compl. Exhibit C, Virginia Tourism Corporation Website “Advertising Opportunities at Virginia Welcome Centers.”

ARGUMENT

I. THE LOWER COURT ERRED IN ITS DETERMINATION THAT PRIVATE LITERATURE DISTRIBUTED AT STATE REST STOPS, WELCOME FACILITIES, AND SIMILAR LOCATIONS IS GOVERNMENT SPEECH AND THEREFORE NOT SUBJECT TO FIRST AMENDMENT PROTECTIONS

Government speech is not a new phenomenon; for millennia governments have used a variety of methods to communicate certain sets of preferred ideas, concepts, and values to citizens. When the government speaks, free speech protections are not implicated. *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015). This is, in large part, because government speakers are beholden to the democratic process, which serves as a serious check against what they choose say. *See Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235 (2000). Applying ordinary free speech constraints on government speech would heavily restrict its ability to perform core functions. Indeed, “it is not easy to imagine how government could function if it lacked this freedom.” *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009).

However, not all speech occurring in or around government land, offices, or employees can be considered government speech. “While government speech is not restricted by the Free Speech Clause, the government does not have a free hand to regulate private speech on government property. This Court long ago

recognized that members of the public retain strong free speech rights when they venture into public streets and parks. . . .” *Id* at 469. With respect to the visitor guides published by Petitioner Vista-Graphics, if the speaker is Vista-Graphics then the First Amendment’s free speech protections are fully applicable and the restrictions imposed by the Respondents on those guides must be reviewed under those standards.⁶

Since *Summun* outlined the criteria for determining what is government speech and what is private speech, this Court has reviewed several cases where lower courts inconsistently applied the *Summun* criteria. Such review is essential to the protection of free speech rights, for “while the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse.” *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). Indeed, this case is one example of misuse.

The three *Summun* criteria for determining whether expression is government speech are (1) a history or tradition of government communication of messages through the medium, (2) the degree of public association with the medium with the government, and (3) the degree of government editorial control

⁶ That private individuals have the right to engage in political and religious speech on traditional and designated public forums unfettered by content based restrictions from the government is a well settled principle that was not contested below. See *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788 (1985), *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), and *Widmar v. Vincent*, 454 U.S. 263 (1981).

over the messages conveyed in the medium. *Summum*, 555 U.S. at 470-472.⁷

A. While Governments Have Historically Had Occasion to Communicate With the Public Through Brochures, the Medium Has Historically Been Understood As Private Speech.

The first factor requires a review of the history of guidebooks, which is difficult to summarize in a few sentences in large part because their past is so extensive. At their core, travel guides are a collection of information and tips about where to find food, shelter, and entertainment that were likely passed between our earliest ancestors. Written descriptions of popular places can be traced back to some of the earliest classics, like the histories of Homer and Herodotus.⁸ Educational guides privately commissioned by royals and other wealthy individuals suggested sites to see to their children and their tutors during their travels were common throughout the middle ages.⁹

Today, the private American Automobile Association alone publishes hundreds of different guidebooks.¹⁰ At the time of this brief's writing, bookseller Barnes and Noble listed 18,000 different travel guides

⁷ The factors are identified in more generally applicable terms in *Tam, supra*, at 1760.

⁸ See generally Nicholas T. Parsons, *Worth the Detour: A History of the Guidebook*, The History Press, 2007.

⁹ *Id.*

¹⁰ *Travel Publication*, American Automobile Association NewsRoom, <http://newsroom.aaa.com/travel/publications/>.

for sale on their site.¹¹ The total number of privately produced print travel books, guides, and brochures is impossible to precisely determine, but it's a multi-million-dollar industry.¹²

Virginia does publish, and has a history of publishing, official state guidebooks and brochures.¹³ The existence of one, or even a series, of government guides should not be taken to mean that the entire medium of guidebooks is associated with government messages. The license plates in *Walker* and the public park statues in *Summum* were both mediums that were historically commissioned, designed, and or created entirely by or for the government, where private contribution was limited (as in *Summum*'s statues) or entirely non-existent (as in *Walker*'s license plates). Guidebooks, by contrast, have traditionally been authored, printed, and distributed by private parties for private consumption, with governments occasionally contributing a work to the larger private conversation. *The Virginia is for Lovers Travel Guide 2017* no more makes the field of printed travel information a traditional method of government communication

¹¹ *Travel Guide Search*. Barnes & Noble, https://www.barnesandnoble.com/s/travel+guide?_requestid=599962.

¹² Jon Marcus, *Are Travel Guidebooks Making a Comeback?*, *The Boston Globe*, May 30, 2015, <https://www.bostonglobe.com/lifestyle/travel/2015/05/30/are-travel-guidebooks-making-comeback/mKrCIPouyj1ktjnLmgRorO/story.html>.

¹³ *Virginia Travel Guide*. The Commonwealth of Virginia, Virginia Tourism Corporation, <https://www.viginia.org/travelguide>.

than a commercial during the Super Bowl advertising the Navy as a career option coopts television in the government's favor.

B. The Public Is Unlikely To Mistake the Petitioners' Private Speech For Government Speech By the Commonwealth of Virginia.

The analysis for the second *Summum* factor, public perception of the government with the medium, is much the same in this case as it was in *Tam*. In that case, this Court wrote “[i]f the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently. . . . It is unashamedly endorsing a vast array of commercial products and services. And it is providing Delphic advice to the consuming public.” *Tam*, 137 S. Ct. at 1758. Similarly, if state approval of a guide brochure makes the brochure government speech, the Commonwealth of Virginia must be endorsing to the traveling public a vast array of attractions and services, almost all of which it has neither inspected nor examined.

Quite to the contrary, Virginia has made it patently clear in both the SAVE and PMA programs that materials may not state or imply that the Commonwealth endorses products or services advertised in the materials. Similarly, the Patent and Trademark Office makes clear the same non-endorsement requirement with respect to approved trademarks. *See Tam*, 137 S. Ct. at 1759. Like the consumers of trademarked products (and unlike in *Summum* and *Walker*), an average tourist is unlikely to come upon a brochure for Busch Gardens Williamsburg in a Virginia welcome area (or, for that matter, on Virginia's

official website)¹⁴ and come to the conclusion that the Old Dominion endorses or recommends the park on the whole, the Loch Ness Monster roller coaster ride, or any of the Anheuser-Busch alcoholic beverages sold throughout the park.

The district court recognized this improbability,¹⁵ but decided that the display of brochures is government speech regardless. Pet. App. 48a-49a. And without citing to any evidence in the record opposing the District Court’s finding, the Court of Appeals contradicted that finding by ruling it was “confident that the public will associate the plaintiffs’ guides with the Commonwealth of Virginia[.]” Pet. App. 12a.

The idea that the public would believe travel guides and promotional materials constitute government speech solely because they are located on government property is unsupported by any of this Court’s government speech cases and is contrary to common sense. To the contrary, this Court has recognized that the government does not endorse all speech it merely permits on its property and that the government does not endorse all speech it fails to censor. *See Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990) (school does not endorse religious speech by allowing

¹⁴ *Theme Parks and Zoos: Busch Gardens*, Commonwealth of Virginia, <https://www.virginia.org/listings/ThemeParksAndZoos/BuschGardens/>.

¹⁵ “The brochures and pamphlets in the displays are produced by private groups who pay to place them in the Welcome Centers. A non-lawyer confronted with the resulting displays would be unlikely to conclude that they were government speech.” Pet. App. 48a.

student club to promote its meetings over school's public address system as other clubs are allowed). Privately published travel guides and promotional materials which, like Petitioners, contain nothing indicating an affiliation with the Commonwealth do not become government speech by being distributed at rest areas and welcome centers any more than newspapers are government speech because distributed from new racks on public sidewalks, *see Discovery Network*, 507 U.S. at 419, or expression through broadcasting outlets is government speech because the broadcast spectrum is allocated by the federal government.

C. Virginia's Regulations, Though Arbitrarily Broad, Do Not Create A True Editorial Interest On Behalf of the Government.

The third and final *Summum* factor is the degree of government editorial control of the message. As the District Court noted, "[t]he third factor especially is frustratingly circular. Plaintiffs cannot challenge the government's regulation of the Welcome Center displays because the displays are government speech. Why are they government speech? Because the government regulates them." Pet. App. 59a.

This circular reading of the *Summum* editorial control factor cannot be what this Court intended. Indeed, the editorial controls originally discussed in *Summum* were natural, practical limitations on the medium. In *Summum*, 555 U.S. at 479, this Court noted that, "public parks can accommodate only a limited number of permanent monuments." The city in *Summum* had to limit the number and type of messages they displayed because the medium physically could not accept more. This Court specifically contrasted

those physically limited mediums against mediums like the one in this case which can host many speakers concurrently. *Summum*, 555 U.S. at 478.

The government control in *Walker* was also greater and inherent to the medium, unlike the guides and pamphlets at issue in the instant case. Applications for a new license plate design in Texas had to go through a lengthy application that was only granted after approval by a state committee. *Walker*, 135 S. Ct. at 2249. Upon committee approval, the state would take ownership of the submitted image. *Id.* at 2248. It would then print the plates, the images on them, and the text in a state-selected font and color in a state facility, as had been the practice for nearly 100 years. *Id.* at 2249. The plates would then be used as a form of government identification for a number of years in order to provide useful information to government agents. Even after the plates were no longer needed, the state prescribed the method of disposal of the license plates. *Id.* Exercising its editorial control of the medium, Texas denied at least a dozen applications for plate designs. *Id.* Any private speech that could be said to exist in the selection of a particular image for the background of an individual's license plate was clearly secondary to the government purpose and speech that are the reasons the license plates exist.

Virginia's restrictions, by contrast, are extremely new, unnecessary, and arbitrary. Indeed, this entire case arises because Vista-Graphics, until 2012, was able to print and distribute their pamphlets in Virginia's tourist areas with little to no editorial control by the state. Unlike Texas's license plates, the bro-

chures in the case before the bar are privately authored, privately illustrated, privately printed, privately funded, and even sometimes privately distributed¹⁶ for the purpose of providing information to other private parties. Importantly, private parties retain ownership of both the physical pamphlets and the messages they contain while they are displayed in the government facilities; Virginia returns any unused pamphlets to their owners. Virginia imposes no restrictions on colors or fonts, only on maximum size (likely a logistical control more so than a content based one, meant to ensure that the brochures will fit in the slots the state provides). Importantly, unlike Texas in the *Walker* case, no evidence is in the record indicating that Virginia has ever exercised the editorial control it has asserted by denying any applications by companies wishing to enroll in the brochure placement program.

Ultimately, the doctrine of government speech exists to allow government to express its opinion on a particular issue. By accepting and displaying hundreds of private tourism brochures across the state, Virginia is not expressing any opinion on the locations advertised therein and it is inconceivable

¹⁶ Virginia allows companies that enroll in the brochure section of the SAVE program to, “ship brochures directly to the Welcome Centers from [their] location” rather than having them centrally distributed by the state. Virginia even incentivizes companies to select this option by waiving the distribution fee. The enrollment form is publicly available at <https://enrollment.himediallc.com/forms/welcome-center-brochure-distribution-0>.

that the average consumer would mistakenly believe to the contrary.

CONCLUSION

Virginia's attempt to restrict First Amendment protected expression, including speech that is political and religious in nature, under the guise of the government speech doctrine represents a dangerous expansion of that doctrine that threatens any private speech occurring in public places. The Court of Appeals' ruling is a threat not just to Vista-Graphics, but to citizens throughout the Commonwealth and beyond. This Court should grant Certiorari to review and ultimately reverse the decision below.

Respectfully submitted,

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