IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

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., PLAINTIFFS

V. No. 4:03CV00481 GTE

FLETCHER LONG, JR., District One Prosecuting Attorney; BRENT DAVIS, District Two Prosecuting Attorney; HENRY BOYCE, District Three Prosecuting Attorney; TERRY JONES, District Four Prosecuting Attorney; DAVID GIBBONS, District Five Prosecuting Attorney; LARRY JEGLEY, District Six Prosecuting Attorney; ED EASLEY, District Seven Prosecuting Attorney; WM. RANDAL WRIGHT, District Eight-North Prosecuting Attorney; BRENT HALTOM, District Eight-South Prosecuting Attorney; HENRY MORGAN, District Nine-East Prosecuting Attorney; TOM COOPER, District Nine-West Prosecuting Attorney; ROBERT DITTRICH, District Eleven-East Prosecuting Attorney; STEVE DAIRYMPLE, District Eleven-West Prosecuting Attorney; STEVE TABOR, District Twelve Prosecuting Attorney; JAMIE PRATT, District Thirteen Prosecuting Attorney; RON KINCADE, District Fourteen Prosecuting Attorney; TOM TATUM, II, District Fifteen Prosecuting Attorney; DON MCSPADDEN, District Sixteen Prosecuting Attorney; CHRIS RAFF, District Seventeen Prosecuting Attorney; STEVEN D. OLIVER, District Eighteen-East Prosecuting Attorney; TIM WILLIAMSON, District Eighteen-West Prosecuting Attorney; TONY ROGERS, District Nineteen-East Prosecuting Attorney, BOB BALFE, District Nineteen-West Prosecuting Attorney; H.G. FOSTER, District Twenty Prosecuting Attorney; MARC MCCUNE, District

Twenty-One Prosecuting Attorney; ROBERT HERZFELF, District Twenty-Two Prosecuting Attorney; and LONA HORN MCCASTLAIN, District Twenty-Three Prosecuting Attorney, in their official capacities as PROSECUTING ATTORNEYS, **DEFENDANTS**

MEMORANDUM OPINION AND CERTIFICATION ORDER

The Complaint in this case was filed on June 10, 2003. The Plaintiffs are, or represent, authors, librarians, publishers, wholesalers, retailers and distributors of books, magazines, and comic books. Some Plaintiffs also represent members of the reading public, both adults and minors, in the State of Arkansas. The Defendants are all of the prosecuting attorneys in the State of Arkansas.

For the reasons stated below, the Court, pursuant to Rule 6-8 of the Rules of the Arkansas Supreme Court, moves the Arkansas Supreme Court to answer four (4) questions of law and for cause states that this case presents unresolved questions of Arkansas law which are likely to be outcome determinative of this pending federal cause of action.

I. PROCEDURAL BACKGROUND

The Plaintiffs seek "preliminarily and permanently to enjoin enforcement of and to declare facially unconstitutional and void, portions of Ark. Code § 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.[1] Act 858 was signed by the Governor on March 28, 2003, and was scheduled to take effect on June 26, 2003. The parties have agreed

[1] The Plaintiffs originally contended that the offending sections were also unconstitutional under the Arkansas Constitution. Later, however, they voluntarily withdrew that contention.

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. Supp. 5-68-502(1) (Michie Supp. 2003). Plaintiffs' Exhibit A reads in its entirety:

EXHIBIT A: THE OFFENDING SECTIONS

> Ark. Supp. 5-68-502(1) and (2). Unlawful Acts. As Amended, 3/28/2003.
>
> 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' Amended Complaint goes on to allege 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; (c) they are unconstitutionally vague." (Amended Complaint at ¶ 5).

Court 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, it is also alleged 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. Count 3 further 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 claim 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.[2]

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. Attached to the motion are the declarations of Dwain Gordon, President of Arkansas Library Association; Judith Krug, Executive Director of the Freedom to Read Foundation of the American Library Association; Mary Gay Shipley, Owner and Proprietor of Shipley, Inc., d/b/a/ That Bookstore in

---

[2]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(1)(b) that were added by Arkansas Act 858 of 2003 pending a final ruling on the merits of Plaintiffs' claims.

Blytheville; Christopher Finan, President of American Booksellers Foundation for Free Expression, Charles Brownstein, Executive Director of Comic Book Legal Defense Fund and Charles E. Wetzel, Vice President, Strategic Planning and Wholesaler Relations, Curtis Circulation Company, and a member of the plaintiff International Periodical Distributors Association, Inc., and Rita Sklar, Executive Director of the American Civil Liberties Union of Arkansas.

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

It is important to review the background of the legislation which is being challenged in this action. 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. A copy of Act 133 is attached hereto as Appendix A. 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. A copy of Act 1263 of 1999 is attached hereto as Appendix B. 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. § 5-58-501 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. A copy of Act 858 of 2003 is attached hereto as Appendix C. 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. Discussion

In 1968 the U.S. Supreme Court determined that the First Amendment does not prevent a state from regulating the sale of pornographic material which is harmful to children, even though such material is not obscene for adults. *Ginsberg v. New York*, 390 U.S. 629 (1968). It is now well established that materials found to be "obscene" for adults are not constitutionally protected speech. *See Miller v. California*, 413 U.S. 15 (1973). *Ginsberg* also established the doctrine of "variable obscenity" which permits the definition of obscenity to be constitutionally adjusted "to social reality by permitting the appeal of . . . [sexually explicit] material to be assessed in terms of the sexual interest . . . of . . . minors." *Ginsberg*, 390 U.S. at 638 (*quoting Mishkin v. New York*, 383 U.S. 502 (1966)); *See also New York v. Ferber*, 458 U.S. 747 (1982).

It appears obvious that Act 133 of 1969 was enacted by the Arkansas General Assembly in response to the *Ginsberg* decision. Act 133 criminalized the sale to minors of materials that, although not obscene for adults, are obscene as to minors. In 1999 the Arkansas General Assembly passed Act 1263 which, *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 vs. California*, 413 U.S. 15 (1973). That Amendment also prohibited the display of material that met the 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."

Although *Ginsberg* dealt with the sale or loan of such material, it is clear that the U.S. Supreme Court did not intend to limit the "variable obscenity doctrine" to sales alone. Indeed,

the U.S. Supreme Court described the New York statute in *Ginsberg* as one which denied minors access "to such materials as a means of regulating the availability of sexual materials to minors, and as a restraint on minors' exposure to such materials." 390 U.S. at 636-639. *See also Erznoznic vs. City of Jacksonville*, 422 U.S. 205, 212 (1975); *FCC vs. Pacifica Foundation,* 438 U.S. 726 (1978).

The situation in this case is similar to that dealt with by the federal courts and the Supreme Court of Virginia in what we will refer to herein as "*The Virginia Case.*". In that case the U.S. District Court for the Eastern District of Virginia overturned a Virginia statute that made it unlawful to knowingly display materials harmful to juveniles where juveniles could examine and peruse them. The Court of Appeals for the Fourth Circuit affirmed[3]. The U.S. District Court and the Fourth Circuit held that the statute violated the First Amendment by being unconstitutionally over broad on its face. The same challenge is being made to the Arkansas statute here. Before discussing the Virginia case, it is important to understand the limitations upon such a facial challenge.

"A 'facial' challenge means a claim that the law is 'invalid *in toto*' – therefore incapable of any valid application.'" *Village of Hoffman Estates vs. Flipside, Inc.*, 455 U.S. 489, 499 N. 5 (1982). The U.S. Supreme Court has pointed out that the facial over breadth doctrine is "manifestly strong medicine. It has been employed by the court sparingly and only as a last resort. Facial over breadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Broaderick vs. Oklahoma*, 415 U.S. 601, 613-614 (1973).

---

[3] Full citations to these decisions and to the other court decisions in the Virginia Case will be provided when that case is reviewed below.

The U.S. Supreme Court also observed that it has "'never found that a statute could be facially invalid merely because it is possible to conceive of a single impermissible application . . .'" *Ferber*, 458 U.S. at 772. A statute should never be stricken as facially over broad where a case-by-case analysis can obviate difficulties in construction. As stated in *Flipside*, "although it is possible that specific future applications . . . may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise." *Flipside*, 455 U.S. at 504. "Furthermore, where conduct plus speech is involved the overbreadth must be both 'real' and 'substantial' in relation to the statute's plainly legitimate sweep." *Ferber*, 458 U.S. at 770, quoting *Broaderick*, 413 U.S. at 615. If a legitimate limiting construction can be placed on any challenged provision, it is not facially over broad. *See Broaderick* 413 U.S. at 613.

A. Upper Midwest v. Minnesota and M.S. New v. Casado

Before dealing at length with the Virginia case referred to above which went through the Fourth Circuit and then to the U.S. Supreme Court, it is necessary to consider two cases which arose before the Virginia case and which were cited in the Fourth Circuit's opinion. *See Virginia v. American Booksellers Ass'n, Inc.*, 802 F.2d 691 (4th Cir. 1986).

These two cases are *M.S. News Co. v. Casado*, 721 F2d. 1281 (10th Cir. 1983) and the case of *Upper Midwest Booksellers Ass'n vs. Minnesota*, 780 F2d. 1389 (8th Cir. 1986). The Defendants here heavily rely on these two cases. Indeed, Defendants suggest that the *Upper Midwest Booksellers Ass'n* case should be controlling since it represents the most recent precedent in the Eighth Circuit. On the other hand, the Plaintiffs in this case argue that these two cases are distinguishable and are also no longer good law, having been undercut by subsequent cases. It is, therefore, important to examine these two cases carefully.

In the *Upper Midwest Booksellers* case, the Eighth Circuit considered a challenge to a Minnesota ordinance that regulated the manner in which materials deemed "harmful to minors" could be displayed and sold. A section of the ordinance made it unlawful for any person to knowingly display any material that is "harmful to minors" unless the material was placed in a sealed wrapper. The ordinance also required an opaque cover of any material whose packaging or cover, standing alone, was "harmful to minors." The ordinance contained a "safe harbor" section stating that the "sealed wrappers" and "opaque covers" provisions did not apply if minors were not allowed to be present or were not able to view the proscribed materials or their covers. Under the ordinance, businesses were deemed to be in compliance if they "physically segregated the proscribed material so that minors cannot be present or cannot view the materials, posted a sign reading 'Adults Only – you must be 18 to enter,' and enforced these restrictions." *Upper Midwest*, 780 F.2d at 1391.

The plaintiff in *Upper Midwest*, a trade organization of retail merchants, made a facial challenge to the ordinance, arguing that the cover and wrapper requirements were overbroad because they impermissibly limited adult access to materials constitutionally protected as to adults. The District Court of Minnesota rejected Upper Midwest's arguments and denied the challenge to the statute's constitutionality. *Upper Midwest*, 602 F.Supp. 1361 (1985). Upper Midwest Booksellers appealed. The Eighth Circuit affirmed. *Upper Midwest*, 780 F.2d 1389 (1986).

The Defendants here contend that *Upper Midwest* "is not only persuasive but is binding on this Court." (Defendants' Brief in Opposition at pp. 13-16). Of course, if the Eighth Circuit case controls and is dispositive of the issues before us, then this Court would be obligated to

follow that precedent whether it agreed with it or not.[4] Defendants, in their brief, quoted at length from the Eighth Circuit's opinion in *Upper Midwest*, and the Court does so here, *to-wit*:

> . . . The problem in this case arises because the Minneapolis ordinance regulates the display, rather than only the sale to minors, of material that is obscene as to minors but which is not obscene as to adults. The ordinance therefore limits to some extent the ability of adults to visit a bookstore or newsstand and browse through material that is obscene as to children but not as to adults. Because the regulation here simultaneously affects material protected in relation to one group – adults – and unprotected in relation to another group – minors – it falls into interstices of current First Amendment doctrine. The question we must address is whether the City has struck an appropriate balance between its legitimate interest in the protection of its young and allowing adults access to material protected under the First Amendment.
>
> The Minneapolis ordinance is basically the same as the statute upheld in *Ginsberg* except that the ordinance here not only prohibits the dissemination to minors of material obscene as to them but also restricts the manner of display of that material. The sealed wrapper requirement prevents either adults or minors from scanning the material only prior to purchase. Thus, the restrictions contained in the ordinance do have an incidental effect on the First Amendment rights of adults. Midwest argues that this incidental effect renders the ordinance invalid under *Butler v. Michigan,* 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412 (1957). In *Butler,* the Supreme Court unanimously condemned a statute absolutely prohibiting adults or minors from disseminating or possessing any material "tending to the corruption of the morals of youth." *Id.* at 381, 77 S.Ct. at 525. The Court stated that the legislation was "not reasonably restricted to the evil with which it is said to deal" and noted that the result of the statute was "to reduce the adult population . . . to reading only what is fit for children." *Id.* at 383, 77 S.Ct. at 526.
>
> Although it is true that the sealed wrapper provision limits adults as well as children from engaging in pre-purchase examination of material regulated by the ordinance, we do not find the ordinance to be incompatible with *Butler*. The statute in *Butler* resulted in the total suppression of the material covered by the statute. Here, as the District Court observed, the ordinance "does not prohibit adults from purchasing non-obscene materials; adults continue to have ultimate access to the materials in question." 602 F. Supp. at 1370. We note that the Supreme Court has rejected suggestions similar to that now advanced by Midwest regarding the applicability of *Butler* to restrictions that are intended

---

[4] Of course, the Arkansas Supreme Court is under no obligation to follow the Eighth Circuit's interpretation of the law of any state, including that of Arkansas.

to protect minors but that also affect adults, and we decline to extend *Butler* to prohibit reasonably structured display regulations. *See Ginsberg*, 390 U.S. at 634-35, 88 S.Ct. at 1277-78 (*Butler* inapplicable because retailers not prohibited from stocking and selling magazines covered under statute); *Pacifica Foundation*, 438 U.S. at 750 n. 28, 98 S.Ct. at 3040 n. 28 (adults still may purchase material despite restrictions).

We believe that the ordinance in the instant case is one that is "carefully limited," *Miller*, 413 U.S. at 24, 93 S. Ct. at 2614, and that does not unduly burden the First Amendment rights of adults. Any burden here is the result of the permissible regulation of material that is obscene as to minors. The restriction in relation to adults is merely an incidental effect of the permissible regulation is minimal in its impact. Adults are still free to request a copy of restricted material to view from a merchant or to peruse the material in adults only bookstores or in segregated sections of ordinary retail establishments. More significantly, adults are still able to view any of the material in a free and unfettered fashion by purchasing it. The continued availability of these materials to adults for purchase under the ordinance weighs strongly in favor of the ordinance's constitutionality. In upholding the FCC's action to regulate the broadcast of "indecent" material, the Supreme Court observed in *Pacifica Foundation* that the regulation "does not by any means reduce adults to hearing only what is fit for children. *Cf. Butler v. Michigan*, 352 U.S. 380, 383, 77 S.Ct. 524, 525. Adults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words." 438 U.S. at 750 n. 28, 98 S.Ct. at 3040 n. 28; *see also id.* at 760, 98 S.Ct. at 3046 (Powell, J., concurring, joined by Blackmun, J.). Similarly, adults under the Minneapolis ordinance continue to have access to the material simply by purchasing it or going to retail establishments that have an adults only policy or segregated sections for those materials that fall within the definition of harmful to minors. For these reasons, we believe that the ordinance 'leave[s] open adequate alternative channels of communication,' *Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 76, 101 S.Ct. 2176, 2186, 68 L.Ed.2d 671 (1981), and that it does not unconstitutionally restrict the access of adults to protected material under the First Amendment.

Midwest also suggests that the Minneapolis ordinance does not qualify as a time, place, or manner restriction because it is not content-neutral. Although content-based regulation usually is proscribed, some content-based time, place, or manner restrictions have been approved by the Supreme Court. *See, e.g., New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982); *FCC v. Pacifica Foundation,* 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978); *Young v. American Mini Theatres,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d (310 (1976). Even though the regulation mandated by the Minneapolis ordinance may be a content-based time, place, or manner restriction impinging upon the rights of adults, we nevertheless believe that it is permissible as a reasonable means of attempting to control the merchandising to minors of sexually explicit material

obscene as to them.

* * *

Any material covered by the Minneapolis ordinance is likely to be on the "borderline between pornography and artistic expression" since to be subject to the ordinance the material must be obscene at least as to minors. The ordinance here results in a restriction on both the manner in which and the place where particular material may be exhibited. We believe that the City's substantial interest in the well-being of its youth in the instant case supports its classification of the materials at issue, just as Detroit's interest in the quality of its neighborhoods in *Young* justified that ordinance's zoning restrictions.

* * *

. . . The Minneapolis ordinance imposes no content limitations on the creators of the regulated materials and the materials continue to be available to all adults. The Minneapolis ordinance does have the effect of withholding offensive expression from the young "without restricting the expression at its source," *Pacificia Foundation,* 438 U.S. at 749, 98 S.Ct. at 3040, and thus is narrowly tailored to achieve its purpose. While the ordinance does restrict to some degree the ability of adults to view these materials prior to purchase, we do not believe these restrictions are "significant" since they relate primarily to the manner of display of the materials and the restrictions do not suppress the materials.

That such regulation is allowable in the instant case derives ample support not only from *Young*, but from other Supreme Court cases as well. For example, the Court observed in *New York v. Ferber* that it has "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." 458 U.S. at 757, 102 S.Ct. at 3354. Additionally, Justice Brennan's dissenting opinion in *Slaton* implicitly supports the result reached here. In discussing the permissible scope of state regulation of sexually explicit material, Justice Brennan stated:

> I would hold, therefore that at least in the absence of the distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly "obscene" contents. Nothing in this approach precludes those governments from taking action to serve what may be strong and legitimate interests through regulation of the manner of distribution of sexually oriented material.

> *Slaton*, 413 U.S. at 113, 93 S.Ct. at 2662 (Brennan, J., dissenting) (emphasis added). We believe it is likely that the Minneapolis ordinance is the type of permissible regulation that Justice Brennan had in mind in *Slaton*, and in any event we are convinced that it satisfies the requirements for a valid time, place, or manner restriction. Finding a total absence of the "substantial overbreadth" necessary to facially invalidate an ordinance, *Ferber*, 458 U.S. at 769, 1021 S.Ct. at 3361, we affirm the District Court's holding that subsection 6 of the Minneapolis ordinance does not violate the First Amendment.

Id., 780 F.2d at 1394-98 (footnotes and some citations omitted).

The other case cited by the State of Virginia as being in conflict with the Fourth Circuit's opinion is the case of *M.S. News vs. Casado*, 721 F.2d 1281 (10th Cir 1983). *Casado* involved a challenge to the constitutionality of a Wichita, Kansas ordinance, the critical and pertinent portion of which stated:

> No person . . . shall knowingly: (a) display material which is harmful to minors in such a way that minors, as a part of the invited general public, will be exposed to view such material provided, however, 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 2/3's of the material is not exposed to view.

Casado, 721 F.2d at 1296-97 (reprinting the City of Wichita ordinance in the Appendix).

Significantly, the Kansas ordinance at issue in *Casado* is very similar to the Arkansas statute, Ark. Code Ann. § 5-68-502 prior to its amendment in 2003. *Casado* involved a challenge to the constitutionality of the above-quoted portion of the Wichita, Kansas ordinance. The District Court denied the constitutional challenge and granted the defendant's motion to dismiss. Plaintiffs appealed. The Tenth Circuit affirmed. *Casado*, 721 F.2d 1281.

On appeal to the Tenth Circuit, the plaintiffs in *Casado* contended, among other things, that the ordinance went beyond the permissible scope of *Ginsberg v. NY*, 390 U.S. 629 (1968) and was overbroad and vague. The plaintiffs contended that the ordinance limited the access of

adults and minors approaching adulthood to constitutionally permissible material. They also argued that the ordinance neither afforded fair warning to those within its reach, nor provided explicit standards for those who enforce it. *Casado*, 721 F.2d at 1285.

Judge Bill Holloway, writing for the Tenth Circuit, noted that *Ginsberg* had rejected a vagueness challenge to a New York statute similar to the Wichita, Kansas ordinance. However, the plaintiffs contended that the Wichita ordinance was different from the New York statute because the former proscribed not just the sale or dissemination of material harmful to minors, (as in *Ginsberg*) but also forbad the display of such materials. The Tenth Circuit found no constitutional infirmity in the Wichita ordinance as a result of its addition of the display prohibition. The Court noted:

> Although First Amendment challenges to legislation under the overbreadth and vagueness doctrines are related, they are distinct. The vagueness doctrine is anchored in the Due Process Clauses of the Fifth and Fourteenth Amendments, and protects against legislation lacking sufficient clarity of purpose and precision in drafting. Overbroad legislation need not be vague, indeed it may be too clear; its constitutional infirmity is that it sweeps protected activity within its proscription. We consider the overbreadth and vagueness issues separately.

Id., 721 F.2d at 1287-88 (citations omitted).

Turning first to the overbreadth issue the Court stated:

> As noted, plaintiff News argues that the Wichita ordinance is overbroad, restricting the access of adults and minors approaching adulthood to constitutionally permissible publications. News says that as commercial enterprises seek to avoid violating the ordinance, the natural tendency will be to limit materials available for view by anyone.
>
> We disagree. First, as noted, with respect to the sale or distribution of materials, "harmful to minors," the ordinance has a clear and acceptable standard that will permit sale or distribution to adults of such materials. Second, the portion of the ordinance dealing with display of material "harmful to minors" is reasonably structured. It is true that compliance with the ordinance will to some degree restrict the viewing by adults of materials which are, as to adults, constitutionally protected. However, the restriction is reasonable and does not offend the First

Amendment.

Reasonable time, place and manner regulations are permissible where the regulations are necessary to further significant governmental interests.

* * *

Moreover, the proscription on display of material harmful to minors does not unreasonably restrict adults' access to material which is not obscene as to them. The ordinance permits the "display" of material harmful to minors if it is in blinder racks which conceal the lower two-thirds of the material. Thus, adults may still have some access to material not obscene as to them, and they may purchase the material.

* * *

The portion of the Wichita ordinance proscribing display to minors is conduct plus speech because it regulates the manner in which material with a particular content can be disseminated; it does not regulate pure speech itself. Thus, there must be substantial overbreadth for the ordinance to be held overbroad on its face. We find no such infirmity. As noted, the display portion of the ordinance does not restrict minors' access to materials which they have a constitutional right to obtain. The ordinance only prohibits displaying material "harmful to minors," and this term is defined to include only material that is obscene as to minors under the *Miller* test as adapted to evaluate whether material is harmful to minors. Although minors are entitled to a significant measure of First Amendment protection, a narrowly drawn ordinance restricting their access to sexually oriented material does not abridge their First Amendment rights.

We therefore hold that the display provision of the ordinance is not overbroad on its face.

Id., 721 F.2d at 1288-89 (citations omitted).

Turning next to the challenge for vagueness, the Court observed:

If a law threatens to inhibit First Amendment freedoms a more stringent vagueness test is used. In the First Amendment area vague laws offend three important values. First, they do not give individuals fair warning of what is prohibited. Second, lack of precise standards permits arbitrary and discriminatory enforcement. Finally, vague statutes encroach upon First Amendment freedoms by causing citizens to forsake activity protected by the First Amendment for fear it may be prohibited.

* * *

> We find no vagueness defect in the Wichita ordinance. First, the ordinance provides fair warning of what is prohibited. It plainly prohibits displaying material harmful to minors in a manner so that minors will be exposed to it. Although it is not "an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children . . . the Constitution does not require impossible standards; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . ." We believe that the ordinance does this. The obscenity standard as to minors is clearly defined. Common understanding and practices provide commercial establishments with sufficient notice of the type of display the ordinance is designed to prohibit.
>
> Furthermore, whatever imprecision is present is mitigated by the ordinance's scienter provision. . . . The ordinance defines knowingly in terms almost identical to the definition approved in *Ginsberg.* In addition to the degree of scienter that the Constitution requires be shown to obtain a conviction for violating obscenity laws, the Wichita ordinance, as *Ginsberg* did, makes it an excuse from liability if one makes an honest mistake as to a minor's age.
>
> Second, we do not perceive any real danger of arbitrary enforcement. To violate the ordinance, one must display material which, taken as a whole must fail the *Miller* test as applied to minors. This sufficiently constrains the discretion of the authorities. The ordinance adopts the correct standard for evaluating whether material is harmful to minors and we will not assume that the authorities will act in bad faith.
>
> Third, we are not persuaded that the ordinance will lead citizens to forsake activity protected by the First Amendment. The ordinance is narrowly drawn within the confines of the *Miller* and *Ginsberg* standards. It provides fair warning of what is prohibited, and sufficiently constrains the discretion of the authorities. In such circumstances we do not believe it chills the exercise of First Amendment rights.
>
> In sum, we are not persuaded to hold the Wichita ordinance invalid for vagueness.

Id., 721 F.2d at 1290-91 (citations, footnotes and some internal quotations omitted).

Plaintiffs here take the position that neither *Midwest* nor *Casado* remain good law after the decision of the U.S. Supreme Court in *Virginia vs. American Booksellers*, 484 U.S. 383

(1988. They point to the restricted and narrowed interpretations by the Virginia Supreme Court which were necessary to sustain the constitutionality of the Virginia statute, and they contend no case subsequent to *Virginia vs. American Booksellers* has been upheld without such narrowing constructions. Since the Minnesota ordinance at issue in *Upper Midwest* was not so limited, they contend it would not (without such limitations) be upheld today. Responding to the Defendant's arguments that *Upper Midwest* has not been specifically over-ruled and, further, that it has been cited with approval in subsequent decisions, Plaintiffs state:

> In further support of the first point, it is notable that no decision of the Eighth Circuit Court of Appeal or of any district court in the Eighth Circuit has cited *Upper Midwest* for the holding relied on by defendants. The only Court of Appeals case which quoted *Upper Midwest* did so as to the standard as to overbreadth (*Excalibur Group v. Cit of Minneapolis*, 116 F.3d 1216 *8th Cir. 1997)), as did two of the five district court opinions (*Tom T. Inc., v. City of Eveleth,* 2003 U.S. Dist. LEXIS 3718 (D. Minn. March 11, 2003); *U.S. v. Alexander,* 736 F. Supp. 968 (D. Minn. 1990)). Two of the remaining three district court opinions quoted language from *Upper Midwest* with respect to severability. (*Minn. Citizens Concerned for Life v. FEC,* 936 F. Supp. 633 (D. Minn. 1996); *Gay & Lesbian Servs. Network v. Bishop,* 841 F. Supp. 295 (W.D. Mo. 1993)). The fifth case quoted it in the context of health regulations. *Doe v. Minneapolis*, 693 F. Supp. 774 (D. Minn. 1988).

Plaintiffs also argue that *Upper Midwest* has also been undercut by the case of *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-49 (1986) and its progeny which limit the "time, place and manner" analysis to those situations where the legislation is passed to combat undesirable secondary effects. They point out that the Arkansas statute is not directed at undesirable secondary effects, citing *SOB, Inc. v. County of Benton*, 317 F. 3d 956, 962 (8th Cir. 2003). And they quote from the Ninth Circuit case in *Crawford v. Lundgren*, 96 F. 3d 360 (9th Cir. 1996) in support of their argument as follows:

> [The statute], however, is not designed to remedy potential secondary effects of the "harmful matter." The statute is based only on the State's determination that

> reading the materials at issue will be "harmful" to minors. The statute, therefore, does not focus on the secondary impact of the speech, but rather on the direct impact of the speech on part of its potential audience. The statute is designed to prevent the materials from provoking harmful reactions in minor readers. That justification does not fall within the parameters of the secondary effects doctrine.

See Crawford, 96 F.3d at 385 (citing *Boos v. Barry*, 485 U.S. 312 (1988)).

The Court agrees with Plaintiffs that *Upper Midwest* would not be decided the same way today absent the Court giving the ordinance limiting constructions such as those provided by the Virginia Supreme Court in *Virginia v. American Booksellers*, 372 S.E.2d at 623. See discussion below. It also agrees that the "time, place and manner" analysis would not save the statute at issue in this case after the U.S. Supreme Court's decision in *Renton* since the Arkansas statute was not enacted to deal with any "secondary effect." On the contrary, the focus was directly, and simply, on preventing harm to minors. This does not mean that *Upper Midwest* and *M.S. News* have been completely overruled and have, thereby, lost all of their precedential value. But this Court is convinced that, had the Courts in those two cases been confronted with the arguments made in this case and with the manner in which the *Virginia* case was handled by the U.S. Supreme Court, the Eighth and Tenth Circuits would not have upheld the constitutionality of the challenged laws absent state rulings providing limiting constructions of those laws similar to the construction given the Virginia statute by the Supreme Court of *Virginia in Virginia v. American Booksellers*. To make this clear we now take up and consider that case.

B. The Virginia Case

The manner in which the U.S. Supreme Court handled the attack upon the Virginia statute in *American Booksellers* provides perhaps the best insight into that Court's thinking on issues such as those raised in the instant proceeding. The Court will, therefore, trace the progress of

that case from the U.S. District Court for the Eastern District of Virginia to the Fourth Circuit Court of Appeals, thence to the U.S. Supreme Court, thence to the Supreme Court of Virginia, back to the U.S. Supreme Court and then finally back to the Fourth Circuit Court of Appeals.

The plaintiffs in that case challenged the constitutionality of a 1985 amendment to § 18.2-391 of the Code of Virginia and more particularly the portion thereof that provided that "it shall be unlawful for any person . . . to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse" books and other material with a sexual content which is "harmful to juveniles." *American Booksellers*, 617 F. Supp. at 700. That same statute made it unlawful to sell such materials to juveniles but the "sale" portion was not challenged. *See Ginsberg vs. New York*, 390 U.S. 629, 88 S.Ct. 1274 10 L.Ed.2d 195 (1968) (discussing challenge to a "sale" ordinance). The plaintiffs contended that the 1985 amendment was facially invalid in that it unconstitutionally infringes upon rights protected by the First Amendment. *See American Booksellers,* 617 F. Supp. at 701-702.

A trial was held in the U.S. District Court after which the Court made certain findings of fact, among which was 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 702-703. It went on to state:

> In order to comply with the 1985 amendment, bookstores are faced with approximately four choices. First, a bookstore could simply bar all persons under the age of 18 from its store. However, this alternative would certainly have a dramatic impact upon the store's sales of children's books. Moreover, such a move would create the impression that the store deals primarily in "adults only" or pornographic material, which would have a devastating impact upon the store's business.
>
> Second, the store could create an "adults only" section in order to display the proscribed material. However, the books covered by the statute come from 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. An "adults 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. Moreover, 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 undoubtedly drop.

Third, the bookstore could simply limit its inventory to books not regulated by the new law. However, since the new law would restrict the display of a number of very popular books, including some best sellers, this alternative is not commercially feasible. In addition, this alternative would create practical difficulties in ordering new books because bookstores rarely have the opportunity to review books before ordering them.

Finally, the bookstore could place all of the proscribed material behind a counter where they would not be displayed to the public. However, due to the large number of books involved, this alternative would require bookstores to significantly alter the structure of their stores. Moreover, since the display of books is so crucial to their sale, such a move would substantially hurt sales.

American Booksellers, 617 F. Supp. at 701-702. In describing the overbreadth challenge the district court observed:

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. In *Butler v. Michigan*, 352 U.S. 380, 77 S.Ct 524, 1 L.Ed.2d 412 (1957), the Supreme Court struck down a Michigan law which made it unlawful for anyone to "make available for the general reading public . . . a book . . . found to have a potentially deleterious influence on youth." 352 U.S. 382-83, 77 S.Ct. at 525. Writing for a unanimous Court, Justice Frankfurter rejected a contention similar to the one offered by the defendants here: The state insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig.

352 U.S. at 383, 77 S.Ct. at 525. Here, as in *Butler*, the challenged statute is "not reasonably restricted to the evil with which it is said to deal." *Butler*, 352 U.S. at 383, 77 S.Ct. at 526.

* * *

> 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. at 705-706. The Attorney General for the State of Virginia argued that there were less onerous means for complying with the statute such as placing the materials on special "adult only" racks, to which the district court responded:

> This interpretation completely ignores the plain language of the new law, which restricts the *display* of the proscribed materials, not simply their perusal. If the proscribed material is on a shelf in an area which juveniles are permitted to roam then the item is "on display" where the juvenile "may" examine it even if the item is tagged. Indeed, since the material may well have pictures or passages "harmful to minors" on its front or back cover, the law is violated if a person under the age of 18 can simply see it. The amendment makes no provision for tags, adults only racks or blinder racks.

American Booksellers, 617 F. Supp. at 706. The Attorney General also argued that the Court should uphold the challenged display provision as a valid time, place and manner restriction on speech, to which the Court responded:

> The "crucial question" in examining a regulation under the time, place and manner test is "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford,* 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed. 2d 222 91972). The manner of expression here – the display of the books or other materials – is unquestionably compatible with the activity of the places affected by the regulation – bookstores, art galleries, convenience stores and department stores. Because the amendment does not regulate expression incompatible with the normal activity of the affected businesses, the amendment here is not a valid time, place and manner restriction.

American Booksellers, 617 F. Supp. at 706. The district court recognized in a footnote that the

Tenth Circuit held a similar Wichita City, Kansas, ordinance valid under such a time, place and manner analysis. *See American Booksellers,* 617 F. Supp. at 706, n.4 (citing *M.S. News,* 721 F.2d 1281). Finally, the court concluded as a matter of law that the 1985 amendment was facially invalid for overbreadth and could not be saved by any narrowing construction. *American Booksellers,* 617 F. Supp. at 706-707. It, therefore, permanently enjoined the defendants from enforcing that amendment. *Id.*

The case was appealed to the Fourth Circuit Court of Appeals which affirmed the district court's decision. *See American Booksellers*, 802 F.2d 691. The Fourth Circuit noted that the plaintiffs were attacking the display provision of the amendment on the ground that it would unreasonably restrict adult access to materials protected under the First Amendment. *Id.* at 694. Indeed, the Commonwealth conceded that the First Amendment rights of adults cannot be limited by the restrictive obscenity standards which may be applied to juveniles, but it contended that the district court erred when it found that the statute did not accommodate the state's interest in protecting juveniles in the least restrictive fashion and in concluding that the amendment was facially over broad. The Court observed:

> A Court will not find a statute facially invalid unless: (1) it cannot easily be given a narrowing construction; and (2) it has both a real and substantial deterrent effect on protected expression. *Erznoznik*, 422 U.S. at 216, 95 S.Ct. at 2276. The Commonwealth urges that narrowing constructions were readily available to the district court. Specifically, it asserts that the prohibited materials can still be stocked by the Booksellers so long as the materials are displayed in a manner whereby juveniles cannot examine and peruse them. The Commonwealth asserts that the amendment is a valid time, place, and manner regulation such as the zoning ordinance upheld in *Young v. America Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed. 2d 310 (1976). While it is true that the Supreme Court has upheld reasonable time, place, and manner restrictions, the speech so regulated either occurred in the public forum or was subject to a general zoning ordinance. *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984); *Young,* 427 U.S. 50, 96 S.Ct. 2440. The state's interest in

regulating activities in public places is, of course, of a somewhat different character than its interest in what goes on in a private bookstore. Even under the time, place, and manner analysis, however, the amendment must fall because the governmental interest asserted in this type of regulation must not involve the content of the regulated speech. *Clark,* 468 U.S. 288, 104 S.Ct. at 3065. There is no question that the Virginia amendment imposes restrictions based on the content of publications.

The amendment's most serious flaw, however, is its breadth. A demonstrably over broad regulation may act as a deterrence to the exercise of constitutionally protected rights. *Erznoznik,* 422 U.S. at 216. In the instant case, the amendment's language is broad, and it does not provide any potential defenses or methods of compliance. The Commonwealth, nonetheless, asserts that compliance with the amendment would not deter the exercise of first amendment rights. It stresses that only a small percentage of the inventory in book stores could be classified as harmful to juveniles and argues that retail outlets can readily modify their display methods to comply with the amendment. Because of its recent passage, no one has yet been prosecuted under the Virginia amendment. Additionally, there was little specific evidence presented below, making it difficult to determine what percentage of materials in a given retail outlet might be subject to the amendment's restrictions. It cannot be gainsaid, however, that book retailers face a substantial problem attempting to comply with the amendment in ordering, reviewing, and displaying publications for sale. *See American Booksellers Association, Inc. v. Webb,* 590 F.Supp. 677, 692-93 (N.D.Ga. 1984).

The Commonwealth suggests a number of ways by which the book retailer may solve these problems, but none appears to us to significantly ease the first amendment burden created by the amendment. The display methods suggested by the Commonwealth appear either insufficient to comply with the amendment or unduly burdensome on the first amendment rights of adults, and, to this extent, we disagree with the rulings in *M.S. News* and *Upper Midwest Booksellers.* Placing "adults only" tags on books and magazines or displaying the restricted material behind blinder racks or on adults only shelves freely accessible in the main part of the store would not stop any determined juvenile from examining and perusing the materials. The statute requires that such materials not be displayed so that minors *may* have access to them. Forcing a bookseller to create a separate, monitored adults only section, requiring that the material be sealed, or taking the materials off display and keeping them "under the counter" unreasonably interferes with the booksellers' right to sell the restricted materials and the adults' ability to buy them. Many adults, for a variety of reasons, would not enter a display area identified as "for adults only." Selling materials in sealed wrappers or from under the counter would unrealistically limit access by adults and would significantly interfere with the Booksellers' business practices. Contrary to the Commonwealth's argument that the scienter requirement in the statute allows a

> book retailer to avoid the hazards of self censorship, each of these suggested practices would require the seller to read and make a content based judgment on each item on his shelves in order to select the ones requiring special treatment. More importantly, a retailer cannot rely on the amendment to guide him in deciding what are the least restrictive modifications in display methods which would be sufficient to satisfy the statute.
>
> In sum, we feel that the amendment discourages the exercise of first amendment rights in a real and substantial fashion, and that it is not readily subject to a narrowing interpretation so as to withstand an over breadth challenge. We, therefore, affirm the district court's judgment declaring the challenged amendment unconstitutional and enjoining its enforcement.

American Booksellers, 617 F. Supp. at 695-696. In a footnote the Court raised the issue of older minor's first amendment rights:

> We also question whether an older minor's first amendment rights can be limited by the standards applicable to younger juveniles. "[M]inors are entitled to a significant measure of First Amendment protection" and the government may restrict these rights "only in relatively narrow and well-defined circumstances." *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 212-13, 95 S.Ct. 2268, 2274, 45 L.Ed.2d 125 (1975). These restrictions are justified when a child is not possessed of a full capacity for individual choice, and, in assessing that capacity, the age of the minor is a significant factor. *Id.* at 214 n. 11, 95 S.Ct. at 2275 n. 11. While the preamendment statute allowed retailers to consider a minor's relative maturity in deciding whether to sell a particular item to him, the current statute's display provision is not susceptible to such a selective application.

American Booksellers, 617 F. Supp. at 695, n.7. In another footnote the Fourth Circuit noted its disagreement with *M.S. News Co. v. Casado,* 721 F.2d 1781 (10th Cir. 1983) and *Upper Midwest Booksellers v. City of Minneapolis*, 780 F.2d. 1387 (8th Cir. 1986):

> As we note, *infra,* we disagree with the rationale of some cases which hold that otherwise constitutionally offensive "display" provisions can be legitimized by specifying certain restrictive display methods as being acceptable under the statute. Technically, however, the ordinance upheld in *M. S. News Co. v. Casado,* 721 F.2d 1281 (10th Cir.1983), is distinguishable from the Virginia statute which we review in that it specifically provides that material kept behind "blinder racks" was not deemed to have been "displayed." Similarly, retailers were able to comply with the ordinance in *Upper Midwest Booksellers*, 780 F.2d 1389, by placing the materials behind opaque covers, in sealed wrappers, or in "adults

only" settings.

American Booksellers, 617 F. Supp. at 696, n.8.

Virginia appealed the Fourth Circuit's opinion to the U.S. Supreme Court. The appeal came to the Supreme Court before its "mandatory jurisdiction" under section 28 U.S.C. § 1254(2) was abolished. That section provides for a direct appeal to the Supreme Court from any decision from a federal court holding a state statute to be unconstitutional. The jurisdictional statement also contended that the Fourth Circuit's opinion was in conflict with decisions from the Eighth and Tenth Circuits "which have both held that such display provisions . . . are valid time, place and manner regulations." *See Virginia v. American Booksellers*, 484 U.S. 383 (1988) (citing *Upper Midwest Booksellers,* 780 F.2d at 1396-97; *M.S. News,* 721 F.2d at 1288; *Young vs. American Mini Theatres,* 427 U.S. 50 (1976)).[5]

The United States Supreme Court's opinion, *see Virginia v. American Booksellers Association*, 484 U.S. 383, 108 S.Ct. 636 (1988), held that the Plaintiffs had standing to bring a pre-enforcement facial challenge based on the injury to them and their claim that the state statute infringed upon their First Amendment rights. *Virginia v. American Booksellers Association*, 484 U.S. 392-393, 108 S.Ct. 642-643. The court declined, however, to rule on the constitutional issues raised until it had received from the Virginia Supreme Court an authoritative interpretation of the Virginia statute at issue. *Id.*, 484 U.S. at 393, 108 S.Ct. at 643. The Court now quotes at length from the Supreme Court's opinion, written by Justice Brennan, to show how that Court

---

[5]The Court attaches hereto, as an exhibit, the more important and pertinent portions of the jurisdictional statement and the brief of the parties, filed in the United States Supreme Court, as an aid in understanding that Court's decision to certify two questions concerning the proper interpretation of the state law at issue to the Virginia Supreme Court, before considering and passing on the federal constitutional issues in the case. See Appendix D.

arrived at this conclusion:

> We have concluded that we should not attempt to decide the constitutional issues presented without first having the Virginia Supreme Court's interpretation of key provisions of the statute. Several factors combine in a unique way to counsel that course.
>
> At oral argument the State's attorney conceded that if the statute is read as plaintiffs contend, not only is it unconstitutional but its enforcement *should*, as a normative matter, be enjoined. Indeed, he seemingly conceded that if any of the books introduced as plaintiffs' exhibits below is covered by the statute, plaintiffs should prevail. However, the State argues that the statute's coverage is much narrower than plaintiffs allege or the courts below found. It contends that the statute covers only a very few "borderline" obscene works, and none of the exhibits introduced by plaintiffs.
>
> There was testimony below that if the coverage of the statute is as narrow as the State argues, it would reach less than a single shelf of a typical bookseller's wares. If that is true, methods of compliance exist that are substantially less burdensome than those discussed by the lower courts. For example, as is currently done in one of the plaintiff bookstores, a single shelf containing restricted books can be located within sight of the bookseller. If a juvenile examines or peruses the materials, an employee can prevent his continuing to do so. *Id.*, at 207. This is not to say that the law might not still raise substantial constitutional questions. However, the nature of the First Amendment "spillover" burden to adults would be dramatically altered.
>
> Plaintiffs, pointing to the lower courts' interpretation of the law, paint a strikingly different picture. They see the statute as a broad enactment, potentially applying to a huge number of works. This is not a law, they say, covering only "borderline obscenity," but rather a device expunging from display up to a quarter of the books available to juveniles. and, as a practical matter, to adults. The courts below similarly regarded the coverage; for a law, like Virginia's, that applies to up to 25 percent of a typical bookstore's inventory (as the District Court held) or that would confront booksellers with a "substantial problem" of compliance (as the Court of Appeals stated) must extend beyond only the nearly obscene. This broader reading of the statute would raise correspondingly greater First Amendment questions.
>
> * * *
>
> Given this history we are reluctant to adopt without question the lower courts' interpretation of state law. At the same time, since the Attorney General does not bind the state courts or local law enforcement authorities, we are unable to accept

her interpretation of the law as authoritative.

Under these unusual circumstances, where it appears the State will decline to defend a statute if it is read one way and where the nature and substance of plaintiffs' constitutional challenge is drastically altered if the statute is read another way, it is essential that we have the benefit of the law's authoritative construction from the Virginia Supreme Court.

* * *

Consequently, we shall resort to its certification Rule 5:42 to ask the Virginia Supreme Court whether any of the books introduced by plaintiffs as exhibits below fall within the scope of the amended statute, and how such decisions should take into account juveniles' differing ages and levels of maturity.

We will also certify a second question. At oral argument, in response to a question from the bench, the State's attorney declared that a bookseller will not be subject to criminal prosecution if, as a matter of store policy, the bookseller prevents a juvenile observed reviewing covered works from continuing to do so, even if the restricted materials are not segregated. If this is what the statute means, the burden to the bookseller, and the adult book buying public, is significantly less than that feared and asserted by plaintiffs. (Even if the statute means that the bookseller is required to announce or manifest the store's policy, perhaps by appropriate signs in the store or other reasonable measures, the burdens might be less than under plaintiffs' construction.)

* * *

It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be "readily susceptible" to a narrowing construction that would make it constitutional, it will be upheld. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975); *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). The key to application of this principle is that the statute must be "readily susceptible" to the limitation; we will not rewrite a state law to conform it to constitutional requirements.

* * *

In these circumstances, there is some advantage and no cost, either in terms of the First Amendment chilling effect or unnecessary delay, to certifying a proffered narrowing construction that is neither inevitable nor impossible. Thus, we certify this second question.

* * *

Pursuant to Rule 5:42 of the Virginia Supreme Court, we respectfully certify to that court the following questions:

> 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 plaintiffs' 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?

American Booksellers, 484 U.S. at 394-98, 108 S.Ct. at 643-48 (internal citations omitted).

As noted, one of the two questions certified to the Supreme Court of Virginia, was "whether any of the books introduced by plaintiffs . . . . fall within the statute's scope, and what general standard should be used to determine the statute's reach in light of juveniles' differing ages and levels of maturity." *Id.*, 484 U.S. at 398, 108 S.Ct. at 648.

In taking up this certified question, the Supreme Court of Virginia stated:

> The booksellers apprehend that a Virginia prosecutor might consider some of the 16 works in question as lacking "serious literary, artistic, political or scientific value for juveniles" because they would be unsuitable for young children, although suitable for older adolescents. The attorney general responds that the focus of the inquiry is not upon the youngest members of the class, not upon the most sensitive members of the class, and not upon the majority of the class. A book will pass statutory muster, she contends, if it has serious value for a legitimate minority of juveniles, and in this context, a legitimate minority may consist of older, normal (not deviant) adolescents.

We agree with the attorney general.

Virginia v. American Booksellers, 372 S.E.2d at 624. The court then concluded:

> We conclude that if a work is found to have a 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 taken as a whole.

The Virginia statute, like the Arkansas statute defines "Harmful to Juveniles" to mean:

> ". . . that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (a) predominately appeals to the prurient, shameful or morbid interest of juveniles, (b) is patently offensive to prevailing standards 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 Ann. § 18.2-390 (6). From the above discussion it will be noted that the Virginia Supreme Court dealt only with the third prong of the definition. It explained:

> The first two prongs of the tripartite test, "prurient interest" and "patently offensive," are purely questions of fact for determination by a properly-instructed jury. *Miller*, 413 U.S. at 30, 93 S.Ct. at 2618. As an appellate court, we may not resolve them. The third prong, "lack of serious merit," however, is a mixed question of law and fact, *see Smith v. United States*, 431 U.S. 291, 301, 97 S.Ct. 1756, 1764, 52 L.Ed.2d 324 (1977), which we may properly decide. Because a work will not be deemed "harmful to juveniles" unless it meets all three prongs of the test, we consider the third prong alone.

Virginia v. American Booksellers, 372 S.E.2d at 623. The Virginia Supreme Court then went on to make the ruling quoted above.

So, we conclude: Assuming the challenged material is a description or representation of "nudity, sexual conduct, sexual excitement or sadomasochistic abuse" that "predominantly appeals to the shameful or morbid interest of juveniles" and is "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles," nevertheless, it will <u>not</u>, under the holding of the Virginia Supreme Court, be obscene

as to juveniles under the age, say, of 14 if the material "taken as a whole" is not "lacking in serious literary, artistic, political or scientific value" for those mature juveniles that are, say, 16 or 17 years of age. If true, do we not end up with a statute "rewritten" to protect only the older mature minority of the overall "minor" population?

To explain further, at the risk of some repetition, it can be said that material 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 the 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?

Recently, the Court requested the parties to comment upon the above analysis. Plaintiffs' counsel by letter of January 28, 2004, agreed with the correctness of that analysis and noted the effect of Virginia Supreme Court's interpretation as follows:

> As you state, the construction put forward by defendants - that material is only "harmful to minors" if it is "harmful" to a mature cohort of 17-year-olds – mitigates the constitutional infirmities of the challenged Arkansas statute. It does so in two respects:
>
> I. It avoids the problem of older minors being restricted from access to material constitutionally protected as to them.
>
> II. By limiting the scope of harmful to minors material to what the Solicitor General of Virginia referred to as borderline obscene material, the restriction on adult access is substantially limited.
>
> However, as you also note, it does so at a price; by limiting the definition of "harmful to minors" material to borderline obscene material "harmful" to mature 17-year-olds, it eliminates the constitutionally appropriate protection to younger minors now in the law. Prior to the position taken in this case by the State, it was a crime to sell, furnish, distribute, etc. to a minor younger than 18 material inappropriate (i.e., "harmful to minors") to him or her. The policy decision to eliminate this protection in order to maintain the constitutionality of the access statute challenged in this action (albeit at a limited level of coverage) is one within the prerogative of Arkansas legislature; such legislative policy decisions are not for the courts. In *ACLU v. Reno*, 421 U.S. 844, 884-85 (1997) the Supreme Court pointed out that courts should "not rewrite a . . . law to conform it to constitutional requirements" (quoting from *American Booksellers*), particularly when the legislature "has sent inconsistent signals as to where the line or lines should be drawn because doing so involves a far more serious invasion of the legislative domain. *Id.* 884."

Plaintiffs suggest that this conclusion should end the analysis and the Court should simply declare the statute unconstitutional because it is not permitted to "rewrite" the law. They

also suggest that the Arkansas Supreme Court would likewise not be permitted to "rewrite the statute and, therefore, the issue should not be certified to the Arkansas Supreme Court." However, the U.S. Supreme Court in the Virginia case apparently thought otherwise. It certified, as permitted by Virginia law, the issue of the interpretation of the Virginia statute to the Virginia Supreme Court. *See Virginia v. American Booksellers*, 484 U.S. 383. The Virginia Supreme Court, in turn, adopted the narrow interpretation of "harmful to minors" suggested by that State's Attorney General, while expressing no awareness of or concern for the effect that that interpretation had upon the statute as a whole. *Virginia v. American Booksellers*, 372 S.E.2d at 624. The Virginia Supreme Court's interpretation was then reported to the U.S. Supreme Court which, in turn, forwarded it to the Fourth Circuit which, thereupon, reversed itself and upheld the constitutionality of the Virginia statute. *See Id.*; *Virginia v. American Booksellers*, 488 U.S. 905, 109 S.Ct. 254; *Virginia v. American Booksellers*, 882 F.2d 125.

The Defendants' attorney, by their letter of January 29, 2004, stated their views on the Court's analysis as follows:

> The defendants agree that a narrowing construction of the statute tends to solve the problems confronting bookstores and libraries while also protecting the First Amendment rights of minors to access material that is not obscene as to them. The defendants also agree, however, that a narrowing construction offers a more limited amount of protection for younger minors as it tends to encompass only material defined as "borderline obscenity."
>
> The court is concerned that adopting a narrowing construction of the statute would "distort the obvious objectives of the statute beyond recognition." By enacting the statute, the defendants believe it was the legislature's intent to protect minors (to the extent constitutionally permissible) from harmful material. Given the choice, any State seeking to protect minors from harmful materials would rather have a narrowly interpreted statute as opposed to no statute at all. Furthermore, the defendants believe that the concerns expressed by the Court only underscore the usefulness and propriety of using the certification procedure. As the Supreme Court explained in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997):

> Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court. [Citation]. 'Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when . . . the state courts stand willing to address questions of state law on certification from a federal court.'

Id. at 79 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'Connor, J., concurring)). Certifying the question to the Arkansas Supreme Court has two distinct advantages in this case. First, as the Court notes, when construing state statutes the state courts do not face the same limitations imposed on the federal courts. Second, because the Arkansas Supreme Court can render final, authoritative interpretations of Arkansas law (which this Court cannot do), certifying the issue to the Arkansas Supreme Court will eliminate the possibility that this Court might adopt an erroneously narrow interpretation of the statute.

The Court agrees that it should certify this issue to the Arkansas Supreme Court pursuant to its Rule 6-8.[6]

This Court hereby certifies the following questions of law to the Arkansas Supreme Court:

QUESTION 1.

Is the statute intended to protect *all* minors, i.e. all persons 17-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

---

[6] Paragraph (a) of Rule 6-8 provides:

(A) *Power to Answer.*

(1) The Supreme Court may, in its discretion, answer questions of law certified to it by order of a federal court of the United States if there are involved in any proceeding before it questions of Arkansas law which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court.

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?[7]

QUESTION 2.

The statute 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(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

---

[7]Prior to formulating this question, the Court accepted proposed questions from the Plaintiff and Defendant. Both proposed questions similar to that adopted by the Court. The question as proposed by Plaintiffs is:

Would it be a crime under the statute to sell to or display to a twelve-year-old girl material which appeals to her prurient interest, is patently offensive to prevailing standards as to what is suitable to her, and has no serious value to her, even though it has serious value to a mature seventeen-year-old male?

The question as proposed by Defendants is:

For purposes of the display provision found in Arkansas Code Annotated 5-68-502(1)(A) and Act 858, what is the appropriate age benchmark to be utilized in applying the harmful to minors definition as set forth in Arkansas Code Annotated Section 5-68-501(2)? More specifically, is material to be judge by reference to the oldest member of the minor class for purposes of the display provision?

before he or she breaches the "allow to view" provision ?

QUESTION 4.

The "Safe Harbor" provision contained in § 5-68-501(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?

Dated this 4th day of February, 2004.

Garnett Thomas Eisele
UNITED STATES DISTRICT JUDGE

THIS DOCUMENT ENTERED ON DOCKET SHEET IN COMPLIANCE WITH RULE 58 AND/OR 79(a) FRCP ON 2/4/04 BY

APPENDIX

Exhibit A- Arkansas Act 133 of 1969

Exhibit B - Arkansas Act 1263 of 1999

Exhibit C - Arkansas Act 858 of 2003

Exhibit D - Excerpts from Jurisdictional Statements and Briefs of the Parties in Virginia v. American Booksellers

ACT 133

AN ACT Prohibiting the Sale or Loan of Pornographic Literature to Minors; to Prescribe the Penalties for the Violation of This Act; and for Other Purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

SECTION 1. As used in this Section: (a) "Minor" means any person under the age of seventeen (17) years.

(b) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(c) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(1) predominantly appeals to the prurient, shameful or morbid interest of minors, and

(2) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(3) is utterly without redeeming social importance for minors.

(g) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(1) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and

(2) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

SECTION 2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, or

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual con-

duct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

It shall be unlawful for any person knowingly to exibit for a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

SECTION 3. Any person violating any provision of this Act shall be guilty of a misdemeanor and, upon conviction thereof, shall be subject to a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00) or imprisonment of not less than three (3) months nor more than six (6) months, or both such fine and imprisonment.

THIS BILL *having remained with the Governor five (5) days, Sunday excepted, and the General Assembly being in session, it became a law the 7th day of August, 1969.*

KELLY BRYANT

Secretary of State

ACT 135

AN ACT to Provide for the Payment of Interest to a Contractor by a Public Agency Where Payment in Accordance With the Terms of the Contract Is Not Made Within Ninety (90) Days After Completion and Acceptance of the Project; and for Other Purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

SECTION 1. Whenever any agency of this State or of any county, municipality or school district, or other local taxing unit or improvement district shall enter into a contract covered by the provisions of Act 159 of 1949, as amended, for the making of repairs or alterations or the erection of buildings or for the making of any other improvements, and/or contracts for the construction or improvement of highways, roads, streets, sidewalks, curbs, gutters, drainage and/or sewer projects, or other construction project, and the contract provides that payment therefor shall be made on completion and acceptance of the project, and the contractor shall, upon completion and approval of the project, present a claim for payment of the amount due thereon in accordance with the terms of the contract, and if the same is not paid by the public authority within ninety (90) days from the date of presentation of such claim, the public authority shall pay to said contractor interest at the rate of ten percent (10%) per annum on the unpaid amount due for all periods of time payment under said contract is not made subsequent to ninety (90) days after presentation of claim of payment as provided hereinabove.

SECTION 2. All laws and parts of laws in conflict herewith are hereby repealed.

SECTION 3. If any provisions of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Act which can be given

the Arkansas Legislative Council or Joint Budget Committee which relate to its passage and adoption.

SECTION 5. CODE. All provisions of this Act of a general and permanent nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code Revision Commission shall incorporate the same in the Code.

SECTION 6. SEVERABILITY. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

SECTION 7. GENERAL REPEALER. All laws and parts of laws in conflict with this act are hereby repealed.

SECTION 8. EMERGENCY CLAUSE. It is hereby found and determined by the Eighty-second General Assembly, that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a two (2) year period; that previous General Assemblies have provided appropriations for the projects provided or enumerated in this act; that certain appropriations will expire before the adjournment of the General Assembly; and that if such appropriations expire, the projects and programs authorized herein will cease thereby depriving the citizens of the State of the benefits to be derived from such projects. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1999

/s/ Russ

APPROVED: 4/8/1999

ACT 1263

"AN ACT TO STRENGTHEN THE PORNOGRAPHY LAWS OF THIS STATE; AND FOR OTHER PURPOSES."

Subtitle

"TO STRENGTHEN THE PORNOGRAPHY LAWS OF THIS STATE."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code 5–68–501 is amended to read as follows:

"5–68–501. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) 'CD–ROM' means a compact disk which has the capacity to store graphic, audio, video and written materials and may be used by computer or other device to play or display materials harmful to minors;

~~(6)~~(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 ~~it~~ the material or performance, taken as a whole, has the following characteristics:

(A) ~~Predominantly appeals to the prurient, shameful, or morbid interest of minors~~ 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; and

(B) ~~Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors~~ 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) ~~Is utterly without redeeming social importance for minors~~ The material or performance lacks serious literary, scientific, medical, artistic, or political value for minors;

~~(7)~~(3) 'Knowingly' means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(A) The character and content of any material described herein which is reasonably susceptible to examination by the defendant; and

(B) The age of the minor, provided that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the age of the minor;

(4) 'Magnetic disk memory' means a memory system that stores and retrieves binary data on record-like metal or plastic disks coated with a magnetic material, including but not limited to, hard disk drives and floppy diskettes;

(5) 'Magnetic tape memory' means a memory system that stores and retrieves binary data on magnetic recording tape;

(6) 'Material' means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture, film, record, recording tape, CD–ROM disk, magnetic disk memory, magnetic tape memory, video *tape or other media, but does not include matters displayed, transmitted, retrieved or stored on the internet or other network for the electronic dissemination of information;*

~~(1)~~(7) 'Minor' means any person under the age of ~~seventeen (17)~~ eighteen (18) years;

~~(2)~~(8) 'Nudity' means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state;

(9) 'Performance' means any motion picture, film, video tape, played record, phonograph or tape, preview, trailer, play, show, skit, dance, or other exhibition performed or presented to or before an audience of one (1) or *more, with or without consideration, but does not include matters displayed, transmitted, retrieved or stored on the internet or other network for electronic dissemination of information;*

(10) 'Person' means any individual, partnership, association, corporation, or other legal entity of any kind; and

(11) 'Reasonable bona fide attempt' means an attempt to ascertain the true age of the minor by requiring production of a driver's license, marriage license, birth certificate or other governmental or educational identification card or paper and not relying solely on the oral allegations or apparent age of the minor.

~~(5)~~(12) 'Sadomasochistic abuse' means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed;

~~(3)~~(13) 'Sexual conduct' means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or female breast;

~~(4)~~(14) 'Sexual excitement' means the condition of the human male or female genitals when in a state of sexual stimulation or arousal;"

SECTION 2. Arkansas Code 5–68–502 is amended to read as follows:

"5-68-502. Unlawful acts.

~~(a)~~ 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 ~~to sell or loan for monetary consideration to a minor~~:

(1) ~~Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors~~ Display material which is harmful to minors in such a way that minors, as a part of the invited general public, will be exposed to view such material. Provided, however, 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 (⅔) of the material is not exposed to view; or

(2) ~~Any book, pamphlet, magazine, printed matter, however reproduced, or sound recording which contains any matter enumerated in subdivision (1) of this section or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to minors.~~ Sell, furnish, present, distribute, allow to view, or otherwise disseminate to a minor, with or *without consideration, any material which is harmful to minors, provided that this prohibition shall not apply to any dissemination by a parent, guardian or relative within the third degree or consanguinity of the minor, or any dissemination with the consent of a parent or guardian of the minor; or*

(3) Present to a minor or participate in presenting to a minor, with or *without consideration, any performance which is harmful to a minor, provided that this prohibition shall not apply to any dissemination by a parent, guardian or relative within the third degree or consanguinity of the minor, or any dissemination with the consent of a parent or guardian of the minor.*

~~(b) It shall be unlawful for any person knowingly to exhibit for a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited a motion picture, show, or other presentation which, in whole or in part, depicts nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors.~~"

SECTION 3. All provisions of this act of a general and permanent nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code Revision Commission shall incorporate the same in the Code.

SECTION 4. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

SECTION 5. All laws and parts of laws in conflict with this act are hereby repealed.

/s/ Hunter

APPROVED: 4/8/1999

ACT 1264

"AN ACT TO AMEND ARKANSAS CODE 22-3-502 CONCERNING THE CAPITOL ARTS AND GROUNDS COMMISSION; AND FOR OTHER PURPOSES."

Additions are indicated by underline; deletions by ~~strikeout~~

Stricken language would be deleted from and underlined language would be added to the law as it existed prior to this session of the General Assembly.

State of Arkansas
84th General Assembly
Regular Session, 2003

As Engrossed: H2/19/03
A Bill

Act 858 of 2003
HOUSE BILL 1525

By: Representatives Anderson, Bledsoe, Borhauer, Dees, Fite, Green, Hardwick, Harris, Kenney, Key, Lamoureux, Martin, Matayo, Norton, Parks, Penix, S. Prater, Rosenbaum, Schulte, Scroggin, C. Taylor, Walters, Wood, *Bennett, Berry, Bright, Creekmore, Hutchinson, Medley, Roebuck, Pritchard*
By: Senators Bisbee, Altes

For An Act To Be Entitled

AN ACT TO REQUIRE MATERIAL HARMFUL TO MINORS TO BE OBSTRUCTED FROM VIEW AND SEGREGATED IN COMMERCIAL ESTABLISHMENTS; AND FOR OTHER PURPOSES.

Subtitle

AN ACT TO REQUIRE MATERIAL HARMFUL TO MINORS TO BE OBSTRUCTED FROM VIEW AND SEGREGATED IN COMMERCIAL ESTABLISHMENTS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code § 5-68-502(1), concerning the display of materials harmful to minors, is amended to read as follows:

(1)(A) Display material which is harmful to minors in such a way that minors, as a 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 ~~material is kept behind devices commonly known as "blinder racks" so that 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

/s/ Anderson, et a ***APPROVED: 3/28/20031***

021320

Exhibit D

Excerpts of Jurisdictional Statements and Briefs of the Parties
Virginia v. American Booksellers, 484 U.S. 383 (1988)

In the appellants' "statement of reasons" why the question presented is substantial, states:

Almost two decades ago this Court found that the First Amendment does not preclude a State from regulating the sale of pornographic material to children which, although not obscene for adults, is "harmful to juveniles." *Ginsberg v. New York*, 390 U.S. 629 (1968). The question presented here is whether the Commonwealth of Virginia can constitutionally prohibit merchants from displaying this *very same* proscribed material where children can examine and peruse it at their leisure. Virginia's interest in regulating such activity is just as compelling as the legitimate state interest in *Ginsberg*; the federal question presented is equally as substantial.

* * *

In response to *Ginsberg*, the General Assembly of Virginia enacted §§ 18.2-390 and 391 of the Code of Virginia making it unlawful to knowingly sell or loan to children sexually explicit items that are harmful to them; these statutes were nearly identical to the one validated in *Ginsberg*. The definition of "harmful to juveniles" found in § 18.2-390(6) was subsequently modified to comport with the *Miller v. California* standard. Then, in 1985, § 18.2-391 was amended to also make it unlawful to knowingly display for commercial purposes these same proscribed materials where juveniles could examine and peruse them (App. K at A-44), making Virginia one of at least twenty-eight states and several localities having a law concerning the display or exhibition of pornographic material to juveniles. (App. L at A-46).

* * *

Despite this Court's strong admonitions against facial overbreadth invalidation, the court of appeals concluded that the Amendment was overbroad on its fact because its "language is broad, and it does not provide any potential defenses or methods of compliance." (App. A at A-8). But the Amendment does not prohibit the examination, perusal or dissemination of proscribed materials by or to adults, any more than the rest of § 18.2-391 or the *Ginsberg* statute deny adults access to, and retailers the right to sell, materials "harmful to juveniles."

Such display provisions as the Amendment do " 'not prohibit adults from purchasing non-obscene materials; adults continue to have ultimate access to the materials in question.'" *Upper Midwest Booksellers v. City of Minneapolis,* 780 F.2d 1389, 1395 (8th Cir. 1985). "[T]he proscription on display of material

harmful to minors does not unreasonably restrict adults' access to material which is not obscene as to them. * * *[A]dults may still have some access to materials not obscene as to them, and they may purchase such material." *M.S. News Co. v. Casado,* 721 F.2d 1281, 1288-89 (10th Cir. 1883); *see also Ginsberg*, 390 U.S. at 634-35 (retailers not prohibited from stocking and selling magazines covered under the statute); *Pacific Foundation,* 438 U.S. at 750 n.28 (adults still may purchase material despite restrictions.)

As for the Fourth Circuit's concern that the Amendment does not list any potential defenses or methods of compliance, since the Amendment does not suffer from vagueness, a facial overbreadth analysis does not require that the statute itself list ways of compliance: so long as a limiting construction *could* be placed on the challenged provision, it is not facially overbroad. *See Broaderick*, 413 U.S. at 613. As long as it is clear what a display statute makes illegal, it need not spell out what a retailer must do to comply with it; this is left, for example, to the business policies he wants to adopt. *See Capital News co. Inc v. Metro. Gov't., etc.,* 562 S.W.2d 430 (Tenn. 1978).

Moreover, the Amendment has a scienter requirement. This allows retailers to "avoid the hazard of self-censorship of constitutionally protected material," *see Ginsberg*, 390 U.S. at 644, and relieves them of the obligation to have an actual awareness of the contents of every book or magazine they sell or display. *See American Booksellers Ass'n, Inc. v. Rendell,* 481 A.2d 919, 941 (Pa. Super. 1984); *Freeman v. Commonwealth,* 233 Va. 301, 311, 288 S.E. 2d 461 (1982). The scienter requirement likewise allows the retailer to comply with the Amendment's display provision by making a good faith effort, by any means, to restrict juveniles from examining *and* perusing material that the bookseller actually knows or has reason to know is proscribed. Accordingly, Virginia suggested numerous ways to the court of appeals that a retailer could comply with the Amendment: the material could be placed in so-called "blinder racks, " in wrappers preventing perusal or in "adult only" racks, display methods found by the Eighth and Tenth Circuits to be minimally intrusive. *See Upper Midwest Booksellers; M.S. News.* Even easier, perhaps, tags could be placed on the materials in question, or they could be color coded. And, of course, the merchant would continue to have the protection of the applied overbreadth doctrine in questionable circumstances. *See Broaderick,* 413 U.S. at 615-16.

Simply put, then, the fact that a merchant might have to take some additional steps to segregate sexually explicit, material does not mean that the Amendment is facially overbroad. Indeed, as in *New York v. Ferber,* "it could reasonably be argued that the bookseller, with an economic incentive to sell materials that may fall within the statute's scope, may be less likely to be deterred than the employee who wishes to engage in political campaign activity. 458 U.S. at 772.

The appellants' conclusion states:

> The federal question presented here is clearly one of substantial importance: it involves the invalidation of a duly enacted state statute by a federal court, surely one of the most significant events possible under our system of federalism; the Fourth Circuit's judgment has created a clear conflict among the federal courts of appeals; at least twenty-eight (28) states and several localities have provisions concerning the display of pornographic materials to minors in one form or another (App. L at 46); and, lastly, "the regulation of sales without control over commercial displays of materials deemed harmful to minors would render" meaningless the protective efforts constitutionally validated by this Court in *Ginsberg*. *See Rendell,* 481 A.2d at 942. This substantial and important issue is worthy of this Court's full consideration.

The appellee responded:

> The Amendment bars any general retail bookstore or newsstand from displaying any book or magazine that could be "harmful" to a hypothetical minor of any age who *could* examine the work. The Amendment thereby restricts access of both adults and older juveniles to material which is not obscene as to them, but which may be "harmful" to the youngest juvenile. The vast overbreadth of the Amendment is most starkly evinced by the Virginia Attorney General's concession before the Fourth Circuit that, under the Amendment, any general retail bookseller who displays *Hollywood Wives* by Jackie Collins, a national bestseller for over six months, on his business premises has committed a misdemeanor. The display of this an other best-selling novels is a crime under the Amendment because a hypothetical nine-year-old for whom the work is "harmful" *may* examine and peruse it.
>
> In contrast to the two city ordinances that have been upheld in two other circuits, the Amendment is not limited to prohibiting minors from actually perusing "harmful" materials or having "harmful" materials thrust before their view. Thus no conflict among the circuits is presented.
>
> The appellees move to dismiss the appeal and affirm the judgment below on the grounds that the rulings below are constitutionally correct and this appeal presents no substantial federal question to review.

In their argument the appellees pointed out that restrictions upon the "display" of materials harmful to juveniles has a much greater impact than restrictions upon sales of such materials:

Restrictions on display have a vastly broader impact on First Amendment rights than do restrictions on sales. Prohibiting the sale of a work to a particular minor as to whom the work is obscene does not affect the First Amendment rights to anyone as to whom the work is not obscene. Prohibitions on display, on the other hand, restrict the access of all readers to any material which is obscene as to the youngest reader. The district court found, based on uncontroverted testimony, that this restriction on access "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." 617 F. Supp. at 706. The rationale of *Ginsberg v. New York* that supported a variable test of obscenity for *sales* to minors, cannot justify restrictions on *display* to minors, since such restrictions also constitute restrictions on display to adults and older juveniles of books that, as to them, are First Amendment protected. The district court specifically found that display of books is a critical factor in their sale.

> "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."

617 F.Supp. at 702.

The Amendment criminalizes the mere display – the mere presence – of certain words or pictures. Under the Amendment, the mere availability of "harmful" words or pictures on general retail business premises is illegal, if any juvenile *could* have access to such words and pictures.

Under the Amendment, it is the "display" that is the crime. It is not necessary for a juvenile actually to enter a book store before a book store owner or clerk may be arrested for violating the Amendment. It is not necessary for a juvenile actually to "examine or peruse" certain words or pictures before a book store owner or clerk may be arrested. The elements of the crime are simply that (1) one knowingly displays for commercial purpose, (2) words or pictures deemed "harmful" to any juvenile, (3) in a place where it is possible that juveniles "may" examine or peruse them.

Any work that is harmful to a juvenile of *any* age cannot be displayed in a general retail book store. The Amendment prohibits a bookseller from making the reasonable distinction as to whether a particular work may be "harmful" to a nine-year-old but not "harmful" to a seventeen-year-old.. The Amendment thus

> irrebuttably presumes that whatever is "harmful" for a nine-year-old may be justifiably proscribed as to a seventeen-year-old college student.

The appellees dealt with the Eighth and Tenth Circuit opinions as follows:

> The Virginia Attorney General attempts to rely upon Eighth Circuit and Tenth Circuit opinions that were distinguished and criticized by the Fourth Circuit. Unlike the Amendment, the city ordinances at issue in *M.S. News Co. v. Casado,* 721 F.2d 1281 (10th Cir. 1983), and *Upper Midwest Booksellers Ass'n v. Minneapolis,* 780 F.2d 1389 (8th Cir. 1985), did not flatly prohibit general retail book stores from displaying all works that could be harmful to any juvenile: In *M.S. News* and *Upper Midwest*, the ordinances permitted such materials to be freely available in any general retail book store so long as no material that is "harmful to juveniles" was involuntarily thrust into the view of juveniles. While the Amendment criminalizes the mere "display" of materials without regard to whether a juvenile views such materials, the ordinances in *M.S. News* and *Upper Midwest* only prevented the harmful aspects of materials from being thrust into the view of a minor.
>
> The amendment prohibits all "display" of materials where juveniles "may" examine and peruse them, and thereby effectively bars the "display" of all such materials to any adult as well. Permitting Virginia booksellers to display only materials suitable for a nine-year-old may insure that no juvenile will peruse "harmful" materials. The First Amendment, however, has never been interpreted to permit such a Draconian prohibition.
>
> The Virginia Attorney General effectively concedes that *M.S. News* and *Upper Midwest* do not support the Amendment by repeatedly suggesting that the courts rewrite the Amendment so that it, like the ordinances at issue in *M.S. News* and *Upper Midwest*, only prohibits the thrusting of "harmful" materials into the view of minors. The Attorney General suggests that all material may be displayed so long as any "harmful" material is placed in blinder racks or adult only racks, or if "harmful" material is identified with "color-coded"tags. Jurisdictional Statement at 9-10. The courts below have properly rejected these suggestions as being diametrically opposed to the plain language and clear intent of the Amendment.

The appellees' brief argues that the Amendment not only prohibits free access by adults but also to older juveniles of works that might not be appropriate to, say, a nine-year-old. The appellee concluded their statement as follows:

> The Amendment broadly restricts the First Amendment rights of adults and older

juveniles. The Appellant cites no authority, and the lower courts found no authority, to support the vast sweep of the Amendment's prohibition. There is no such authority. Moreover, the decision below creates no conflict among the federal courts of appeals. This appeal accordingly raises no substantial question that would warrant this Court's review, and therefore the appeal should be dismissed or the judgment below should be summarily affirmed.

In their reply brief appellants state:

> Booksellers assert that there is no *Ginsberg* issue in this case, but their arguments consistently reveal that their real complaint is with *Ginsberg's* concept of "variable obscenity," not with Virginia's amendment. They argue, for example, that the Amendment completely bars all pornographic material not fit for children, thus violating the rule of *Butler v. Michigan*, 352 U.S. 380 (1957). This same argument was advanced in Ginsberg and rejected. 390 U.S. at 634.
>
> They also contend that Virginia's display provision "presumes" that whatever is harmful for a young child is also harmful for an older one, but the Amendment has nothing to do with what is "harmful" for *any* child: "harmful to juveniles" is defined in Va. Code § 18.2-390, not the Amendment. This fifteen year old statute tracks the language validated in *Ginsberg*. Once again, the Appellees' argument is with the variable obscenity doctrine, not the Amendment.
>
> Booksellers' further contention that the Amendment is violated by just having proscribed material in a store is simply rhetoric: the Amendment's scienter requirement makes a merchant liable only if she *knowingly* places such material where a child can *examine and peruse* it; if the pornography is not so knowingly placed, the Amendment is not violated. Virginia recognizes that "[i]t is not innocent but *calculated* purveyance of filth which is exorcised . . . ." *Ginsberg*, 390 U.S. at 644.
>
> * * *
>
> Due to Booksellers preemptive attack on the Amendment, no Virginia court has ever had the opportunity even to construe its language, much less narrow it. Virginia suggested several ways the Amendment could be narrowed if necessary. So long as a limiting construction may be placed on a challenged provision, it is not facially overbroad. *Broderick,* 413 U.S. at 613.
>
> * * *
>
> Finally, Virginia has consistently asserted that the Amendment is a valid time, place and manner regulation. *See Renton v. Playtime Theatres,* 475 U.S. ____,

106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Upper Midwest Booksellers; M.S. News Co.* Booksellers do not dispute this contention.

Exhibit D

Excerpts of Jurisdictional Statements and Briefs of the Parties
Virginia v. American Booksellers, 484 U.S. 383 (1988)

The appellants' "statement of reasons" as to why the question presented is substantial, states:

> Almost two decades ago this Court found that the First Amendment does not preclude a State from regulating the sale of pornographic material to children which, although not obscene for adults, is "harmful to juveniles." *Ginsberg v. New York*, 390 U.S. 629 (1968). The question presented here is whether the Commonwealth of Virginia can constitutionally prohibit merchants from displaying this *very same* proscribed material where children can examine and peruse it at their leisure. Virginia's interest in regulating such activity is just as compelling as the legitimate state interest in *Ginsberg*; the federal question presented is equally as substantial.
>
> * * *
>
> In response to *Ginsberg*, the General Assembly of Virginia enacted §§ 18.2-390 and 391 of the Code of Virginia making it unlawful to knowingly sell or loan to children sexually explicit items that are harmful to them; these statutes were nearly identical to the one validated in *Ginsberg*. The definition of "harmful to juveniles" found in § 18.2-390(6) was subsequently modified to comport with the *Miller v. California* standard. Then, in 1985, § 18.2-391 was amended to also make it unlawful to knowingly display for commercial purposes these same proscribed materials where juveniles could examine and peruse them (App. K at A-44), making Virginia one of at least twenty-eight states and several localities having a law concerning the display or exhibition of pornographic material to juveniles. (App. L at A-46).
>
> * * *
>
> Despite this Court's strong admonitions against facial overbreadth invalidation, the court of appeals concluded that the Amendment was overbroad on its fact because its "language is broad, and it does not provide any potential defenses or methods of compliance." (App. A at A-8). But the Amendment does not prohibit the examination, perusal or dissemination of proscribed materials by or to adults, any more than the rest of § 18.2-391 or the *Ginsberg* statute deny adults access to, and retailers the right to sell, materials "harmful to juveniles."
>
> Such display provisions as the Amendment do " 'not prohibit adults from purchasing non-obscene materials; adults continue to have ultimate access to the materials in question.'" *Upper Midwest Booksellers v. City of Minneapolis,* 780

F.2d 1389, 1395 (8th Cir. 1985). "[T]he proscription on display of material harmful to minors does not unreasonably restrict adults' access to material which is not obscene as to them. * * *[A]dults may still have some access to materials not obscene as to them, and they may purchase such material." *M.S. News Co. v. Casado,* 721 F.2d 1281, 1288-89 (10th Cir. 1883); *see also Ginsberg*, 390 U.S. at 634-35 (retailers not prohibited from stocking and selling magazines covered under the statute); *Pacific Foundation,* 438 U.S. at 750 n.28 (adults still may purchase material despite restrictions.)

As for the Fourth Circuit's concern that the Amendment does not list any potential defenses or methods of compliance, since the Amendment does not suffer from vagueness, a facial overbreadth analysis does not require that the statute itself list ways of compliance: so long as a limiting construction *could* be placed on the challenged provision, it is not facially overbroad. *See Broaderick*, 413 U.S. at 613. As long as it is clear what a display statute makes illegal, it need not spell out what a retailer must do to comply with it; this is left, for example, to the business policies he wants to adopt. *See Capital News co. Inc v. Metro. Gov't., etc.,* 562 S.W.2d 430 (Tenn. 1978).

Moreover, the Amendment has a scienter requirement. This allows retailers to "avoid the hazard of self-censorship of constitutionally protected material," *see Ginsberg*, 390 U.S. at 644, and relieves them of the obligation to have an actual awareness of the contents of every book or magazine they sell or display. *See American Booksellers Ass'n, Inc. v. Rendell,* 481 A.2d 919, 941 (Pa. Super. 1984); *Freeman v. Commonwealth,* 233 Va. 301, 311, 288 S.E. 2d 461 (1982). The scienter requirement likewise allows the retailer to comply with the Amendment's display provision by making a good faith effort, by any means, to restrict juveniles from examining *and* perusing material that the bookseller actually knows or has reason to know is proscribed. Accordingly, Virginia suggested numerous ways to the court of appeals that a retailer could comply with the Amendment: the material could be placed in so-called "blinder racks, " in wrappers preventing perusal or in "adult only" racks, display methods found by the Eighth and Tenth Circuits to be minimally intrusive. *See Upper Midwest Booksellers; M.S. News.* Even easier, perhaps, tags could be placed on the materials in question, or they could be color coded. And, of course, the merchant would continue to have the protection of the applied overbreadth doctrine in questionable circumstances. *See Broaderick,* 413 U.S. at 615-16.

Simply put, then, the fact that a merchant might have to take some additional steps to segregate sexually explicit, material does not mean that the Amendment is facially overbroad. Indeed, as in *New York v. Ferber,* "it could reasonably be argued that the bookseller, with an economic incentive to sell materials that may fall within the statute's scope, may be less likely to be deterred than the employee

who wishes to engage in political campaign activity. 458 U.S. at 772.

The appellants' conclusion states:

> The federal question presented here is clearly one of substantial importance: it involves the invalidation of a duly enacted state statute by a federal court, surely one of the most significant events possible under our system of federalism; the Fourth Circuit's judgment has created a clear conflict among the federal courts of appeals; at least twenty-eight (28) states and several localities have provisions concerning the display of pornographic materials to minors in one form or another (App. L at 46); and, lastly, "the regulation of sales without control over commercial displays of materials deemed harmful to minors would render" meaningless the protective efforts constitutionally validated by this Court in *Ginsberg. See Rendell,* 481 A.2d at 942. This substantial and important issue is worthy of this Court's full consideration.

The appellee responded:

> The Amendment bars any general retail bookstore or newsstand from displaying any book or magazine that could be "harmful" to a hypothetical minor of any age who *could* examine the work. The Amendment thereby restricts access of both adults and older juveniles to material which is not obscene as to them, but which may be "harmful" to the youngest juvenile. The vast overbreadth of the Amendment is most starkly evinced by the Virginia Attorney General's concession before the Fourth Circuit that, under the Amendment, any general retail bookseller who displays *Hollywood Wives* by Jackie Collins, a national bestseller for over six months, on his business premises has committed a misdemeanor. The display of this an other best-selling novels is a crime under the Amendment because a hypothetical nine-year-old for whom the work is "harmful" *may* examine and peruse it.
>
> In contrast to the two city ordinances that have been upheld in two other circuits, the Amendment is not limited to prohibiting minors from actually perusing "harmful" materials or having "harmful" materials thrust before their view. Thus no conflict among the circuits is presented.
>
> The appellees move to dismiss the appeal and affirm the judgment below on the grounds that the rulings below are constitutionally correct and this appeal presents no substantial federal question to review.

In their argument the appellees pointed out that restrictions upon the "display" of materials harmful to juveniles has a much greater impact than restrictions upon sales of such

materials:

> Restrictions on display have a vastly broader impact on First Amendment rights than do restrictions on sales. Prohibiting the sale of a work to a particular minor as to whom the work is obscene does not affect the First Amendment rights to anyone as to whom the work is not obscene. Prohibitions on display, on the other hand, restrict the access of all readers to any material which is obscene as to the youngest reader. The district court found, based on uncontroverted testimony, that this restriction on access "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." 617 F. Supp. at 706. The rationale of *Ginsberg v. New York* that supported a variable test of obscenity for *sales* to minors, cannot justify restrictions on *display* to minors, since such restrictions also constitute restrictions on display to adults and older juveniles of books that, as to them, are First Amendment protected. The district court specifically found that display of books is a critical factor in their sale.
>
> > "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."
>
> 617 F.Supp. at 702.
>
> The Amendment criminalizes the mere display – the mere presence – of certain words or pictures. Under the Amendment, the mere availability of "harmful" words or pictures on general retail business premises is illegal, if any juvenile *could* have access to such words and pictures.
>
> Under the Amendment, it is the "display" that is the crime. It is not necessary for a juvenile actually to enter a book store before a book store owner or clerk may be arrested for violating the Amendment. It is not necessary for a juvenile actually to "examine or peruse" certain words or pictures before a book store owner or clerk may be arrested. The elements of the crime are simply that (1) one knowingly displays for commercial purpose, (2) words or pictures deemed "harmful" to any juvenile, (3) in a place where it is possible that juveniles "may" examine or peruse them.
>
> Any work that is harmful to a juvenile of *any* age cannot be displayed in a general retail book store. The Amendment prohibits a bookseller from making the

> reasonable distinction as to whether a particular work may be "harmful" to a nine-year-old but not "harmful" to a seventeen-year-old.. The Amendment thus irrebuttably presumes that whatever is "harmful" for a nine-year-old may be justifiably proscribed as to a seventeen-year-old college student.

The appellees dealt with the Eighth and Tenth Circuit opinions as follows:

> The Virginia Attorney General attempts to rely upon Eighth Circuit and Tenth Circuit opinions that were distinguished and criticized by the Fourth Circuit. Unlike the Amendment, the city ordinances at issue in *M.S. News Co. v. Casado,* 721 F.2d 1281 (10th Cir. 1983), and *Upper Midwest Booksellers Ass'n v. Minneapolis,* 780 F.2d 1389 (8th Cir. 1985), did not flatly prohibit general retail book stores from displaying all works that could be harmful to any juvenile. In *M.S. News* and *Upper Midwest*, the ordinances permitted such materials to be freely available in any general retail book store so long as no material that is "harmful to juveniles" was involuntarily thrust into the view of juveniles. While the Amendment criminalizes the mere "display" of materials without regard to whether a juvenile views such materials, the ordinances in *M.S. News* and *Upper Midwest* only prevented the harmful aspects of materials from being thrust into the view of a minor.
>
> The amendment prohibits all "display" of materials where juveniles "may" examine and peruse them, and thereby effectively bars the "display" of all such materials to any adult as well. Permitting Virginia booksellers to display only materials suitable for a nine-year-old may insure that no juvenile will peruse "harmful" materials. The First Amendment, however, has never been interpreted to permit such a Draconian prohibition.
>
> The Virginia Attorney General effectively concedes that *M.S. News* and *Upper Midwest* do not support the Amendment by repeatedly suggesting that the courts rewrite the Amendment so that it, like the ordinances at issue in *M.S. News* and *Upper Midwest*, only prohibits the thrusting of "harmful" materials into the view of minors. The Attorney General suggests that all material may be displayed so long as any "harmful" material is placed in blinder racks or adult only racks, or if "harmful" material is identified with "color-coded"tags. Jurisdictional Statement at 9-10. The courts below have properly rejected these suggestions as being diametrically opposed to the plain language and clear intent of the Amendment.

The appellees' brief argues that the Amendment not only prohibits free access by adults but also to older juveniles of works that might not be appropriate to, say, a nine-year-old. The appellee concluded their statement as follows:

> The Amendment broadly restricts the First Amendment rights of adults and older juveniles. The Appellant cites no authority, and the lower courts found no authority, to support the vast sweep of the Amendment's prohibition. There is no such authority. Moreover, the decision below creates no conflict among the federal courts of appeals. This appeal accordingly raises no substantial question that would warrant this Court's review, and therefore the appeal should be dismissed or the judgment below should be summarily affirmed.

In their reply brief, appellants state:

> Booksellers assert that there is no *Ginsberg* issue in this case, but their arguments consistently reveal that their real complaint is with *Ginsberg's* concept of "variable obscenity," not with Virginia's amendment. They argue, for example, that the Amendment completely bars all pornographic material not fit for children, thus violating the rule of *Butler v. Michigan*, 352 U.S. 380 (1957). This same argument was advanced in Ginsberg and rejected. 390 U.S. at 634.
>
> They also contend that Virginia's display provision "presumes" that whatever is harmful for a young child is also harmful for an older one, but the Amendment has nothing to do with what is "harmful" for *any* child: "harmful to juveniles" is defined in Va. Code § 18.2-390, not the Amendment. This fifteen year old statute tracks the language validated in *Ginsberg*. Once again, the Appellees' argument is with the variable obscenity doctrine, not the Amendment.
>
> Booksellers' further contention that the Amendment is violated by just having proscribed material in a store is simply rhetoric: the Amendment's scienter requirement makes a merchant liable only if she *knowingly* places such material where a child can *examine and peruse* it; if the pornography is not so knowingly placed, the Amendment is not violated. Virginia recognizes that "[i]t is not innocent but *calculated* purveyance of filth which is exorcised . . . ." *Ginsberg*, 390 U.S. at 644.
>
> * * *
>
> Due to Booksellers preemptive attack on the Amendment, no Virginia court has ever had the opportunity even to construe its language, much less narrow it. Virginia suggested several ways the Amendment could be narrowed if necessary. So long as a limiting construction may be placed on a challenged provision, it is not facially overbroad. *Broderick,* 413 U.S. at 613.
>
> * * *
>
> Finally, Virginia has consistently asserted that the Amendment is a valid time,

place and manner regulation. *See Renton v. Playtime Theatres,* 475 U.S. ____, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Young v. American Mini Theatres, Inc.,* 427 U.S. 50 (1976); *Upper Midwest Booksellers; M.S. News Co.* Booksellers do not dispute this contention.