IN THE

Supreme Court of Virginia

RECORD NO. 880090

COMMONWEALTH OF VIRGINIA,

Appellant,

AMERICAN BOOKSELLERS ASSOCIATION, INC., *et al.*,

Appellees.

BRIEF ON BEHALF OF APPELLEES

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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 880090

COMMONWEALTH OF VIRGINIA,

Appellant

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., ET AL.,

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BRIEF FOR THE APPELLEES

STATEMENT

This case is about freedom of speech in its most fundamental aspect - about the right of the people to display and sell, and to peruse and buy, books and magazines and newspapers. It raises the question whether government is free to impose severe restrictions on the rights of adults to have access to expressive materials that may be deemed "harmful" to some children.

At issue is the constitutionality of a Virginia statute that imposes criminal punishment on sellers of books and periodicals if they display materials that contain "explicit and detailed" accounts of sexuality, and that are deemed by the statute to be "harmful to juveniles," in a manner "whereby juveniles may examine and peruse" them. Violation of this

provision is a Class 1 misdemeanor punishable by a one-year term of imprisonment and a fine of $1000. Va. Code §§ 18.2-11, 18.2-391(e). Appellees, who are or represent sellers, publishers, and distributors of books, magazines, and other printed matter, challenged the statute under the First and Fourteenth Amendments. Both the U.S. District Court and the Fourth Circuit Court of Appeals agreed with appellees that the statute is unconstitutional and enjoined its enforcement. The United States Supreme Court, while finding "substantial constitutional problems" under the statute, certified two questions to this Court, the answers to which will be of assistance to the U.S. Supreme Court in its final decision.

The certified questions are:

(1) Does the phrase "harmful to juveniles" as used in Virginia Code §§ 18.2-390 and 18.2-391 (1982 and Supp. 1987), properly construed, encompass any of the books introduced as plaintiff's exhibits below, and what general standard should be used to determine the statute's reach in light of juveniles' differing ages and levels of maturity?

(2) What meaning is to be given to the provision of Virginia Code § 18.2-391(a) (Supp. 1987) making it unlawful "to knowingly display for commercial purpose in a manner whereby juveniles may examine or peruse" certain materials? Specifically, is the provision

complied with by a plaintiff bookseller who has a policy of not permitting juveniles to examine and peruse materials covered by the statute and who prohibits such conduct when observed, but otherwise takes no action regarding the display of restricted materials? If not, would the statute be complied with if the store's policy were announced or otherwise manifested to the public?

A. The Virginia Statute.

Since 1970, following the U.S. Supreme Court's decision in Ginsberg v. New York, 390 U.S. 629 (1968), the Commonwealth of Virginia has made it a criminal offense "knowingly to sell or loan to a juvenile" sexually explicit materials that are deemed to be "harmful to juveniles" as defined by statute. Va. Code §§ 18.2-390 and 391. The State amended this statute by adding a provision, effective July 1, 1985, that makes it a crime "to knowingly display [such materials] for commercial purpose in a manner whereby juveniles may examine or peruse [them]." Va. Code § 18.2-391(a).

The Virginia juvenile display statute covers a broad range of expressive materials. It applies to "[a]ny book, pamphlet, magazine, printed matter however reproduced, or sound recording" that contains explicit depictions or descriptions of sexual conduct and that, taken as a whole, is "harmful to juveniles." Va. Code § 18.2-391(a)(1), (2). The phrase

"harmful to juveniles" is defined to mean "that quality of any description or representation, in whatever form, * * * [that] (a) predominately appeals to the prurient, shameful or morbid interest of juveniles, (b) is patently offensive to prevailing standards [for juveniles] in the adult community as a whole with respect to what is suitable material for juveniles, and (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles." Va. Code § 18.2-390(6) (emphasis added). A "juvenile" is defined as anyone under 18 years of age. Va. Code § 18.2-390(1).

There is no dispute in this case about the power of Virginia to prohibit both the display and the sale, to adults and children, of hard-core pornography that meets the constitutional standard of what is obscene. However, the statute at issue by its terms appears to sweep within its coverage a wealth of both serious and popular literature that adults have a clear constitutional right to buy but that could be viewed as unfit for children (especially younger children) under "prevailing standards [for juveniles] in the adult community" because of sexually forthright scenes or themes. In particular, our contemporary literature has, ever since Joyce and Lawrence, been strongly committed to the candid depiction of the erotic as an essential element of reality. Modern fiction, from Proust and Hemingway to Genet and Philip Roth, contains frequent depictions of sexual conduct, some of it vivid and even disturbing. And a great many non-fiction works,

especially in the fields of health, science, and human relations, also deal forthrightly with sexual subjects.

Given the breadth of its scope, the 1985 amendment imposed a severe new burden on establishments selling books and magazines within the State.[1/] The prior statute had prohibited the sale of a particular book to a particular juvenile if the bookseller had reason to believe that the book lacked serious value for that child and would instead simply appeal to his prurient interests. That version of the statute itself imposed a difficult task on the bookseller, who had to make a quick on-the-spot judgment about the appropriateness of a given book or magazine for a juvenile of that age and maturity. But the task was at least a manageable one, involving a rough judgment whether a specific item should be sold to a specific youth. In contrast, the amended statute by its terms requires booksellers in advance of sale to ensure, on pain of criminal penalties, that no books, pamphlets, or magazines meeting the vague standard of "harmful to juveniles" are available anywhere in the bookstore where any juvenile "may examine and peruse" them. And in determining whether a particular book on display would be considered "harmful to

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1/ Books and magazines are sold today not only in traditional bookstores, but also--and, in some locations, primarily--in supermarkets, drugstores, etc. For convenience, in this brief we often refer to "booksellers" to describe all such retailers.

juveniles," the bookseller is forced, if one applies the previously accepted meaning of "harmful to juveniles", to apply the statutory test in the hypothetical context of the youngest and least mature browser.

Accordingly, a conscientious bookseller wishing to be certain to abide by the 1985 amendment to the Virginia statute must engage in rigorous self-censorship in one of three ways: (a) he can eliminate from inventory all books and magazines, no matter how clearly important and serious (and without regard to the constitutional rights of adults to peruse and buy the material) that might, because they include sexual depictions, be viewed as "harmful" to the youngest juvenile; (b) he can display such books and magazines in "adults only" sections of the bookstore or put other severe restrictions on access to them; or (c) he can exclude children entirely as customers (perhaps by "carding" all customers, as is done in bars).[2/] These alternatives, however, would dramatically reduce the availability to adults and more mature juveniles of constitutionally protected books and periodicals and would have a severe adverse effect on the bookseller's business.

2/ Some of these options are of course not meaningfully available to outlets such as newsstands and grocery stores.

B. Litigation.

1. On July 16, 1985, appellees filed this action in the United States District Court for the Eastern District of Virginia to challenge the validity of the 1985 display statute under the First and Fourteenth Amendments.[3/] Appellees contended that it was "not possible, under the terms of the [1985] Amendment, to restrict the display of materials covered by the Amendment to juveniles without also restricting such access by adults" (Jt. App. 7). Appellees charged that the statute "effectively requires booksellers to remove from their shelves substantial amounts of * * * constitutionally protected matter thereby restricting the right of adult customers to view, peruse and purchase protected literature" (Jt. App. 7). Appellees further claimed that the statute violates the First Amendment rights of more mature juveniles, whose access to books is limited to the level appropriate for the youngest children (Jt. App. 8). Appellees also attacked the new statute as vague, because "the words 'display,' 'harmful to juveniles' and 'in a manner whereby juveniles may examine and peruse'" fail to "provide adequate notice of an offense under the Amendment" (Jt. App. 8-9).

3/ The suit was originally brought against local officials. The Commonwealth of Virginia intervened in the suit as defendant and is now the only party appellant.

Following an evidentiary hearing,[4/] the district court held the juvenile display statute unconstitutional (Jt. App. 136-152). The court found that "the average general bookstore in the Northern Virginia area carries a significant percentage of materials (varying between 5-25%) that are 'harmful to juveniles' as defined in the statute" (Id.at 140); in the case of appellee Books Unlimited, for instance, "approximately 10-15% of its books may not be displayed under

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4/ The Commonwealth implies in its opening brief (p. 6) that the testimony was a surprise and objected to by the Commonwealth. This is not the fact. As counsel for the booksellers stated at the hearing:

> "We have had prior conversations with the Attorney General's Office and they were aware that that was the posture that we were going to take [that testimony was to be given]. And at least up until this point they have not objected to that. And in fact, there was some discussion as to whether or not they would want to take depositions of these people prior to the hearing. We did make those people available for depositions, but I was advised that they chose not to. And it was my understanding also that the State was considering the possibility of presenting its own witnesses, but apparently has decided not to present any witnesses in contravention of our position." (Jt. App. 49).

In addition, the Commonwealth misstates the testimony of Heather Florence by describing her as an "expert" who did not know what "harmful to minors" meant under Virginia law (pg. 6). Mrs. Florence, Vice President and General Counsel of Bantam Books, testified both by affidavit and oral testimony to the "virtual impossibility", even for a First Amendment lawyer such as she, of applying the "harmful to juveniles" definition to hundreds of titles for all relevant ages. (Jt. App. 15, 90, 94-95.)

the new law" (Id. at 139). Books that fall within the display provision "come from a wide variety of subject matters, such as romance, fiction, photography, best sellers, science fiction and health" (Ibid.). Although some books and magazines are subject to the provision because of explicit photographs or pictures on their covers, "[m]ost of the books [that] come within the statute's fairly broad ambit [do so] on the basis of their content" (Ibid.).

The district court also specifically found that ready access to books is "critical" to their sale to the reading public (Jt. App. 139-140):

> In all bookstores, the display of a particular book, and the manner in which it is displayed play a critical role in determining how many copies the bookstore will sell. Customers often become familiar with a book, and desire to purchase it only after browsing and looking through the shelves. Customers are generally hesitant about asking for help in locating books, and they are especially reluctant to ask for books that have a strong sexual content.

Accordingly, at appellee Ampersand Books, for example "at least one copy of every title carried * * * is on display" (Ibid.).

The district court considered various means of complying with the juvenile display provision and found that none was practicable. First, bookstores could decline to carry any materials that fall within the statutory definition of "harmful to juveniles." However, since the statute extends to

a substantial proportion of bookstores' inventory and applies to "a number of very popular books, including some best sellers, this alternative is not commercially feasible" (Jt. App. 141).

Bookstores could also refrain from publicly displaying these materials by keeping them behind the counter. However, "since the display of books is so crucial to their sale, such a move would substantially hurt sales" (Jt. App. 141). Furthermore, "due to the large number of books involved, this alternative would require bookstores to significantly alter the structure of their stores" (Ibid.).

Alternatively, bookstores could create an "adults only" section in which to display such materials. This solution would generate its own problems, however, because "many adults would be reluctant and embarrassed to browse in an 'adults only' corner of the store, and sales of books placed in this new area would undoubt[ed]ly drop" (Jt. App. 141). Beyond that, because the juvenile display provision encompasses material in "a wide variety of literary disciplines, such as fiction, romance, photography, and best sellers[,] books which are 'harmful to minors' are mixed into so many different subject areas that it would be almost impossible for booksellers to sort through the books to create a new section" (Ibid.). "An 'adult only' area would be costly to create, difficult to monitor, and would create a great deal of confusion in the mind of a consumer searching for a particular book" (Ibid.).

Finally, bookstores could attempt to exclude people under the age of 18. The district court found, however, that "such a move would create the impression that the store deals primarily in 'adult only' or pornographic material, which would have a devastating impact upon the store's business" (Jt. App. 140). And "this alternative would certainly have a dramatic impact upon the store's sales of children's books" (Ibid.), which account for 10% of the business of appellee Ampersand Books and 40% of the sales of appellee Books Unlimited (Jt. App. 58, 100, 139).

Based on these findings, the district court set forth its conclusions of law. On the merits, the district court held that the juvenile display provision was overbroad on its face and thus violated the First Amendment. Relying principally on Butler v. Michigan, 352 U.S. 380 (1957), the court stated that "[i]n promoting the morals of its youth by restricting their access to certain communications, the state may not create barriers which simultaneously place substantial restrictions upon an adult's access to those same protected materials" (Jt. App. 146). The court determined that the Virginia statute would have a crippling effect on adult readers and booksellers (Id. at 147-148 (citations omitted)):

> The level of discourse reaching commercial bookshelves cannot be limited to what might be appropriate for an elementary school library. The state's purpose in passing the challenged amendment, however praiseworthy, cannot be pursued by means

> which effectively stifle an adult's access to communications he or she is entitled to receive. While the intended effect of the amendment is to prevent examination and perusal by minors of certain "harmful" materials, the unavoidable collateral effect f the law is to severely limit the ability of adults to examine these protected materials.

Thus, the inevitable consequence of the provision is "severely [to] limit [] sales to adults" and to impose commercial burdens for booksellers that are "commercially impractical" (Id. at 148).

2. The court of appeals unanimously affirmed in all relevant respects (Jt. App. 153-166). It first held that appellees had standing to challenge the 1985 amendment to the Virginia statute. The court recognized the dilemma that the statute created for appellees: "[i]f [appellees] attempt to comply with the amendment, they face economic injury; if [they] continue to conduct their business in their normal fashion, they face the prospect of prosecution" (Id. at 158). Noting that "[i]t would be unreasonable to assume that the [State] adopted the 1985 amendment without intending that it be enforced" (Id. at 158 n.4), and emphasizing appellees' "legitimate concern that the amendment will be implemented so as to infringe on their first amendment right[s] * * * " (Id. at 157), the court held that appellees did "not have to expose [themselves] to prosecution" in order to obtain a determination of the validity of the display provision (Id. at 158).

The court of appeals also held that the statute was unconstitutional. It agreed with the district court that "book retailers face a substantial problem attempting to comply with the amendment in ordering, reviewing, and displaying publications for sale" (Jt. App. 163) and that the available methods of complying with the statute would "unreasonably interfere[] with the booksellers' right to sell the restricted materials and the adults' ability to buy them" (Id. at 163-164). Thus, the statute "discourages the exercise of first amendment rights in a real and substantial fashion, and * * * is not readily subject to a narrowing interpretation" (Id. at 164). Finally, the court of appeals concluded that the display provision was not a valid "time, place, and manner" regulation because it was impermissibly based on the content of the materials (Id. at 161).

3. The United States Supreme Court found probable jurisdiction of appellants' appeal and the matter was fully briefed and argued. At oral argument, the Commonwealth of Virginia conceded that if any of the books introduced as exhibits below is covered by the statute, plaintiffs should prevail. (Jt. App. 234) Because of this position and the radically differing interpretations of the statute put forward by the parties, the Supreme Court of the United States certified to this Court two questions, which certification this Court has accepted and which questions are the subject of this proceeding.

Both questions relate to the meaning of the statute in question. The first seeks a determination whether any of the sixteen books put in evidence by plaintiffs in the U.S. District Court during the hearing before that court are covered by the statute in question, and a statement as to what standard has been applied in determining that coverage or lack of coverage. The second question relates to manner of compliance.

ARGUMENT

POINT I

THE MEANING OF "HARMFUL TO JUVENILES" AND THE SIXTEEN EXHIBITS

The Commonwealth's Position

In its opening brief, the Commonwealth of Virginia in effect concedes that, were the statute to be read and applied to comply with its plain language, it would be unconstitutional.

On page 10 of its brief the Commonwealth defines what it believes to be the governing principle in understanding the term "harmful to juveniles". The Commonwealth states that the term "relates only to certain sexually explicit material within a very narrow spectrum of pornography, works on the 'borderline' with obscenity." The statutory definition of "harmful to juveniles" has three components: appeal to prurient interest, patent offensiveness and serious value. Va. Code § 18.2-390(6). The Commonwealth's definition is arrived at by treating the third component - serious value - in an unusual manner. The Commonwealth explains:

> Therefore, if a reasonable person would find that a particular book, taken as a whole, has serious "value" for a legitimate minority of juveniles such as older adolescents, then that work would have, as a matter of law, serious "value" for the entire class of juveniles thus making the differing ages and maturity levels within the class of juveniles irrelevant. In other words, older juveniles are not reduced to the level of young children; young children are raised to the level of older, more mature adolescents because of where the General Assembly drew the "age line."

> This "raising" effect is a major reason the Commonwealth believes the scope of § 18.2-390(6)'s "harmful to juveniles" definition to be so narrow, concerning only "borderline obscenity": because the General Assembly drew the line at eighteen, any difference between a work's serious literary, artistic, political or scientific value for older "juveniles" and persons eighteen and older is going to be, as a practical matter, indistinguishable.

(Comm. Br. pp. 15-16) (footnotes omitted).

Under the Commonwealth's position, "harmful to juveniles" under Va. Code § 18.2-390(6) is indistinguishable from "obscene" for adults under Va. Code § 18.2-372. The same definition of "harmful to juveniles" applies to the proscription of the sale of "harmful" material to juveniles. Thus, if the Court adopts the Commonwealth's position, the entire Virginia statutory provision dealing with "prohibited sales and loans to juveniles" (Va. Code § 18.2-391) would have no independent meaning or purpose. In fact, that statute, under which persons may have, in the past, been convicted for sales of "harmful" material to juveniles, is either unconstitutional or surplusage, and any convictions must be vacated and retried under the Commonwealth's new definition. This is not likely to be the result the General Assembly intended.

If this Court accepts the Commonwealth's new found concession that § 18.2-391 is not unconstitutional because it is surplusage and is indistinguishable from the statutes relating to adult obscenity, plaintiff booksellers' position

will have been vindicated, because, in effect, the statute will have been nullified.

If on the other hand, the Commonwealth's position is that "harmful to juveniles" includes something different from "obscene," the statute is clearly so vague as to be unconstitutional. A bookseller cannot determine with any degree of certainty what is "borderline" obscenity not having "serious value for a legitimate minority of juveniles."[5/]

When the wording of a criminal statute is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application, the statute is rendered invalid for vagueness and cannot be enforced. The vagueness found in the Commonwealth's "definition" is precisely the sort that the U.S. Supreme Court in N.A.A.C.P v. Button, 371 U.S. 415, 433 (1963), said cannot be tolerated in a law directed at First Amendment protected material.

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to .o a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the

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5/ The Commonwealth has made no attempt to offer a workable distinction between "borderline obscenity" under Va. Code § 18.2-391 and "obscenity" under Va. Code § 18.2-372. To the contrary, the Commonwealth concedes that the two are "as a practical matter, indistinguishable." (Comm. Br. p. 16). Thus, if there is a distinction between material that is "harmful to juveniles," and that which is obscene for adults, that distinction is, under the Commonwealth's position, impossible for a bookseller to ascertain.

> existence of a penal statute susceptible of sweeping and improper application.
>
> * * *
>
> "These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their existence almost as potently as the actual application of sanctions.
>
> * * *
>
> Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity". (emphasis added)

See also Baggett v. Bullitt, 377 U.S. 360, 372 (1964).[6/] The situation here is like that in Airport Commissioners of Los Angeles v. Jews for Jesus, 482 U.S. ___, 107 Sup. Ct. 2568, 2573 (1987), in that "the vagueness of this [narrowing] construction itself presents constitutional difficulty."

Problems With the Commonwealth's Position

This Court may, however, have difficulty in accepting the Commonwealth's only recently articulated position that "harmful to juveniles" is "indistinguishable" from the adult obscenity standard, since it runs contrary to common sense, the

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6/ In finding statutory oath requirements for state employees facially unconstitutional, the Court in Baggett stated: "The uncertain meanings of the oaths require the oath-taker - teachers and public servants - to 'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked . . . . Free speech may not be so inhibited".

plain language of the statute, and the positions taken by the Commonwealth in three separate courts earlier in this case.

In the federal courts below, the statute in general and the amendment in particular were described by the Commonwealth in glowing terms as broadening the protection of children. "[B]oth the Amendment and the preexisting statute are designed to protect children from exposure to sexually explicit material which is harmful to them. * * * Because of the governmental interest in protecting children's welfare, it is 'altogether fitting and proper for a State to include in a statute designed to regulate the sale of pornography to children special standards broader than those embodied in legislation aimed at controlling dissemination of such material to adults.' * * * With Ginsberg's recognition of a State's legitimate and constitutional responsibility to protect children from exposure to material obscene as to them came the General Assembly of Virginia's 1970 enactment of §§ 18.2-390 and 391. . . ." (quotations from pages 17-19 of the Commonwealth's Brief in the Supreme Court of the United States). Now, before this Court, the Commonwealth suddenly decides that this highly significant statute has no meaning whatsoever. The definition it now proposes to this Court

emasculates §§ 18.2-390 and 18.2-391, rendering them unnecessary.[7/]

Similarly, in the U.S. District Court, the Fourth Circuit Court of Appeals and in the United States Supreme Court, the Commonwealth consistently took the position that the "harmful to juveniles" provisions of Virginia law are based on, and gain constitutional validity from, the decision of the United States Supreme Court in Ginsberg v. New York, 390 U.S. 629 (1968). In fact, before the United States Supreme Court, the Commonwealth stated "The Amendment is the progeny of Ginsberg v. New York." (Sup. Ct. Brief at page 18). However, the Commonwealth now suggests to this Court a non-meaning of "harmful to juveniles" which is directly contrary to Ginsberg. In Ginsberg the U.S. Supreme Court stated: "The "girlie" picture magazines involved in the sales here are not obscene for adults." (390 U.S. at 634). In fact, the major holding of Ginsberg is that material may be "harmful to juveniles" even if

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7/ When a state regulates speech which is constitutionally protected as to adults, the First Amendment requires that this regulation substantially further the state's interests in protecting minors from speech that is "harmful" to them. The Commonwealth's concession that the statute is surplusage makes it impossible for the statute to meet this requirement, and thus the Commonwealth's construction of the statute renders it unconstitutional. See Community Television of Utah, Inc. v. Wilkinson, 611 F.Supp. 1099 (D. Utah 1985), aff'd, 800 F.2d 989 (10th Cir. 1986), aff'd without decision, 107 S.Ct. 1559 (1987); Bolger v. Young's Drug Products Corp., 463 U.S. 60 (1983); Erznoznick v. City of Jacksonville, 422 U.S. 205 (1975); Butler v. Michigan, 352 U.S. 380 (1957).

it is not obscene, and therefore protected, as to adults. Indeed, the traditionally accepted view is that in dealing with sales to minors of materials "harmful to minors," retailers can "consider a minor's relative maturity in deciding whether to sell a particular item to him." American Booksellers Association v. Virginia, 802 F.2d 691, 695 n.7 (4th Cir. 1986), (Jt. App. 160).[8/] As this Court has recognized, "[i]t may be true that what is obscene for one child is not obscene for another." Freeman v. Commonwealth, 233 Va. 301, 288 S.E.2d 461, 466 (1982).[9/] Similarly, in Erznoznick v. City of Jacksonville, 422 U.S. 205 (1975), the United States Supreme Court recognized that the age of a minor is a significant

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8/ See also, e.g., Ill. Supreme Court Committee on Pattern Jury Instructions, Illinois Pattern Jury Instructions § 9.58 (1981): "You should consider whether the predominant appeal of the material is to a prurient interest by judging it with reference to average children of the same general age of the child to whom such material allegedly was offered, distributed, sent, or exhibited, unless it appears from the nature of the matter or the circumstances of its dissemination, distribution, or exhibition that it is designed for specially susceptible groups."

9/ The Attorney General's Commission on Pornography also recognized the inherent necessity of judging obscenity in terms of juveniles' relative ages and maturity levels. The Commission stated that "[w]e think it unfortunate when Catcher in the Rye is unavailable in a high school library, but none of us would criticize the decision to keep Lady Chatterly's Lover, plainly protected by the First Amendment, out of the junior high schools." 1 Attorney General's Commission on Pornography Final Report at 273 (1986).

factor in assessing his or her capacity, and thus the level of protection required (422 U.S. at 214, n.11).[10/]

Further, it is unseemly for the Commonwealth to assert that the General Assembly would spend its valuable time amending a statute to prohibit display of material in certain commercial contexts, if possession in public of such material was already a crime under Va. Code § 18.2-374(4). As the Attorney General stated during the trial "the General Assembly tries not to put surplus words in a statute." (Jt. App. 125.)

The Commonwealth asks this Court to adopt a construction of the statute which ignores its plain meaning and the intent of the provision. As this Court has repeatedly stated, however, this Court cannot adopt a construction of the statute that fails to comport with the law's plain meaning, and the court cannot add words to the law under the guise of statutory construction. "It is elementary that it is the function of the courts to interpret and apply the acts of the legislature as written and not to rewrite or correct them." General Accident Fire and Life Assurance Corp. v. Aetna

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10/ The General Assembly's acceptance of this sliding maturity/age level in the determination of what is "harmful to juveniles" finds support in the statute at issue here. Va. Code § 18.2-390(7) requires for conviction knowledge of "the age of the juvenile". Since "juvenile" is defined as "a person less than eighteen years of age" (Va. Code § 18.2-390(1)), the statute appears to require knowledge of the precise age below 18 of a juvenile who either may be purchasing a book or who may be able to examine materials on display in the store.

Casualty and Surety Co., 208 Va. 467, 158 S.E.2d 750, 755 (1958). See also Carter v. Nelms, 204 Va. 338, 131 S.E.2d 401, 406 (1963) ("When the legislature has spoken plainly it is not the function of courts to change or amend its enactments under the guise of construing them."); Harward v. Commonwealth, 229 Va. 363, 330 S.E.2d 89, 90 (1985) ("The primary objective of statutory construction is to determine legislative intent. In determining that intent, the plain, obvious, and rational meaning of a statute is always preferred over a curious, narrow, or strained construction.").

Although the State urges this Court to uphold the constitutionality of the statute, the Court may not add to the statute terms that the Legislature never intended to use. Instead, the Court must construe the law as written and base its decision upon the terms contained within it:

> For this court to "introduce words of limitation" into an overbroad criminal statute in order to render it constitutional "would to some extent, substitute the judicial for the legislative department . . . To limit this statute . . . would be to make a new law, not to enforce an old one. This is no part of our duty."

Home Box Office v. Wilkinson, 531 F. Supp. 986, 998 (N.D. Utah 1982) (citations omitted).

The Plain Meaning of the Statute.

What then is a reasonable and appropriate meaning for "harmful to juveniles" in the display context? If the intended

purpose of the statute - to protect each and every minor from the particular material harmful to him - is to be achieved, the phrase "harmful to juveniles," in the context of the statute, must be construed to encompass any title which may be deemed inappropriate for the least mature and youngest potential juvenile browser.[11/] For if materials are displayed in a manner which allows even a single child to browse through even a single book deemed "harmful" to his age group and maturity level, the provision is violated and the General Assembly's intent must be enforced.

Thus "harmful to juveniles" under Va. Code § 18.2-391(a) encompasses any book that any reasonable Virginia jury could find patently offensive, and which appeals[12/] to

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11/ In determining which books the statute encompasses, a bookseller or publisher must consider local community standards. As this Court has recognized in the adult obscenity context:

> It would be difficult, if not impossible, for a Virginia jury 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.

Price v. Commonwealth, 214 Va. 490, 201 S.E.2d 798, 799 (1974), cert. denied, 419 U.S. 902 (1974).

12/ The Commonwealth suggests in its brief that the "appeals to the prurient interest" element is to be judged according to an author's intent to create an "obscene" work, rather than a community's perception of the effect the book will have

(Footnote continued on following page)

the prurient interest of, but is lacking in serious literary, artistic, political or scientific value for, the least mature and youngest potential browser.[13/]

The Sixteen Exhibits

Each of the books marked in evidence as examples in this proceeding has value for adults or for children of certain ages or certain maturity levels. However, following the statutory guidelines, a reasonable jury in some Virginia localities, applying contemporary community standards, could find at least some of the books "harmful" for at least the youngest and least mature potential browsers in their community.

12/ (Footnote continued from previous page)

on its children. This is not the generally accepted meaning of the term, however. See, e.g., American Law Institute, Model Penal Code § 541.4(4)(b) (1962): "In any prosecution under this Section evidence shall be admissible to show...what the predominant appeal of the material would be for ordinary adults or any special audience to which it was directed, and what effect, if any, it would probably have on conduct of such people." See also 2 Devitt and Blackmar, Federal Jury Practice and Instructions § 62.05 (1977). At any rate, a bookseller clearly cannot be held responsible for making an unguided determination of the author's intent in creating the work. Rather, the bookseller must gauge the content of a book by the reception it would have in his locality.

13/ By suggesting this interpretation, plaintiffs do not suggest that such an interpretation would avoid the many constitutional problems raised by plaintiffs in the federal courts. Rather, plaintiffs merely suggest that this interpretation is likely to have been intended by the General Assembly.

One of the exhibits was even conceded to be so before the Court of Appeals. When addressing the Fourth Circuit, the Commonwealth took the position that "with one possible exception, Plaintiffs' exhibits introduced below are clearly not "harmful to juveniles" under the statute's objective standards." (Emphasis added) (Appellant's brief, p. 25). The Commonwealth went on to state with respect to that exception that "a contrast to these [other] books is presented by one Plaintiffs' exhibit, Jackie Collins' Hollywood Wives, whose predominant theme appears to be gratuitous sexual excitement and extra-marital sex as a recreational activity." (Appellant's brief, pp. 27-28). Before this Court, however, the Commonwealth describes Hollywood Wives very differently: "Jackie Collins' 550-page Hollywood Wives is a novel about the private lives of Hollywood's film community taken from Ampersand Books' general fiction section. Hollywood Wives spent over six months on the New York Times bestseller list and was a Literary Guild alternate selection. Pages 14 and 15 cited by the Plaintiffs at trial contain a one paragraph semi-graphic description of oral sex between a producer and a makeup girl." (Comm. Br. p. 17).

The Commonwealth, in its brief, attempts to minimize the likelihood of any of the sixteen books introduced at trial being found "harmful to juveniles" by this Court by now describing them in benign terms and suggesting that examples of sexually explicit materials found in them identified at the

trial are the only such examples in each book. This misstates the nature of the books. They were submitted as examples of the types of materials covered--"to demonstrate the scope and breadth of the law" (Jt. App. 48-49). The page references mentioned at trial were merely examples, and not intended to limit.

More important however is the fact that certain of these very books have, in fact, been challenged as "pornographic" and unfit for minors. For example:

Judy Blume, Forever:

(a) Challenged at the Midvalley Junior-Senior High School in Scranton, Pa. (1982) because it contains "four-letter words and talked about masturbation, birth control and disobedience to parents".14/

(b) Challenged at the Park Hill, Mo. South Junior High School library (1982) where it was housed on restricted shelves because the book promotes "the stranglehold of humanism on life in America".15/

(c) Challenged at the Orlando, Fla. schools (1982).16/

(d) Challenged at the Akron, Ohio school district libraries (1983).17/

14/ American Library Association, Newsletter on Intellectual Freedom 83-84 (1982).

15/ American Library Association, Newsletter on Intellectual Freedom 142 (1982).

16/ American Library Association, Newsletter on Intellectual Freedom 124-25 (1982).

17/ American Library Association, Newsletter on Intellectual Freedom 85-86 (1983).

(e) Challenged at the Howard-Suamico, Wis. High School (1983) because "it demoralizes marital sex."[18/]

(f) Challenged and eventually moved from the Holdredge, Nebr. Public Library young adult section to the adult section (1984) because the "book is pornographic and does not promote the sanctity of life, family life."[19/]

(g) Challenged at the Cedar Rapids, Iowa Public Library (1984) because it is "pornography and explores areas God didn't intend to explore outside of marriage."[20/]

(h) Placed on a restricted shelf at Patrick County, Va. School Board (1986).[21/]

(i) Challenged at the Campbell County, Wyo. school libraries (1986) because it is "pornographic" and would encourage young readers "to experiment with sexual encounters."[22/]

(j) Recommended for removal from the West Hernando, Florida Middle School library (1988) after the school's media advisory committee found it inappropriate for sixth through eighth grade students.[23/]

Boston Women's Health Collective, Our Bodies, Ourselves:

(a) Removed from high school library, Townshend, Vt. (1975).[24/]

18/ American Library Association, Newsletter on Intellectual Freedom 39 (1984).

19/ American Library Association, Newsletter on Intellectual Freedom 70 (1984).

20/ American Library Association, Newsletter on Intellectual Freedom 167 (1985).

21/ American Library Association, Newsletter on Intellectual Freedom 39 (1986).

22/ American Library Association, Newsletter on Intellectual Freedom 66 (1987).

23/ American Library Association, Newsletter on Intellectual Freedom 45 (1988).

24/ American Library Association, Newsletter on Intellectual Freedom 105 (1975).

(b) Removed from high school library, Pinellas County, Fla. (1975).[25/]

(c) Removed from high school library, Morgantown, W. Va. (1977).[26/]

(d) Removed from high school library, Helena, Mont. (1978).[27/]

(e) Challenged in Amherst, Wis. (1982) due to its "pornographic" nature; Three Rivers, Mich. Public Library (1982) because it "promotes homosexuality and perversion."[28/]

(f) Challenged at the William Chrisman High School in Independence, Mo. (1984) because the book is "filthy." The health manual was on a bookshelf in the classroom and was the personal property of the teacher.[29/]

Comfort, Alex and Jane, The Facts of Love:

(a) Challenged at the Great Bend, Kans. Public Library (1981).[30/]

(b) Challenged at the Boise, Id. Public Library (1982).[31/]

25/ American Library Association, Newsletter on Intellectual Freedom 138 (1975).

26/ American Library Association, Newsletter on Intellectual Freedom 100 (1977).

27/ American Library Association, Newsletter on Intellectual Freedom 27 (1979).

28/ American Library Association, Newsletter on Intellectual Freedom 100 (1982); 29 (1983).

29/ American Library Association, Newsletter on Intellectual Freedom 106 (1984).

30/ American Library Association, Newsletter on Intellectual Freedom 169 (1981).

31/ American Library Association, Newsletter on Intellectual Freedom 155 (1982).

Scheffield & Bewley, Where Do Babies Come From?:

(a) Moved from the children's section to the adult section of the Tampa-Hillsborough, Fla. County Public Library (1981) by order of the Tampa City Council.[32/]

(b) Placed on restricted shelves at the Evergreen School District elementary school libraries in Vancouver, Wash. (1987).[33/]

Bell, Changing Bodies, Changing Lives:

(a) Placed in a restrictive circulation category at the Muskego, Wis. High School library (1981).[34/]

(b) Challenged in Amherst, Wis. (1982) and the York, Maine (1982) school systems.[35/]

(c) Removed from the Sandy, Oreg. Union High School library (1984) due to "foul language and disregard for a wholesome balance about human sexuality."[36/]

(d) Challenged at the William Chrisman High School in Independence, Mo. (1984) because it is "filthy."[37/]

(e) Challenged at the Boone-Madison, W.Va. Public Library (1984).[38/]

32/ American Library Association, Newsletter on Intellectual Freedom 4-5 (1982).

33/ American Library Association, Newsletter on Intellectual Freedom 87-88 (1987).

34/ American Library Association, Newsletter on Intellectual Freedom 92 (1981).

35/ American Library Association, Newsletter on Intellectual Freedom 100-101 (1982).

36/ American Library Association, Newsletter on Intellectual Freedom 138 (1984).

37/ American Library Association, Newsletter on Intellectual Freedom (1984) 106.

38/ American Library Association, Newsletter on Intellectual Freedom 27-28 (1985).

(f) Challenged at the Gray-New Glouchester, Maine High School library (1986) because the book contains first person accounts of teenagers' sexual experiences.[39/]

In Virginia, itself, The Diary of Anne Frank was challenged in Wise County in 1982 by parents who complained about sexually offensive passages,[40/] and Philip Roth's, Goodbye Columbus and Harold Robbins' The Lonely Lady were challenged in Abingdon as "pornographic."[41/] Repeatedly such other well-known authors as Stephen King and J. D. Salinger also have had their books banned from school libraries as "obscene" and pornographic.[42/]

Unless this Court adopts the Commonwealth's unique reading of "harmful to juveniles" as synonymous with "obscene," it is clear that under the traditional definition works such as those admitted as exhibits here could well be found by a Virginia jury to be "harmful" to at least younger Virginia children.

There is another possible response. This Court could well determine that any criminal statute susceptible to such

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39/ American Library Association, Newsletter on Intellectual Freedom 135-36 (1986).

40/ American Library Association, Banned Books Week '87: Celebrating The Freedom To Read 14 (1987).

41/ American Library Association, Newsletter on Intellectual Freedom 5 (1981).

42/ American Library Association, Banned Books Week '87: Celebrating The Freedom To Read 18, 25 (1987).

varying definitions as the traditional definition and the present Commonwealth definition is too ambiguous and vague to stand.

Simply put, the statute is aimed at the protection of all juveniles, not merely those who are almost adults. It is to be applied according to contemporary community standards in specific Virginia localities. It is clear that a reasonable jury in some Virginia localities may find at least some of the books at issue "harmful" to some juveniles, and especially to younger children. To ignore this potential - as the Commonwealth asks this Court to do - is to make the statute devoid of a practical application. Clearly, the General Assembly did not intend to enact a superfluous and meaningless law. Rather, the General Assembly, in its vigour to protect the children of Virginia, enacted a provision which is incapable of a construction narrowed to its specific purpose. Either, as the Commonwealth now contends, the statute is meaningless as a whole, or the display amendment is so broad as to encompass any book that a reasonable Virginia jury, applying contemporary community standards, could find "harmful" to the

POINT II

MANNER OF COMPLIANCE

The Commonwealth's interpretations in this Court of what is required for a bookseller to comply with the statute means that a bookseller need do nothing, other than adopt a benign policy, to prohibit juvenile perusal of "harmful" material. The Commonwealth suggests three different ways to comply with the statute:

(a) The "Traditional" Approach - "the general framework utilized previously by both sides" (Comm. Br. p. 23) - which may best be described as taking the General Assembly to have meant precisely what it said.

(b) The "Pandering" Approach - following the approach of Pennsylvania Superior Court in American Booksellers Ass'n v. Rendell, 481 A.2d 919 (Pa. Super. 1984), which, without support from the language of the statute, judicially added "ostentatious" to modify the word "display."

(c) The "Permissive" Approach - defining the statute not to bar any manner of display but only actual browsing.

Firstly, if the Commonwealth's recent interpretation of "harmful" to juveniles as indistinguishable from "obscene" is to be accepted, it makes no difference which manner of compliance definition is adopted. Under Va. Code § 18.2-374(3)

it is a crime to exhibit any obscene item, irrespective of whether a minor is or could be present.

The Commonwealth concludes that the statute is complied with by a plaintiff bookseller who has a policy of not permitting juveniles to examine and peruse materials covered by the statute and who prohibits such browsing when it is observed, but otherwise takes no action regarding the display of restricted materials, whether the store's policy is announced or otherwise manifested to the public, or not announced at all (Comm. Br. p. 31).[43/] Curiously enough, the Attorney General adopts this view as "mandated by Virginia law" even though she recognizes that permitting an unannounced policy renders "the provision meaningless." (Comm. Br. p. 27.) Thus, the Attorney General has apparently vigorously litigated in the U.S. District Court, Court of Appeals, and the U.S. Supreme Court to uphold a duplicative statute whose compliance requirements are meaningless.

43/ Under the Commonwealth's "pandering" approach, violation of the statute results if the bookseller displays "harmful" material in an ostentatious manner so that juveniles are aware of the presence of the material in the store. Certain of the Commonwealth's suggested means of compliance would in fact create such pandering. If a bookseller tags, color codes, or wraps the material, or places it on adults only shelves or behind blinder racks, the bookseller will have taken the requisite action "to emphasize or advertise to juveniles the presence of the pornographic material in his store." (Comm. Br. p. 29).

A more likely possibility is that the General Assembly meant what it said. The bookseller is liable for displaying material that a juvenile may peruse. A bookseller cannot be saved from liability under the plain language of the statute either by creating a policy of prohibiting juvenile perusal of books harmful to them only when observing such examination, nor by manifesting its policy to the public. Merely adopting a policy supporting the statute without taking action to implement it, and manifesting this policy to the public, does not fulfill the bookstore's obligation under the statute to remove from display the material that can be deemed "harmful to juveniles." It is not a necessity that a juvenile be browsing through a book to create criminal culpability. It is merely the fact that the book is displayed, and displayed in any manner that a minor may gain access to it, that, by the terms of the statute, subjects the bookseller to criminal prosecution.

The scienter element in no way protects the bookseller. It does not relieve the bookseller of the obligation to review all of the books in its inventory, or which it may want to add to its inventory, in order to judge whether the books are potentially "harmful to juveniles."[44/]

44/ The scienter element provides meaningful protection to the bookseller only as applied to the sale of books. In the sales circumstance, the bookseller may make an honest mistake about the age of a juvenile and the suitability of a book for that minor. In the display context, the bookseller is not faced with a specific minor whose age and

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The statute does not require the bookseller to make an on-the-spot decision regarding a book's content in a specific factual setting. Rather, it requires a preliminary guess at who might be looking through the books on its display, and the general suitability of a book for any potential browser. For a bookseller to commit the crime enunciated in the statute he merely needs to have knowingly placed a book on display. Yet the inventory of a bookstore changes on a constant, almost daily basis. In light of the approximately 35,000 new titles published each year (Jt. App. 22), and the 12,000-13,000 books carried in a modest bookstore such as plaintiff Ampersand Books (Jt. App. 57), this is an impossible burden.[45/]

The Commonwealth nevertheless argues that the words "may" and "examine and peruse" in the statute must be read narrowly. Specifically, the Commonwealth suggests that the word "may" requires only a reasonable certainty that a book will fall within the statute, and that "examine and peruse" requires a particularly close examination -- in effect a thorough reading of the book.

44/ (Footnote continued from previous page)

maturity can be considered, and thus cannot, under the words of the statute, make "a reasonable bona fide attempt to ascertain the true age of such juvenile." Va. Code § 18.2-390(7).

45/ Larger bookstores and bookstore chains, moreover, generally order material centrally for their various outlets. It would be inconceivable for these chains to carry the burden of reviewing every book for its suitability to each and every Virginia community.

Virginia case law makes clear, however, that the word "may" is primarily a permissive one, rather than a mandatory one. See Ross v. Craw, 231 Va. 206, 343 S.E.2d 312 (1986); Price v. Commonwealth, 209 Va. 383, 387, 164 S.E.2d 676, 679 (1968); Spindel v. Jamison, 199 Va. 954, 103 S.E.2d 205 (1958); Masters v. Hart, 189 Va. 969, 55 S.E.2d 205 (1949). Applying this principle, the General Assembly must have intended that the display of material by a bookseller in any way that would permit a juvenile to browse through it violates the display provision.

The Commonwealth's reading of these words does not conform with common experience. A bookseller must attempt to comply with the statute in light of the practical realities of its business. The Commonwealth's reading of the statute's requirements ignores the fact that customers in bookstores, adults as well as minors, generally scan a book, with the thorough reading of the material yet to come. Given the weighty concerns of the display statute, it would be artificial to apply it only when it was reasonably certain that juveniles could study "harmful" materials at length, and not to the more common situation where it could be foreseen that juveniles might pick up the materials and quickly (and probably furtively) scan them. A bookstore need not become a reading room in order to "display" materials in a way that juveniles "may examine and peruse" them.

For these reasons, the statute should not be artificially rebuilt with an interpretation which was not intended and cannot conceivably be implemented, for this result clearly alters the clear mandate of the law that books falling within the statute's scope be removed from display. The statute should be read according to its express purpose and requirement that any representation or description contained within any book that may be found "harmful" to any juvenile be removed from any display to which a juvenile may gain access.

CONCLUSION

For the above reasons, this Court's answer to the first question from the U.S. Supreme Court should be that, properly construed, the phrase "harmful to juveniles," encompasses various of the books which were introduced as plaintiffs' exhibits below. If the statute is to be given any import, it must be construed as protecting all minors within the protected class of juveniles, not merely those on the edge of adulthood. As evidenced by the many challenges and restrictions to which some of these books have been subject, a reasonable jury in some Virginia localities, applying contemporary community standards, could find them patently offensive and appealing to the prurient interest of, but lacking in serious literary, artistic, political or scientific value for, the least mature and youngest potential browser.

As this Court has repeatedly recognized, a statute must be construed in accordance with its legislative intent as shown through the statute's plain meaning. This Court's answer to the second certified question, therefore, should give effect to the plain meaning of the statute that "harmful to juveniles" material must be removed from any display to which a juvenile may gain access.

There is, of course, another alternative. This Court has been deluged by a multitude of meanings and interpretations proposed by the Commonwealth. As evidenced by this multiplicity of meanings, this Court can, as to both questions, find that the statute is too vague to permit this Court to respond to the questions.

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