VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

In re: *Gender Queer, A Memoir*

CASE NO: **CL22-1985**

BRIEF IN SUPPORT OF MOTION TO DISMISS

The goal of this lawsuit is to censor literature. Petitioner Tommy Altman dislikes what he sees on seven pages of an award-winning 240-page book. From that small sample, and without addressing the graphic novel as a whole, he seeks an unconstitutional ruling that the entire book is obscene.

This brief, submitted by the book's author, Maia Kobabe, addresses several defects in Altman's pleading. Analytically first is whether the petition establishes that the statute cited, Code §18.2-384, applies to this book at all. If the Court rules that the book, taken as a whole, is not obscene – that it does not have as its *dominant* theme an appeal to prurient interest, or that it has literary, artistic, political, or scientific value – then the statute does not apply to it and this case will end. Second, the Court may rule that Altman chose to sue under the wrong statute, and again, the case should be dismissed at this stage. Otherwise, the Court must address issues such as nonjoinder and the constitutionality of Virginia's statutory scheme.

There is no comic-arts exception to the First Amendment. A graphic novel is not obscene simply because it uses pictures to portray what courts otherwise protect in books that use words alone.

Preliminary note

Before analyzing this case, the Court should know that Altman mischaracterizes the nature of Kobabe's work. *Gender Queer: A Memoir* – recipient of a 2020 Alex Award from the American Library Association and a Stonewall Awards 2020 Honor Book in Non-Fiction – is not, as claimed in §3 of the petition, a "graphic sexual novel." The term "graphic novel" in publishing and the comic arts refers not to sexually explicit content but long-form storytelling through a sequential narrative consisting of images or diverse symbols in combination, such as pictures, icons, numbers, and words. *See, e.g.*, Randy Duncan and Matthew J. Smith, "How Graphic Novels Work," in *The Cambridge Companion to the Graphic Novel* 8 (2017). The phrase, with this very meaning, entered the lexicon as early as 1964, and no later than 1978. *Merriam-Webster's Collegiate Dictionary*, 11th ed. (2005) at 545 ("a fictional story that is presented in comic-strip format and published as a book").

The use of the paraphrase "graphic sexual novel" is misleading. Disparaging Kobabe's sequential artistic memoir as a "graphic sexual novel" because it contains a small number of depictions of sexual imagery is akin to dismissing literature by Plato or Proust as child pornography because they refer to sexual acts involving prepubescent or adolescent boys.

Altman also erroneously asserts that Kobabe's work depicts "felonious sexual acts between minors." The only image in the book of nudity or a sexual act indisputably involving a minor depicts a scene from Plato's *Symposium* (p. 135 of the

book) on an ancient Greek vase.[1] This classical theme is common in works of philosophy, history, and art of that era.

The other challenged images either depict persons of indeterminate age (*e.g.*, at p. 61) or do not show the activity that Altman incorrectly describes. For example, he refers to a panel that "Illustrates minors tasting their own sexual fluids." But at pp. 62-63 of the book, the teen-aged author adamantly *refuses* to taste her own vaginal fluid. *See also* pp. 128-29, which depict the author at the age of 21, and p. 167, which shows two college students utilizing a prosthetic device.

These elementary errors suggest that Altman did not actually read the book before heading to court. In another context they could be defamatory; the petition falsely asserts that the author has written child pornography and is promoting pedophilia. This book does no such thing. In depicting the author's childhood, the work represents how children, especially on reaching adolescence, begin reflecting on their own sexuality. Even then, the author only depicts internal imagining and self-exploration. Despite Altman's heated rhetoric, masturbation is not a felony; nor is the inclusion of drawings of an adult's exposed upper buttocks or adults experimenting with a sexual prosthetic a radically extreme image or a means of advocating child sex.

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[1] The book is an exhibit to the petition, so the Court may review it in deciding a demurrer or motion. *TC MidAtlantic Dev. v. Commonwealth*, 280 Va. 204, 210 (2010); Rule 1:4(i).

To the contrary, in the extensive history of comics depicting same-sex relationships or the expression of gender identity, *Gender Queer: A Memoir* is relatively discreet. *See, e.g.,* Justin Long, ed., *No Straight Lines: Four Decades of Queer Comics* (2012); Shary Flenniken, *Trots and Bonnie* (2021). Rather than "illustrating extreme graphic sexual acts" or going "substantially beyond customary limits of candor," Kobabe's book is in line with depictions of gender identity and sexual expression that have in recent years become relatively mainstream. One analogous example is Alison Bechdel's *Fun Home*, a 2007 coming-of-age graphic novel on lesbian and queer identity that won the Pulitzer Prize; its subsequent adaptation into a Broadway musical won five Tony awards in 2015. The world portrayed in *Fun Home*, and in *Gender Queer*, has arrived, while Altman was looking the other way.

1. <u>The law requires a holistic view</u>

In *Miller v. California*, 413 U.S. 15 (1973), the U.S. Supreme Court established that the appropriate standard of proof for obscenity is a three-part test: "that the work, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 248 (2002).

The Code of Virginia, drawing on *Miller*, addresses matters of obscenity generally in Chapter 8, Article 5 of Title 18.2. The first section in that article sets out a definition that governs all proceedings under the article, including this one. For ease of reference, the dividers (1), (2), and (3) have been added to Code §18.2-372 here:

> The word "obscene" where it appears in this article shall mean **(1)** that which, considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and **(2)** which goes substantially beyond customary limits of candor in description or representation of such matters and **(3)** which, taken as a whole, does not have serious literary, artistic, political or scientific value.

Conjunctive, not disjunctive

The statutory definition contains three conjunctive requirements, because the linking words are *and*. This means that, to fall within the coverage of the obscenity statutes, "all three things are required ...." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West 2012) at 116 (describing the "Conjunctive/Disjunctive Canon" of interpretation).

The Supreme Court of Virginia has embraced this conjunctive requirement in a related context. In *Commonwealth v. American Booksellers Ass'n*, 236 Va. 168, 176 (1988), the court noted that "a work will not be deemed 'harmful to juveniles' unless it meets all three prongs of the test." (The court there evaluated Code §18.2-390, addressed below in part 2 of this brief.) In that case, the court concluded 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." *Id.* at 177.

The petition ignores the statute

To state a claim for which relief can be granted, a petition for an obscenity declaration must, at a minimum, address each of these three separate requirements. A work that meets, for example, one of the three, but not the other two, cannot be classified as obscene under §18.2-372, so it cannot be subject to the declaratory statute cited in the petition (Code §18.2-384). But the petition never mentions §18.2-372. If *Gender Queer: A Memoir* does not meet this three-pronged definition, then under Virginia law, it is not obscene.

The key requirement here is the opening clause of the first prong: *considered as a whole*. This phrase appears nowhere in the petition; Altman simply ignores it, perhaps reckoning that what he declines to acknowledge cannot hurt him.

The petition never addresses the book as a whole

Paragraph 6 of the petition contains brief, conclusory nods to some elements of the three prongs. But the pleading expressly addresses only "[t]he illustrations contained in Exhibit A and Exhibit D," and not the book as a whole. This piecemeal approach can never satisfy the statutory requirements; the statute requires a holistic view of the entire book before a court can declare it to be obscene. Altman never mentions that broad view, likely because it dooms his cause.

First Amendment jurisprudence also requires a view of the entire artistic work: "The artistic merit of a work does not depend on the presence of a single explicit

scene. Under *Miller*, the First Amendment requires that redeeming value be judged by considering the work as a whole. Where the scene is part of a narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 248 (2002) (internal citations omitted) (citing *Miller*).[2]

The challenged images here appear on seven pages of a 240-page volume – about 2.9% of its content. The petition does not challenge the other 97.1% of the book, so the Court should presume that those passages are unobjectionable. The question here thus becomes whether those seven pages are the dominant theme of the book, taken as a whole; whether the remaining 233 pages are mere empty filler.

This inquiry answers itself. The dominant theme of the book, considered as a whole, does not comprise the sort of depictions that Altman assails here. Far from being a work of pornography, *Gender Queer: A Memoir* is an award-winning illustrated memoir that assures a significant segment of teenagers and young adults that they, too, are a legitimate part of society. The dominant theme of the book is inclusion, an assurance that many people – those whose inner feelings differ from Altman's – are still worthy members of that society. It tells these people, "You are not alone."

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[2] Congress amended 18 U.S.C. §2256 (8)(B) after the *Miller* decision, but the amendment did not affect the cited holding. Pub. L. No. 108-21 (April 30, 2003).

The petition does not address community values

The petition omits an essential element of any obscenity inquiry: relevant community values. Because Altman has not pleaded that the book violates such values, the Court may not presume that it does, even at an initial pleading stage.

This omission is understandable. The *Ashcroft* Court in 2002, 535 U.S. at 247-48, expressly mentions high-school staple *Romeo and Juliet,* more explicit modern adaptations of the Shakespearean original, and then-contemporary films such as *Traffic* and *American Beauty,* as examples of modern community acceptance of matters far beyond those found in *Gender Queer.* The absence of any reference to community values in the petition suggests that Altman is aware of the public's acceptance of books and other expressive media describing or depicting sexual activity involving or appealing to a legitimate minority of older adolescents.

Altman cannot rise above his pleading

The Supreme Court has repeatedly held that a litigant who fails to plead an essential matter is not entitled to recover. For example:

> The basis of every right of recovery under our system of jurisprudence is a pleading setting forth facts warranting the granting of the relief sought. It is the sine qua non of every judgment or decree. No court can base its decree upon facts not alleged, nor render its judgment upon a right, however meritorious, which has not been pleaded and claimed. Pleadings are as essential as proof, the one being unavailing without the other.

Grayson v. Westwood Bldgs, L.P., 300 Va. 25, 69 (2021) (quoting *Allison v. Brown*, 293 Va. 617, 626 (2017).

As noted above, a court cannot declare a publication to be obscene without considering the dominant theme of the work as a whole. Altman never alleges that the book, considered as a whole, is obscene; he alleges only that images on a select few pages are. By statutory definition, he has pleaded himself out of court.

2. Altman has sued under the wrong statute

As noted above, Altman's petition seeks relief under Code §18.2-384. But his specific prayer for relief asks for a declaration that the book is "obscene for distribution *to minors* ...." (Emphasis supplied)

The statute that he cites has no application to minors. The words *minor, juvenile,* and *child* appear nowhere in it. The statute that addresses minors is in a different article: Title 18.2, Chapter 8, Article 6, *Prohibited Sales and Loans to Juveniles.* This is where the Code defines matters that are, for example, "harmful to juveniles" (Code §18.2-390). And Code §18.2-391 proscribes specific acts relating to them.

Under Virginia law, a citizen may institute a proceeding like this one only to obtain a declaration that a publication is obscene generally. There is no provision in the Code for a judicial declaration of obscenity that is specific to juveniles. As with other quasi-criminal statutes, courts will construe this one strictly. *See, e.g., Townes v. State Bd. of Elections,* 299 Va. 34, 50 (2020) (strict construction; clear-and-

convincing burden of proof). This means that the Court cannot extend the reach of §18.2-384 outside Article 5, to meet Altman's perceived need.[3]

Altman chose not to pursue relief under Article 6, presumably because there is no provision in that article for the sort of advance judicial declaration that he craves here. Because the petition does not allege that the book is obscene generally, the Court cannot grant relief under §18.2-384. And even §18.2-391 expressly provides that "any book," including a graphic novel, is to be assessed by being "taken as a whole." Individual panels cannot justify an obscenity declaration.

3. Finding the book obscene would undermine constitutional safeguards

Altman's pleading shortcuts are more than just formalistic procedural error. They eviscerate constitutional safeguards that serve to protect personal freedom and individual rights. They also unconstitutionally discriminate among different models of communication, violating the First Amendment by depriving graphic novels and other expressions of the comic arts of the free speech protections otherwise granted to text.

Altman never assails the book as appealing to the prurient interest of its readers, whether adults or children. Instead, he replaces the threshold inquiries in *Miller* and §18.2-374 with his own test. Section 6 of his petition, which summarizes his

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[3] Such an approach would be unconstitutional. "Considering the character of the audience or the predominant appeal of the material to a select audience or the behavioral effect on those specific people directly encroaches upon the *Miller* guideline." *Beigay v. Traxler*, 790 F.2d 1088, 1094 (4th Cir., 1986).

variation on these principles, begins with the idiosyncratic claim that "[t]he illustrations ... exert a dominant perverse theme to promote felonious sexual encounters between minors." In other words, Altman would have the Court ban a book because it expresses a sexual ethic inconsistent with *his* sense of social norms and *his* sense of the current parameters of the law.

But advocating for a minority or even an illegal sexual ethic has been protected by the First Amendment since at least the Eisenhower Administration. In *One, Inc. v. Olesen*, 241 F.2d 772 (9th Cir. 1957), the Ninth Circuit upheld a declaration that material on homosexuality, then prohibited by law, was obscene and could not be mailed. The Supreme Court unanimously reversed, 355 U.S. 371 (1958), because expression advocating for same-sex sexual activity is not inherently obscene despite its then being illegal. This principle was applied to speech directed to youth as well as to adults, as when, for example, a cartoon in a high school newspaper "depicting a young child doing gymnastics on a man's erect penis drawn to exaggerated scale" was found not to be obscene as to minors, since it did not appeal to the prurient interest and, when the newspaper was taken as a whole, was part of an issue advocating more generally for gay rights. *Rosenblatt v. Common Sense Newspaper, Inc.*, 40 A.D.2d 723, 724, 337 N.Y.S.2d 56, 57-58 (N.Y.A.D. 1972).

Altman's reference in ¶3 to the depiction of "felonious sexual acts between minors" also makes a fundamental error as to the permissible grounds for finding material obscene. He repeats this error in ¶5 ("extreme graphic sexual acts of

felonious sexual conduct between minors") and ¶6 ("a dominant perverse theme to promote felonious sexual encounters between minors"). In *Ashcroft v. Free Speech Coalition*, the Supreme Court expressly held a statute to be unconstitutional for proscribing all descriptions or depictions of sexual activity involving persons under the age of 18. While the activity depicted might in some circumstances constitute a felony, the Court observed that the "idea ... of teenagers engaging in sexual activity ... is a theme of modern society and has been a theme in art and literature throughout the ages." 535 U.S. at 246. The proper standard is the three-part test in *Miller*, now embodied in the Code of Virginia.

If Altman's standard were upheld, only adults would have to right to use illustrated media to express or to view provocative social commentary on issues with social or political significance. Altman demands here that the Court find a graphic memoir obscene as to minors because it depicts forms of sexual expression that the U.S. Supreme Court has repeatedly found to be protected under the Constitution in numerous landmark cases.

To hold this sort of visual depiction to be illegal as to minors in Virginia would repudiate landmark precedent, upheld just a month ago. *Dobbs v. Jackson Women's Health Org.,* 597 U.S. ___ (2022) at Part V.A.3 (reiterating the continued validity of precedent on privacy and equal protection from *Griswold v. Connecticut* through *Obergefell v. Hodges*). Just as courts found that *Griswold's* recognition of the right to purchase contraceptives gave rise to the right to display contraceptives in

the public square, the Court's recognition of equal-rights protection for same-sex relationships and diversity of gender expression carries with it the right to depict these forms of expression as an integral part of American civic life.

The precise boundaries of how various media represent sexual expression and identity will doubtless continue to be negotiated through vigorous debate, but one thing is clear: *There is no comic-arts exception to the First Amendment.* The petition's lurid demonization of comics and graphic novels as a unique form of communication has no basis in law. Just as the First Amendment does not allow for judging books – those composed solely of text – because of sentences or paragraphs ripped out of context, it does not discriminate against comics by allowing random readers to ban them because of isolated images. A graphic novel is not obscene merely because it uses pictures to portray what courts already protect for words.

4. Altman has failed to join all necessary parties

In selecting the persons to whom notice of this proceeding will be given, Altman has named a single nationwide bookseller, perhaps as a representative of all persons or businesses who might find themselves on the wrong end of the obscenity declaration that he craves. But Barnes & Noble is not a proxy; this shortcut omits other booksellers and any persons who own the books. The reach of an obscenity ruling goes beyond the named parties here. Code §18.2-384(K) (any person who sells, lends, etc., the book after judgment presumed to have knowledge of obscenity).

Because these persons and businesses may face criminal sanctions if the Court grants the relief requested, they are necessary parties:

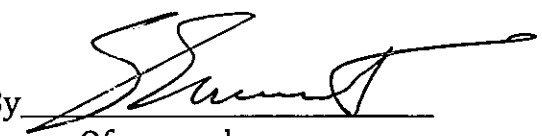
> Where an individual is in the actual enjoyment of the subject matter, or has an interest in it, either in possession or expectancy, which is likely either to be defeated or diminished by the plaintiff's claim, in such case he has an immediate interest in resisting the demand, and all persons who have such immediate interests are necessary parties to the suit.

Raney v. Four Thirty Seven Land Co., 233 Va. 513, 519-20 (1987). And "the judgment in a suit filed in the absence of necessary parties can be set aside as void." *Garner v. Joseph*, 300 Va. 344, 349-50 (2021).

CONCLUSION

Viewed in the proper context – as a whole, and not by isolated passages – *Gender Queer: A Memoir* is not obscene. It thus is not within the statute that Altman mistakenly cites, or even the proper statute to evaluate material that is ostensibly "harmful to juveniles." The Court can and should enter a judgment under Code §18.2-384(J), stating that the book is not obscene.

MAIA KOBABE

By 
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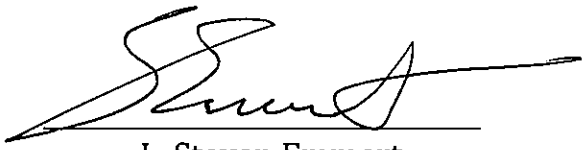
CERTIFICATE

I certify that I served a copy of this brief on all counsel of record by electronic mail this 26th day of July, 2022.



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