

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

In re: *Gender Queer, A Memoir*

Case No. CL22-1985

**Barnes & Noble's Motion to Dismiss  
and to Vacate Order to Show Cause**

Barnes & Noble Booksellers, Inc. (“Barnes & Noble”), by counsel, moves to dismiss the *Petition for Declaration for Adjudication of Obsenity* [sic] *Pursuant to 18.2-384 of the Code of Virginia* (“Petition”) filed April 28, 2022, and to vacate the *Order to Show Cause Pursuant to 18.2-384 of the Code of Virginia* (“Show Cause Order”) entered by the Court on May 18, 2022, on the grounds enumerated below.

**Interest of the Movant**

Barnes & Noble, with its principal place of business in New York, is a national distributor of books through its branded retail stores and online, with a direct interest in the interstate commercial distribution and sale of *Gender Queer, A Memoir*. Barnes & Noble is identified as “Barnes and Nobel” [sic] in Paragraph 3 of the Petition. On May 25, 2022, Barnes & Noble was served with notice of a hearing for a temporary restraining order pursuant to Va. Code § 18.2-384 involving *Gender Queer, A Memoir*, by Maia Kobabe.

**Grounds for Dismissal**

1. This Court lacks subject matter jurisdiction, because no provision of Virginia law authorizes a preemptive ruling that the books at issue are “obscene for unrestricted viewing by minors.” *See* Petition at ¶ 6. Va. Code § 18.2-384 establishes a judicial procedure only for a determination regarding the circulation of “obscene” materials, a term defined in Va. Code § 18.2-372. The Petition cites Section 18.2-374 in its request for relief, which relates to the “Production,

publication, sale, possession, etc., of obscene items.” Petition at ¶ 6. However, the particular relief sought involves a different statute, Virginia Code § 18.2-391, which deals not with obscenity, but with material deemed to be “harmful to juveniles.” Nothing in Va. Code § 18.2-384 authorizes the Court to issue a ruling under the “harmful to juveniles” standard, or to fashion a remedy that limits access by juveniles while allowing full access by adults.

2. The Petition seeking a declaration that *Gender Queer, A Memoir* is obscene is facially defective under Virginia law. The Petition cites no provision of Virginia law that authorizes a court to declare that the book is “obscene for distribution to minors.” The Petitioner proceeded under Va. Code § 18.2-384, but that statute does not provide for a finding that a book is “harmful to juveniles” or to issue a temporary restraining order based on that standard.

3. The Petition’s demand for a declaration that *Gender Queer, A Memoir* is obscene is fatally defective under applicable constitutional standards. The Petition’s request for a declaration the book is “obscene for distribution to minors” and request for a restraining order on that basis, even if they were authorized by state law, are defective, in that the Petition fails to allege facts sufficient to support either a finding of obscenity or that the book is “harmful to juveniles” under controlling constitutional requirements. The Petition does not allege that the book, taken as a whole, is obscene, as the First Amendment requires. *Roth v. United States*, 354 U.S. 476, 488-489 (1957). Nor does it allege that the other elements of the test for obscenity have been met. *Miller v. California*, 413 U.S. 15, 24 (1973). Contrary to these constitutional requirements, the Petition alleges only that the “predominant ... theme” of five selected images in a 240-page memoir “should be deemed obscene as to be [sic] viewed unrestricted by minors.” Petition at ¶¶ 5-6. The Petition’s allegations are facially deficient as a matter of law even if a “harmful to

juveniles” standard could be applied under the law. *American Booksellers Association v. Commonwealth of Virginia*, 236 Va. 168, 177 (1988).

4. Va. Code § 18.2-384 is unconstitutional on its face because it authorizes courts to issue temporary restraining orders to restrict distribution of specified books in advance of any final adjudication of obscenity, *id.*, 18.2-384(E), contrary to established First Amendment doctrine. *Fort Wayne Books v. Indiana*, 489 U.S. 46, 66 (1989).

5. Va. Code § 18.2-384 is unconstitutional on its face because a ruling on a particular book binds “any person who publishes, sells, rents, lends, transports in interstate commerce, commercially distributes or exhibits the book, or has the book in his possession,” and imposes a binding presumption of knowledge on the part of such persons that the designated book is obscene. *Id.*, 18.2-384(K). *See Smith v. California*, 361 U.S. 147, 153 (1960).

6. Va. Code § 18.2-384 on its face violates the Due Process Clause of the Fourteenth Amendment because it authorizes injunctive restrictions against “any person,” and imposes a binding presumption of scienter, even as to individuals who lack actual notice or an opportunity to participate in the judicial proceedings. Va. Code § 18.2-384(K), (M). *See Zenith Corp. v. Hazeltine*, 395 U.S. 100, 110 (1969).

7. Va. Code § 18.2-384 on its face violates the Dormant Commerce Clause, because it authorizes state restrictions on the sale or distribution of books in interstate commerce. *PSInet, Inc. v. Chapman*, 362 F.3d 227, 239-240 (4th Cir. 2004).

8. Va. Code § 18.2-384 is unconstitutional as applied. Barnes & Noble was served with a Motion for TRO and Notice of a hearing regarding *Gender Queer, A Memoir* even though Barnes & Noble is not a party to the underlying Petition and was never served with the Petition. Under Va. Code § 18.2-384, Barnes & Noble and other similarly situated book sellers may be

subjected to restraining orders banning or limiting the circulation of constitutionally-protected materials prior to any final adjudication of the merits. Barnes & Noble and other similarly situated booksellers are subject to adjudication under an improper constitutional standard. As applied, Va. Code § 18.2-384 violates booksellers' free speech and press rights under the First Amendment and their Due Process rights under the Fourteenth Amendment.

9. Va. Code § 18.2-384 is unconstitutional on its face or as applied under Article I Section 12 of the Constitution of Virginia on each of the independent grounds set forth in Paragraphs 3, 4, 5, and 8 above, which are incorporated herein by reference.

10. Va. Code § 18.2-384 is unconstitutional on its face or as applied under Article 1, Section 11 of the Constitution of Virginia on each of the independent grounds set forth in Paragraph 6 above, which is incorporated herein by reference.

Wherefore, Barnes & Noble moves that the Petition be dismissed on each of the independent grounds set forth above, and that the Show Cause Order be vacated in its entirety.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that on this 15<sup>th</sup> day of June 2022, a true and accurate copy of the foregoing was served by electronic mail on the following:

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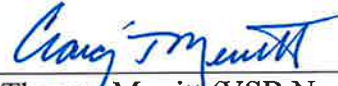
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