IN THE
SUPREME COURT OF ARKANSAS

SHIPLEY, INC., d/b/a THAT BOOKSTORE IN BLYTHEVILLE; ARKANSAS LIBRARY ASSOCIATION; AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, INC.; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; COMIC BOOK LEGAL DEFENSE FUND; FREEDOM TO READ FOUNDATION, INC.; INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC.; AMERICAN CIVIL LIBERTIES UNION OF ARKANSAS, INC.

PETITIONERS

V. **NO. 04-136**

FLETCHER LONG, JR., DISTRICT ONE PROSECUTING ATTORNEY, *ET AL. (*NAMELY ALL THE OTHER PROSECUTING ATTORNEYS IN THE STATE OF ARKANSAS)

RESPONDENTS

CERTIFIED QUESTIONS FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ARKANSAS

THE HONORABLE G. THOMAS EISELE, DISTRICT JUDGE

PETITIONERS' BRIEF AND ADDENDUM

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QUESTION 1

Is the statute (§ 5-68-501, et seq.) intended to protect *all* minors, i.e., all persons seventeen years of age and younger, from exposure to "materials harmful to minors?" If the answer is "yes," may the statute nevertheless be interpreted under Arkansas law to protect only those who are the older, more mature minors from exposure to such materials, if that interpretation is the only way to protect the statute from a successful attack under the United States Constitution?

QUESTION 2

The statute (§ 5-68-502) makes it unlawful to "display material which is harmful to minors in such a way that minors, as part of the invited general public, will be exposed to view such material." Are books and magazines that have contents containing materials harmful to minors but which have no such materials on their binders or covers being "displayed" under the statute if they are simply shelved in bookcases or on book shelves without any additional action or effort to single them out or to draw the attention of the "invited general public" thereto?

QUESTION 3

Does a bookseller or librarian "allow to view … to a minor … any material which is harmful to minors," § 5-68-502(2)(A), by simply shelving and displaying such material, or must he or she affirmatively give permission (i.e. "allow") the

minor to view such material before he or she breaches the “allow to view” provision?

QUESTION 4

The “Safe Harbor” provision contained in § 5-68-502(1)(B) requires that the material be “segregated in a manner that physically prohibits access to the material by minors.” What must booksellers and librarians do to avail themselves of this provision?

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STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND

The Plaintiffs seek "preliminarily and permanently to enjoin enforcement of and to declare facially unconstitutional and void, portions of Ark. Code Ann. § 5-68-502, all as amended by Act 858 of 2003 of the Arkansas General Assembly," on the ground that the offending sections are unconstitutional under the United States Constitution. Act 858 was signed by the Governor on March 28, 2003, and was scheduled to take effect on June 26, 2003. The parties agreed that the Defendants will not seek to enforce the provisions thereof until this case is resolved.

The "Offending Sections" cited by Plaintiffs are set forth in Exhibit A to the Amended Complaint and reference various provisions of Act 858 of 2003, codified at Ark. Code Ann. § 5-68-502 (Supp. 2003), which reads:

> AN ACT TO REQUIRE MATERIAL HARMFUL TO MINORS TO BE OBSTRUCTED FROM VIEW AND SEGREGATED IN COMMERCIAL ESTABLISHMENTS AND FOR OTHER PURPOSES: AN ACT TO REQUIRE MATERIAL HARMFUL TO MINORS TO BE OBSTRUCTED FROM VIEW AND SEGREGATED IN COMMERCIAL ESTABLISHMENTS.
>
> It shall be unlawful for any person, including, but not limited to, any persons having custody, control, or supervision of any commercial establishment, to knowingly:
>
> (1)(A) Display material which is harmful to minors in such a way that minors, as part of the invited general public, will be exposed to view such material.
>
> (B) Provided, however, a person shall be deemed not to have displayed material harmful to minors if the lower two-thirds (2/3) of the material is not exposed to view and

> segregated in a manner that physically prohibits access to the material by minors; or
>
> (2)(A) Sell, furnish, present, distribute, allow to view, or otherwise disseminate to a minor, with or without consideration, any material which is harmful to minors.
>
> (B) Provided, this prohibition shall not apply to:
>
> (i) Any dissemination by a parent, guardian, or relative within third degree of consanguinity of the minor; or
>
> (ii) Any dissemination with the consent of a parent or guardian of the minor;

(Exhibit A to Amended Complaint).

Plaintiffs contend that the "Offending Sections" pertaining to the display and dissemination of non-obscene materials (which are intended to further the State's interest in protecting its youth) are not narrowly drawn to further that purpose and are unconstitutional in that: "(a) they impose an unconstitutional prior restraint on the availability, display, distribution, receipt and perusal of constitutionally protected, non-obscene materials to both adults and older minors; (b) they are unconstitutionally over broad; and (c) they are unconstitutionally vague." (Amended Complaint at ¶ 15).

Specifically**,** Count 1 of the Amended Complaint addresses "restrictions on adult access to constitutionally protected materials," and alleges, *inter alia*:

> It is not possible, under the Offending Sections, to restrict the display of materials covered by the Offending Sections to juveniles without also restricting such access by adults. Ark. Code §5-68-502(1)(B) provides a "safe harbor" from the prohibition on display to minors of material harmful to minors as part of the invited general public which is limited to segregating such material so that access by minors is physically prohibited. This effectively requires booksellers, other retailers and librarians to remove from their shelves

> and place in a segregated "adults only" section substantial amounts of constitutionally protected matter, and thereby restricts the voluntary viewing by, access to and sale of such material to adults. In addition, such adults-only sections carry opprobrium and discourage persons from entering therein. The same is true as to the prohibition of allowing viewing in Ark. Code § 5-68-502(2) (an anti-browsing provision). These restrictions have a chilling effect upon the exercise of rights guaranteed by the First and Fourteenth Amendments of the Constitution and Article II, Section 6, of the Arkansas Constitution in that they inhibit and discourage the possession, sale and distribution of materials, the possession, sale and distribution of which are and ought to be protected under both the U.S. Constitution and the Arkansas Constitution.

(Amended Complaint at ¶ 21).

Count 2 of the Amended Complaint addresses "restrictions on minors' access to constitutionally protected materials," and alleges, *inter alia*:

> The Offending Sections are unconstitutional because they prohibit retail establishments and libraries from displaying any material with sexual content that contains visual or written representations of material "harmful to minors" and from allowing all minors to view such material, despite the fact that such material may be "harmful" only to younger minors, based on their ages or sexual maturity.
>
> The Offending Sections severely inhibit and effectively preclude access by older, more mature, minors to material constitutionally protected as to them. Thus the Offending Sections violate Plaintiffs' right of free expression under the first and Fourteenth Amendments to the U.S. Constitution and Article II, Section 6, of the Arkansas Constitution."

(Amended Complaint at ¶¶ 23-24).

Count 3 of the Amended Complaint addresses "restrictions of speech (prior restraint)" and alleges, *inter alia*:

> The Offending Sections require the removal of constitutionally protected materials from readily viewed and

> accessible areas and proscribes having these materials accessible to minors. The Offending Sections force establishments that trade in material covered by the Offending Sections and to which minors are lawfully admitted either: (a) to exclude minors from their establishment; (b) to place such material out of sight underneath the counter; or (c) to place such material, with the lower two-thirds not exposed to view, in an adults-only restricted area which minors are physically restricted from accessing.

(Amended Complaint at ¶ 25).

In Count 3, Plaintiffs also contend that the Offending Sections will result in the removal from circulation and accessibility of large quantities of materials constitutionally protected as to adults and as to minors; will entail substantial monitoring costs to booksellers; and, "in light of the difficulty of determining what material is harmful to minors," will chill Plaintiffs' First Amendment rights because they will restrict access to any material that could potentially be implicated by the statute. In addition**,** Count 3 alleges that the Offending Sections "impose unreasonable obligations on merchants selling printed materials, encourages such merchants to exclude from their establishments all persons under the age of 18 and restricts the rights of the Plaintiffs to make available" to persons the right "to view, browse through and purchase materials that are constitutionally protected as to minors, or as to adults."

Count 4 of the Amended Complaint addresses "due process (vagueness)" and alleges that the Offending Sections are too vague to meet constitutional muster "because they fail to provide fair notice as to what constitutes a criminal offense under the Offending Sections, in violation of the Fifth Amendment to the

U.S. Constitution." (Amended Complaint at ¶ 30). Paragraph 31 of the Amended Complaint alleges:

> The Offending Sections contain language purporting to describe prohibited acts which is vague and indefinite and subject to different meanings such that it fails to provide adequate notice of an offense including the following:
>
> (d) it is not clear whether "exposed to view such material" in Ark. Code § 5-68-502(1)(A) requires that the covers or binding of the items contain harmful-to-minors material, or whether the "material" referred to includes books, periodicals, etc., the contents of which are harmful to minors;
>
> (e) the meaning of "allow" in Ark. Code § 5-68-502(2)(A);
>
> (f) the meaning of "physically prohibits access" in Ark. Code § 5-68-502(2)(B).

The Plaintiffs contend that they have no adequate remedy at law and that they will suffer immediate and irreparable loss if not granted the requested injunctive and declaratory relief. The Plaintiffs initially sought a temporary restraining order and a preliminary injunction. The parties filed a stipulation on July 11, 2003 in which the Defendants agreed not to enforce the provisions of Ark. Code Ann. § 5-68-502(l)(b) that were added by Arkansas Act 858 of 2003 pending a final ruling on the merits of Plaintiffs' claims. At the time of this certification the U.S. District Court granted a preliminary injunction ordering defendants, "in addition to refraining from enforcing the provisions added by Act 858 of 2003, shall also refrain from enforcing the 'allow to view' provisions of § 5-68-502(2), pending further orders" of the U.S. District Court.

The Defendants filed an answer on July 23, 2003, essentially denying all of Plaintiffs' constitutional challenges.

On July 25, 2003, the Plaintiffs filed a Motion for Summary Judgment. Submitted in support of the motion were the declarations of Mary Gay Shipley, Owner and Proprietor of Shipley, Inc., d/b/a/ That Bookstore in Blytheville (Add 53); Dwain Gordon, President of Arkansas Library Association (Add 79); Christopher Finan, President of American Booksellers Foundation for Free Expression (Add 59); Judith Krug, Executive Director of the Freedom to Read Foundation of the American Library Association (Add 62); Charles Brownstein, Executive Director of Comic Book Legal Defense Fund (Add 66); Charles E. Wetzel, Vice President, Strategic Planning and Wholesaler Relations, Curtis Circulation Company, a member of the plaintiff International Periodical Distributors Association, Inc. (Add 69); Rita Sklar, Executive Director of the American Civil Liberties Union of Arkansas (Add 72); and Dan Crow, Vice-President -Finance and Chief Financial Officer of Hastings Entertainment, Inc. (Add 76).

The Plaintiffs' motion alleges that under the undisputed facts, the Plaintiffs are entitled to judgment as a matter of law that the "Offending Sections" of Ark. Code Ann. § 5-68-502 violate both the First and Fifth Amendments to the Constitution of the United States. On September 8, 2003, the Defendants filed their response opposing the Plaintiffs' Motion for Summary Judgment and including their own Cross-Motion for Summary Judgment in which they contend

that the Defendants are entitled to judgment as a matter of law upon the Plaintiffs' facial constitutional challenges to Arkansas Act 858 of 2003.

II. LEGISLATIVE BACKGROUND

A close review of the background of the legislation which is being challenged in this action is important to fully understand the issues**.** In 1969, the Arkansas General Assembly passed Act 133 criminalizing the sale to minors of material that, while not obscene for adults, is obscene as to minors (Add 40). The provisions of Act 133 of 1969 were very similar to the provisions of a New York statute upheld by the U.S. Supreme Court in the case of Ginsberg v. New York, 390 U.S. 629 (1968). In 1999, the General Assembly passed Act 1263 which amended Act 133 of 1969 (Add 42). The 1999 amendment, *inter alia*, changed the definition of "material that is harmful to minors" to reflect changes in the U.S. Supreme Court's definition of obscenity. See Miller v. California, 413 U.S. 15 (1973). The 1999 amendment, codified at Ark. Code Ann. § 5-68-501, states:

> (2) "Harmful to minors" means that quality of any description, exhibition, presentation, or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when the material or performance, taken as a whole, has the following characteristics:
>
> (A) The average person eighteen (18) years of age or older applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest in sex to minors;
>
> (B) The average person eighteen (18) years of age or older applying contemporary community standards

> would find that the material or performance depicts or describes nudity, sexual conduct, sexual excitement, or sadomasochistic abuse in a manner that is patently offensive to prevailing standards in the adult community with respect to what is suitable for minors; and
>
> (C) The material or performance lacks serious literary, scientific, medical, artistic, or political value for minors[.]

The quoted definition remains the same today.

Act 1263 of 1999 prohibited the display of material that met the above definition of "harmful to minors" in such a way "that minors, as part of the invited general public will be exposed to view such material." However, a "safe harbor" provision was attached that stated that "a person shall be deemed not to have displayed material harmful to minors" if the material is kept behind devices commonly known as "blinder racks" so that the lower two-thirds of the material is not exposed to view. It is this latter portion of the statutory scheme which was amended by Arkansas Act 858 of 2003. (Add 45.) Act 858 struck the portions of the exception referring to "blinder racks" while leaving undisturbed the requirement that the lower two-thirds of the material not be exposed to view. More importantly for our purposes, Act 858 added language requiring that the material harmful to minors also be "segregated in a manner that physically prohibits access to the material by minors." Otherwise, Act 858 of 2003 left the statutory scheme, as amended in 1999, intact.

III. ACTIONS OF THE U.S. DISTRICT COURT

After written briefing and oral argument on the cross-motions for summary judgment, the U.S. District Court issued a Memorandum Opinion and

Certification Order dated February 4, 2004. (Add 1.) Among other issues, the District Court expressed particular concern as to constitutional issues raised by a variable obscenity statute, such as at issue here in the context of access and display regulation:

> [M]aterial which would be harmful to a mature 17 year old "minor" would obviously also be deemed harmful to all minors under the age of 17. But material that is not harmful to a mature 17 year old might well be harmful to those minors under, say, 13 years of age.
>
> The courts have been concerned with the confusion and difficulty which a "variable obscenity" statute would entail if bookstores and libraries had to make the differential obscenity determinations for each of the "minor" age subgroups within the overall 17 years of age and younger population. Some of those courts, such as Virginia Supreme Court, have solved this problem by adopting a narrowing unitary definition of "minors," the effect of which is to prohibit only those materials which are harmful to the older mature minors. This narrowing interpretation tends to solve the problem confronting bookstores and libraries with the difficult problems of making differentiated obscenity interpretations for the various age groups within the overall "minor" classification. And this narrowing interpretation protects the rights of minors to access and view materials not obscene as to them. But, again, does not such a narrowing interpretation distort the obvious objectives of the statute beyond recognition? If only materials that are harmful to the older mature "minors" are proscribed, does this not mean that all those materials which are harmful only to younger minors, say 15 years of age or under, are *not* proscribed and therefore may be displayed? If so, the statute only protects a very small segment of the overall "minor" population, and, ironically, that is the older, more mature segment. Is it possible to believe that the legislature would have enacted this law if it knew that the courts, to save it from certain constitutional attacks, would so limit its application?

At Add 33-34.

Thus, the District Court certified to this Court questions as to that issue and other issues which may be determinative of the constitutional issues raised by Plaintiffs.

ARGUMENT

I

THE CHALLENGED STATUTE, AS WELL AS THE OTHER ARKANSAS STATUTES REGULATING "MATERIALS HARMFUL TO MINORS," ARE INTENDED TO PROTECT ALL MINORS — YOUNGER AND OLDER. THE DECISION WHETHER TO LIMIT THIS PROTECTION ONLY TO SEVENTEEN YEAR OLD MINORS TO TRY TO SAVE THE DISPLAY/ACCESS STATUTE FROM CONSTITUTIONAL INFIRMITY IS LEGISLATIVE AND INAPPROPRIATE FOR THIS COURT.

The decision whether to save the display/access statute from its plain constitutional infirmity by severely limiting its protection to only a very small segment of the overall population of minors — and ironically, the older, more mature segment — is a legislative, not judicial one. The issue of the narrowing of the meaning of "harmful to minors" has significant impact far beyond the browsing limitations challenged in this case. It is a policy decision most appropriate for the legislature and inappropriate for this Court.

As this Court has said:

> It is not the function of this court to legislate; to do so would be a clear violation of this court's authority.

Hatcher v. Hatcher, 265 Ark. 681, 687, 580 S.W.2d 475, 477 (1979). If a statute is unlawful or unconstitutional, this Court cannot

> re-write . . . [it] so that it becomes acceptable. Such an order amounts to a judicial intrusion upon the legislative prerogative and violates the constitutional doctrine of separation of powers. Wenderoth v. City of Fort Smith, 251 Ark. 342, 472 S.W.2d 74 (1971); City of Batesville v. Grace, 259 Ark. 493, 534 S.W.2d 224 (1976).

Cox v. Commissioners of Maynard Fire Improvement Dist. No. 1, 287 Ark. 173, 176, 697 S.W.2d 104, 106 (1985).

The concept of variable obscenity — first articulated in Ginsberg v. New York, 390 U.S. 629 (1968) and what has become the general understanding by legislators, judges and laymen — is that it protects children of all ages as to what is inappropriate to them. It was not seen as a way of protecting younger children only from borderline obscenity inappropriate for mature seventeen year olds. Neither is it intended only to protect the more mature segment of the "minor" population. Until Virginia v. American Booksellers Ass'n, 484 U.S. 383 (1988), the traditional meaning of "harmful to minors" considered the appropriateness of the material in the context of the age and maturity of the specific minor to whom the material was sold. For example, the Illinois Pattern Jury Instructions read:

> 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.

Ill. Supreme Court Committee on Pattern Jury Instructions, Ill. Pattern Jury Instructions § 9.58 (1981).

However, when states began passing laws regulating the ability of minors to browse, constitutional problems arose. The Ginsberg case involved sales to minors; it did not involve a restriction on the display of or access to sexually frank or explicit materials. There is an important and dispositive difference between a

"sale" prohibition, like that at issue in Ginsberg, and minors' access prohibitions, like those at issue here. While a display or access proscription substantially impedes adult access to constitutionally protected material by prohibiting the mere placement of such materials on the shelves, a statute banning the sale of "harmful" material to minors does not impair the ability of booksellers to stock and make available such materials to the general public. It therefore, in no way diminishes an adult's right of access to the material.

In response to certified questions from the U.S. Supreme Court in Virginia v. American Booksellers, the Virginia Supreme Court adopted the Virginia Attorney General's narrow interpretation of the phrase "harmful to juveniles," in fact rendering the statute virtually meaningless to avoid its constitutional defects. See Virginia v. American Booksellers Ass'n, 372 S.E.2d 618 (Va. Sup. Ct. 1988). The Virginia Supreme Court construed the statute to mean that "if a work is found to have serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents, then it cannot be said to lack such value for the entire class of juveniles." 372 S.E. 2d at 624. Based on such narrowing, as well as a narrowing of compliance requirements, the Fourth Circuit reversed its prior holding and, on remand from the U.S. Supreme Court, upheld the Virginia minors access statute. See American Booksellers Ass'n v. Virginia, 882 F.2d 125 (4th Cir. 1989), cert. denied, 494 U.S. 1056 (1990).

Thereafter, a number of other states, acting through their attorneys general, have proffered similar limitations in response to constitutional

challenges. It is now apparently clear that a minors access/display restriction is not constitutional without such limitations.

Under the Arkansas statutory scheme, a single definition of "harmful to minors" in § 5-68-501(2) applies to sales, gifts and loans, in addition to the access and display provision challenged in the federal court. There is no evidence to suggest that the Arkansas legislature intended to eliminate the protection of children under the age of seventeen from "harmful" materials inappropriate for them when it passed Act 858. Nor is there any evidence that the restriction on in-store browsing (limited to materials harmful to seventeen year olds) was so important to the Arkansas legislature that it was willing to forgo restrictions on sales to younger teenage boys and girls of material "harmful" as to them.

Therefore, this Court should answer the first part of the first question in the affirmative, since the statute is intended to protect all minors from exposure to "materials harmful to minors." The Court should answer the second part of the question in the negative, since it is not appropriate under Arkansas law for this Court to interpret the statute to protect only the older, more mature minors, even if that interpretation is the only way to protect the statute from a successful attack under the U.S. Constitution.

II

THE “SAFE HARBOR” SEGREGATION PROVISION MAKES NO SENSE UNLESS THE DISPLAY PROVISION RELATES TO MATERIAL WITH UNOBJECTIONABLE COVERS OR BINDERS, THE CONTENTS OF WHICH ARE "HARMFUL TO MINORS"

Prior to the most recent amendment, it appeared to be clear that the § 5-68-502(1) display provision was directed to the display of harmful to minors material on covers, visible to minors passing by. Such was the harm that was remedied by the former safe harbor requiring that the lower 2/3 of the material be blocked from view. (This is a not uncommon provision in state statutes, accommodating “blinder racks” in which periodicals with sexually explicit/harmful to minors covers can be displayed. In fact, these are the very types of statutes that Defendants rely on to try to save §5-68-502(1) from its obvious constitutional infirmity. See, e.g., Upper Midwest Booksellers Ass'n v. Minnesota, 780 F. 2d 1389 (8th Cir. 1986).)

However, requiring blinder racks and physical segregation only can mean that the display restriction also includes within its scope, material — the covers of which contain no “harmful to minors” material — while the contents may be "harmful to minors." Even the heading of Act 838 refers to “OBSTRUCTED FROM VIEW AND SEGREGATED,” indicating that more than visual obstruction is intended. Otherwise blindering would be sufficient. This converts an intrusive display provision to an access restriction. In fact, neither party — nor the U.S. District Court — has found any statute that has been upheld which requires the

physical segregation of harmful to minors materials — and certainly not a statute with a safe harbor provision requiring both a display provision (the "lower two-thirds" requirement) and an "access" provision (the physical segregation requirement).

By adding an access restriction, the legislature radically expanded the breadth of the display provision contained in §5-68-502(1) and its impact on mainstream business such as plaintiffs. Mainstream bookstores and other disseminators of books and periodicals do not stock materials whose covers include "harmful to minors" material. On the other hand, as evidenced by the declarations filed, including those by the proprietor of That Bookstore in Blytheville, the president of the Arkansas Library Association, the president of the American Booksellers Foundation for Free Expression, the Vice President, Finance and CFO of Hastings Entertainment, Inc., and the Executive Director of the Comic Book Legal Defense Fund, many such establishments carry important and popular works, the content of which could be considered “harmful to minors.” In this regard, it is important to note that "material" for the purpose of § 5-68-502 is not limited to visual depictions. It is defined to include books, magazines, newspapers, pamphlets descriptions, films, videotapes and recordings. See § 5-68-501(6).

With respect to the last portion of question 2, plaintiffs suggest that it is an inappropriate reading of § 5-68-502(1) to limit its application to the display of material whose contents are "harmful to minors" only when there has been "action or effort to single them out or draw the attention of the 'invited general

public.'". If in order to have the segregation Safe Harbor make sense, the provision must relate to offending content as well as offending covers. Therefore, the restriction must logically apply to any shelving of the item — be it a book, periodical, comic book or whatever — if the item itself is exposed to view, even if the "harmful to minors" matter is not. The statute does not reveal any distinctions based on the nature of display. The State's suggestion that displays which "single out" the item may constitute unlawful displays raises both First and Fifth Amendment issues.

Most obvious are issues of vagueness. What constitutes "singling out?" On a lower shelf, rather than a higher? Face-out rather than spine out on a shelf? Display in a shop window or on a table with twenty other new works? The vagueness inherent in such an interpretation poses insurmountable problems for retailers of First Amendment-protected materials such as Plaintiffs. When First Amendment rights are at issue, the U.S. Supreme Court has refused to tolerate such vagueness:

> The objectionable quality of vagueness and overbreadth . . . [depends] upon the danger of tolerating, in the area of First Amendment freedoms, the 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. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

NAACP v. Button, 371 U.S. 415, 432-33 (1963) (citation omitted).

These examples also highlight some of the First Amendment issues. What permits the state to restrict a window display of a new frankly sexual First Amendment protected novel with a non-pictorial cover?

Thus, plaintiffs submit that Question 2 should be answered in the affirmative, because § 5-68-502 applies to material with unobjectionable covers or blinders, the contents of which are "harmful to minors." Thus, such materials are "displayed" if they are simply shelved in bookcases or book shelves accessible to minors.

III

THE PLAIN MEANING OF "ALLOW TO VIEW" IS PASSIVE; IT INCLUDES THE FAILURE TO PREVENT. THEREFORE, NOT PREVENTING MINORS FROM BROWSING SHELVED BOOKS IS CRIMINALIZED BY § 5-68-502(2)(A)

Section § 5-68-502(2)(A) prohibits persons from "allow[ing] to view ... to a minor" harmful to minors material. The plain meaning of this somewhat ungrammatical provision is that a retailer or librarian must prevent minors from access to, and browsing of, harmful to minors material.

This Court has said that it

> will construe a statute just as it reads, giving the words their ordinary and usually accepted meaning in common language.

Neeve v. City of Caddo Valley, 351 Ark. 235, 238, 91 S.W.3rd 71, 74 (2002). See also Director v. Greenwich Collieries, 512 U.S. 267, 272 (1994); Terral v. Terral, 212 Ark. 221, 205 S.W.2d 198 (1947), both cited by Defendants in the U.S. District Court for the proposition that "[a] statute is to be construed just as it

reads, giving the words their ordinary and usually accepted meaning." (Defendants' Brief in Opposition at 23.)

Certified question 3 raises the issue whether, as argued by the State below, "allow" means taking "affirmative steps [to] let a minor view harmful material" or deciding "to turn a blind eye knowing that a minor is viewing" such material. (Id.) But that is not the plain meaning of "allow." Webster's II New College Dictionary (1999) defines "allow" as "to let do or happen." Such a definition clearly requires an affirmative answer to question 3. The State's own quotation below from Webster's Unabridged — "to permit something to happen" — is of similar import.

So to is common parlance. When a parent is scolded for "allowing" his or her child to watch too much television, it does not necessarily mean that the child first asked permission. Rather it means that the parent failed to prevent the viewing.

Applying that approach, Question 3 should be answered affirmatively, that a bookseller or librarian violates § 5-68-502(2)(A) and "allows" a minor to view "harmful to minors" material by shelving and displaying such material where they may be accessed by minors.

IV

THE AMENDMENT REQUIRES BOOKSTORES AND LIBRARIANS, IF THEY ADMIT MINORS TO THEIR PREMISES, TO PLACE THE MATERIALS IN A SEPARATE ROOM OR CLOSED SECTION, EITHER WITH ENTRY LIMITED TO ADULTS EITHER THROUGH TECHNOLOGY OR HUMAN CONTROL

Section § 5-68-502(1)(B) requires that the material be segregated "in a manner that physically prohibits access to the material by minors." The use of the verb "prohibits" is absolute and in addition, the prohibition must be "physical." Telling a minor that a certain area is out-of-bounds is not enough; there must be a physical barrier. Construing the "statute just as it reads, giving the words their ordinary and usually accepted meaning in common language" as required by Neeve v. City of Caddo Valley, supra, this mandates a separate room or physically separated area, with one or more secure entryways, with entry limited to adults by either technology or human control.

The requirement of a physically separated area unreasonably and substantially restricts adult access to materials protected under the First Amendment — an impermissible and unconstitutional result of the statute. As the U. S. District Court in Virginia held in the American Booksellers case after declaring unconstitutional a similar statute at issue here:

> In 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. [citing Butler v. Michigan, 352 U.S. 380 (1957)]

* * * *

> 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 of the law is to severely limit the ability of adults to examine these protected materials. This, in turn, severely limits sales to adults, since the evidence establishes that adults generally become acquainted with these materials, and desire to purchase them, only if they are readily visible.

American Booksellers, 617 F. Supp. 699, 706 (E.D. Va. 1985), rev'd on other grounds 882 F.2d 125 (4th Cir. 1989).

Therefore, Question 4 should be answered by stating that booksellers and librarians must create a separate room or physically segregated area, with one or more entryways, with entry limited to adults either through technology or human control.

CONCLUSION

By reason of the foregoing, plaintiffs respectfully urge this Court to respond to the certified questions as follows:

Question 1 - Yes as to the first question and no as to the second.

Question 2 - Yes.

Question 3 - Yes, by simply shelving and display.

Question 4 - The Safe Harbor is complied with by creating a separate room or physically separated area, with one or more secure entryways, with entry limited to adults either through technology or human control.

Dated: March 18, 2004

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