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July 26, 2022

Via Hand-Delivery

Tina E. Sinnen, Clerk
Virginia Beach Circuit Court
2425 Nimmo Parkway
Virginia Beach, VA 23456

Re: In re: Gender Queer-Book, A Memoir
Virginia Beach Circuit Court Case No.: CL22-1985

Dear Ms. Sinnen:

Enclosed please find a Memorandum of Law in Support of Demurrer and Motion to Dismiss concerning the above-referenced matter which I ask that you file.

Please note that we are sending a hard copy of this pleading and letter to Judge Baskervill via Federal Express.

Thanking you for your assistance, and with kind regards, I am,

Very truly yours,

Ariel L. Stein

ALS/kls
Enclosure
cc: The Honorable Pamela S. Baskervill (Via Electronic Mail to Norma L. Catoe, Judicial Assistant; Hard copy sent Federal Express)
Kevin E. Martingayle, Esquire (Via Electronic Mail)
Michael K. Lowman, Esquire (Via Electronic Mail)
Timothy Anderson, Esq. (Via Electronic Mail)
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Maura J. Wogan, Esq. (Via Electronic Mail)

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

In re. Gender Queer, A Memoir Case No.: CL22-1985

MEMORANDUM OF LAW IN SUPPORT OF DEMURRER AND MOTION TO DISMISS

Respondent, Oni-Lion Forge, LLC ("Oni-LF"), by counsel, submits this Memorandum in Support of its Demurrer and Motion to Dismiss the Petition for Declaration for Adjudication of Obscenity Pursuant to 18.2-384 of the Code of Virginia. In support of its memorandum, Oni-LF states as follows.

I. PRELIMINARY STATEMENT

Gender Queer, A Memoir, (hereinafter, "*Gender Queer*"), is an autobiography written by Maia Kobabe and published by Oni-LF. This coming-of-age story, told in graphic novel form, details the author's own journey of realizing the author's nonbinary and asexual identity. *Gender Queer* has helped countless youth with their own journey, and has earned several awards, including the 2020 American Library Association Alex Award[1]. Despite its obvious artistic, literary, cultural, and educational value, it has become the target of ideologically-driven attacks throughout the country, including this Petition for Declaration for Adjudication of Obsenity [sic] Pursuant to 18.2-384 of the code of Virginia (hereinafter the "Petition").

This Petition, filed by then-candidate for the United States House of Representatives from Virginia's Second Congressional District, Tommy Altman ("Petitioner"), seeks to adjudicate

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[1] *See* YALSA announces 2020 Alex Awards, ALA News, Jan. 27, 2020 (https://www.ala.org/news/press-releases/2020/01/yalsa-announces-2020-alex-awards); Stonewall Book Awards List, ALA.org, (https://www.ala.org/rt/rrt/award/stonewall/honored). While *Gender Queer* has received many literary awards, one award is noted plainly on the books cover and is part of the Petition.

Gender Queer as obscene for distribution to minors and for a restraining order against the distribution, sale, rent, or loan to minors pursuant to Virginia Code § 18.2-384. At the outset, the Petition is doomed. Nothing in the statute permits the Court to deem a book "obscene" to a subset of Commonwealth citizens. Moreover, the Petition is flawed for even what it does allege. Instead of addressing the literary work as a whole, Petitioner highlights seven pages from the 240-pages of *Gender Queer* that he claims "exert a dominant and perverse theme to promote felonious sexual encounters between minors...." *See* Petition ¶ 6. Even if those seven pages were not taken out of context, which they were, the Petition fails to plead with sufficiency that *Gender Queer* is obscene under Virginia Code § 18.2-384. Under both the statute and well-settled constitutional legal precedent, the Petition must allege that *Gender Queer*, taken as a whole, has a dominant theme that appeals to the prurient interest of the average citizen of the Commonwealth. The Petition, as a matter of law, fails to do so.

However, this Petition, and the statute upon which it relies, is procedurally and substantively deficient, as well as unconstitutional. Procedurally, this Petition must be dismissed as Petitioner failed to make proper service of process, allege standing, and join all the necessary parties. No effort was made to name in the Petition, any—much less all—participants in the commercial distribution of *Gender Queer*. This failure is further compounded by the statute's patently unconstitutional scheme permitting all interested and necessary parties be bound by an order of a court merely by publishing a notice in a local newspaper with no showing that notice by publication is the best and only means to afford notice of the proceedings. Finally, the statute is facially unconstitutional as written under controlling First Amendment and Due Process precedent.

The defects in the Petition and the authority upon which it relies cannot be rectified by any subsequent amendment, nor should the Petition be allowed to proceed past preliminary motions. Based on the previously filed Demurrer and Motion to Dismiss, and the following brief in support thereof, the Petition must be dismissed.

II. BACKGROUND AND PROCEDURAL HISTORY

A. The Statute.

Virginia Code § 18.2-384 provides that any Commonwealth Attorney or Virginia citizen who "has reasonable cause to believe that any person is engaged in the sale or commercial distribution of any obscene book" may "institute a proceeding" in a Virginia circuit court requesting "adjudication of the obscenity of the book." The Petitioner must list the names and addresses of the author, publisher, and all other persons interested in its sale or commercial distribution. § 18.2-384(C). The court then must examine the book and determine whether there is "probable cause" to believe the book is obscene. § 18.2-384(C). If probable cause exists, it must issue a show cause order, which is to be published in "a newspaper of general circulation within the county or city in which the proceeding is filed." § 18.2-384(D). After the show cause order, the court may issue a temporary restraining order against the sale of the book alleged to be obscene, after providing four days' notice to the interested parties. § 18.2-384(E). Upon issuance of a temporary restraining order, anyone who sells or distributes the book or holds the book with the intent to sell or distribute it is assumed to "have knowledge that the book is obscene." § 18.2-384(K).

If a party answers the show cause order, the court must order a "prompt hearing," where it hears evidence and considers the following factors:

> 1. The artistic, literary, medical, scientific, cultural and educational values, if any, of the book considered as a whole;

> 2. The degree of public acceptance of the book, or books of similar character, within the county or city in which the proceeding is brought;
> 3. The intent of the author and publisher of the book;
> 4. The reputation of the author and publisher;
> 5. The advertising, promotion, and other circumstances relating to the sale of the book;
> 6. The nature of classes of persons, including scholars, scientists, and physicians, for whom the book may not have prurient appeal, and who may be subject to exception. . .

§ 18.2-384(H).

If the court ultimately determines that a book is "obscene," it becomes unlawful for any person to "publish, sell, rent, lend, transport in intrastate commerce or commercially distribute or exhibit the book" throughout the Commonwealth. As with the issuance of a TRO, this would also impute to anyone involved in the commercial distribution process of the work and libraries with "knowledge that the book is obscene." § 18.2-384(K)For purposes of the statute, Virginia Code § 18.2-372 defines "obscene" as:

> [1] that which, considered as a whole, has its dominant theme or purpose as 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 the 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.

This statute mirrors the "*Miller* test" of obscenity articulated by the U.S. Supreme Court in *Miller v. California*, 413 U.S. 15 (1973).

B. The Book: *Gender Queer, A Memoir.*

Gender Queer is an illustrated autobiographical memoir relaying the experiences the author encountered growing up in today's world as an asexual and nonbinary person through childhood to adulthood. *Gender Queer* has been in publication since 2019. *See* Petition Ex. C1. Since then, *Gender Queer* has won no fewer than twelve awards. *Gender Queer* is currently on

the shelves of countless libraries and bookstores across the United States. *Gender Queer* has also received accolades from a number of organizations, including the School Library Journal, Publishers Weekly and the Journal of the American Medical Association ("JAMA"). As JAMA concluded in recognizing *Gender Queer* as part of its "Graphic Medicine: The Best of 2019:"

> "*Gender Queer* explains gender nonbinariness in highly personal, intimate, patient, and deliberate ways. In light of the high rate of depression and suicide by nonbinary individuals *Gender Queer* ... offers health professionals a valuable opportunity to understand the experiences of patients, like Kobabe, who are in our practices and waiting rooms longing to be recognized and understood."[2]

C. The Petition.

On April 28, 2022, Petitioner Tommy Altman filed his Petition for Declaration for Adjudication of Obscenity Pursuant to 18.2-384 of the Code of Virginia requesting a declaration that *Gender Queer* was "obscene for distribution to minors" and a restraining order "against distribution, sale or loan to minors pursuant to 18.2-384-(J) of the Code of Virginia. As part of the Petition, Petitioner named only the author, Maia Kobabe, and the Publisher, Oni-LF.[3]

On May 18, 2022, the Court issued a show cause order finding that there was probable cause to believe that *Gender Queer* was obscene "for unrestricted viewing by minors."[4] Shortly thereafter, Petitioner filed a motion for a temporary restraining order without serving or noticing Oni-LF or Kobabe. The TRO motion sought an order prohibiting the sale or distribution of

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[2] The value of this book cannot be understated, especially when considering that 42% of LGBTQ youth seriously considered attempting suicide in the past year, including more than half of transgender and nonbinary youth. *See* The Trevor Project National Survey on LGBTQ Youth Mental Health 2021 (https://www.thetrevorproject.org/survey-2021/?section=Introduction).

[3] The Petition incorrectly refers to Oni-Lion Forge, LLC as "Lion Forge, LLC."

[4] There is nothing in the record that reflects how the "probable cause" determination was derived. There was no transcribed hearing or anything to reflect that the entirety of the book was available to the Court, much less reviewed.

Gender Queer to minors. Only Barnes & Noble and the Virginia Beach School Board were served with and named in the TRO.

Oni-LF subsequently filed its Demurrer and Motion to Dismiss, requesting this Court dismiss the Petition with prejudice and vacate the show cause order. This Memorandum is being filed in support of Oni-LF's Demurrer and Motion to Dismiss.

III. ARGUMENT

A. The Petition Fails to Allege a Cause of Action and Demurrer Must Be Granted.

First, the Petition is brought under Virginia Code § 18.2-384 and seeks a determination that *Gender Queer* is "obscene as to minors." However, Virginia Code § 18.2-384 does not afford the relief Petitioner seeks and fails to bestow the court with subject matter jurisdiction to do so. Second, even if the statute did allow the Court to fashion the relief Petitioner requests, the Petition fails to allege facts that can support a conclusion that *Gender Queer* is "obscene" as defined in the statute and under the Constitutions of the United States and the Commonwealth. For these reasons alone, the court should grant Oni-LF's demurrer, dismiss the Petition with prejudice and vacate the show cause order.

1. Legal Standard for a Demurrer and Motion to Dismiss.

"A demurrer accepts as true all facts properly pled, as well as reasonable inferences from those facts." *Steward v. Holland Family Props., LLC,* 284 Va. 282, 286, 726 S.E.2d 251, 253–54 (2012). A demurrer, however, does not admit "inferences or conclusions from facts not stated." *Arlington Yellow Cab Co. v. Transp., Inc.*, 207 Va. 313, 319, 149 S.E.2d 877, 881 (1966) (internal quotation marks and citation omitted). "The purpose of a demurrer is to determine whether a motion for judgment states a cause of action upon which the requested relief may be granted." *Tronfeld v. Nationwide Mut. Ins. Co.*, 272 Va. 709, 712, 636 S.E.2d 447, 449 (2006) (citing *Welding, Inc. v. Bland County Serv. Auth.*, 261 Va. 218, 226, 541 S.E.2d 909, 913

(2001)). "To survive a challenge by demurrer, a pleading must be made with "sufficient definiteness to enable the court to find the existence of a legal basis for its judgment." *Eagle Harbor, L.L.C. v. Isle of Wight County,* 271 Va. 603, 611, 628 S.E.2d 298, 302 (2006) (internal quotation marks omitted).

2. Virginia Code § 18.2-384 Does Not Apply Here.

The Petition is facially deficient in that it only alleges that *Gender Queer* is obscene as to minors and seeks an order banning access to the book to minors within the Commonwealth. As Petitioner alleges, this proceeding was commenced under Virginia Code § 18.2-384.

Virginia Code § 18.2-384 does not afford such a vehicle. The plain text of Virginia Code § 18.2-384 permits the courts of the Commonwealth to determine only whether a publication is obscene under the standards of the Commonwealth as a whole, not a subset of the citizens of the Commonwealth.[5] If a publication is deemed obscene, then, and only then, may a court permit access to a subset of the community based on special circumstances including educational and scientific need. This statutory provision does not bestow upon a person any cognizable cause of action that would ban a minor's access to publications within the Commonwealth. Tellingly, the Petition is devoid of any allegations that *Gender Queer* can be considered obscene for the entirety of the adult population of Virginia Beach, much less the entirety of the Commonwealth, as Virginia Code § 18.2-384 requires.

[5] The Court, in its letter dated June 27, 2022, inquired into what is the appropriate legal standard to determine the relevant community standards that should govern these proceedings. While the statute identifies the city or county where the proceeding is filed, the statutory standard violates the First Amendment and Due Process requirements. Any finding of obscenity under the statute will impact the Commonwealth in its entirety. The Court need not reach that question for purposes of this motion. Oni-LF will brief this issue, when, and if, the issue ever becomes ripe for adjudication.

Here, in stark contrast, the Petition alleges that *Gender Queer* has "no serious literary, artistic, political, or scientific value to minors and therefore should be deemed obscene as to be viewed unrestricted by minors pursuant to 18.2-374 of the Code of Virginia." Petition at ¶ 6 (emphasis added). However, Virginia Code § 18.2-372 neither mentions minors nor creates a mechanism whereby the scope of a literary work may be deemed as obscene as it pertains to only specific groups. Rather, Virginia Code § 18.2-384 requires this Court to consider whether the book is considered "obscene" in its entirety and unfit for distribution to and consumption by all persons. *See* § 18.2-384.

It is no accident that the General Assembly did not draft Virginia Code § 18.2-391 in such a manner. To do so, would ignore long-settled U.S. Supreme Court precedent. Indeed, the U.S. Supreme Court has long held that the question of obscenity must be viewed from the perspective of the average person, not the "the effect of an isolated excerpts upon particularly susceptible persons." *Roth v. U.S.*, 354 U.S. 746, 488-89 (1957); *see also Miller v. California*, 413 U.S. 15, 24 (1973) (reciting definition of obscenity found in § 18.2-372 and adopting *Roth*'s language applying the standard of "the average person, applying contemporary community standards"); *Pope v. Illinois*, 481 U.S. 497 500-01 (1987) (finding the proper inquiry is "whether a reasonable person" would consider the work obscene); *Butler v. Michigan*, 352 U.S. 380, 382-83 (1957) (overturning state statute criminalizing distribution of materials that would have "potentially deleterious influence upon youth" reasoning to do so would lead to limiting "the adult population of Michigan to reading only what is fit for children.").

Virginia does have another statute that reaches the question of the access of juveniles to certain materials: Virginia Code § 18.2-391. This separate Virginia Code provision makes it a misdemeanor to knowingly permit minors to access certain works. However, unlike Virginia

Code § 18.2-384, Virginia Code § 18.2-391 is a criminal statute and creates no private right of action to private parties. What the Petitioner seeks here is nothing short of a judicial revision of the General Assembly's grant of power to the courts in Virginia Code § 18.2-384. The Court must decline the Petitioner's invitation. Courts of the Commonwealth may not create a private right of action to enforce a statute. *See Cherrie v. Virginia Health Servs., Inc.*, 292 Va. 309, 315, 787 S.E.2d 855, 858 (2016) ("When a statute is silent, however, we have no authority to infer a statutory private right of action without demonstrable evidence that the statutory scheme necessarily implies it."). Indeed, for the same reasons stated in Barnes and Nobles' brief, this Court lacks subject matter jurisdiction to fashion a right of action or fashion a remedy absent from the text of § 18.2-391.[6] *Jackson v. Fidelity and Deposit Co. of Md.*, 269 Va. 303, 313 (2005) (finding courts cannot add language to statutes or reach a different result under the guise of judicial interpretation).

Thus, the Petition is facially deficient and must be dismissed and the show cause order vacated.

3. Even if Virginia Code § 18.2-384 was Applicable, the Petition Fails to Allege *Gender Queer* is Obscene and Lacks Literary or Educational Merit.

Even if the Petitioner's attempt to invoke Virginia Code § 18.2-384 here was valid, demurrer should still be granted because the Petition fails to allege facts necessary to support the requested relief. The Petition fails for one simple reason: the allegations of the Petition, even if taken as true, fail to establish that the contents of *Gender Queer*, when taken as a whole, are obscene —whether the reader is an adult or a minor.

[6] Oni-LF adopts Section B.3 of Barnes & Noble's brief.

In deciding whether a book is "obscene" under Virginia law, this Court must consider the book ***as a whole*** and its passages ***in context***. *See* § 18.2-384(H)(1); *see also Allman v. Commonwealth*, 43 Va. App. 104, 109, 596 S.E.2d 531, 534 (2004); *Lofgren*, 684 S.E.2d at 226. A work may only be considered obscene if, when read as a whole, the book's dominant theme is "an appeal to the prurient interest in sex" that goes "substantially beyond customary limits of candor" and has no "serious literary, artistic, political or scientific value." *Id.* The same is true with respect to the "harm to minors" standard. *Commonwealth v. Am. Booksellers Ass'n, Inc.*, 236 Va. 168 (1988) ("A publication must be judged for obscenity as a whole, however, and not on the basis of isolated passages.").

Allman is illustrative of this principle. In that case, the Court of Appeals was asked to consider whether a voicemail from the appellant to the opposing lawyer on a case he had filed was considered "obscene" and in violation of Virginia Code § 18.2–427, a statute that makes unlawful the use of "obscene" language in threatening or harassing someone. 596 S.E.2d at 106. The voicemail "contained numerous unflattering characterizations of [the lawyer], referring to him as 'a pussy' or 'puss' twenty times" and the appellant's statement that he believed the lawyer "must be 'squatting to pee' in 'the ladies room' of his law firm 'because appellant believed [the lawyer] is such a pussy." *Id.* In the voicemail, the appellant also said that the lawyer "should become more masculine and courageous by 'growing a set of balls.'" *Id.* The Court found that, although the voicemail contained "references to 'excretory functions or products thereof,'" "[t]hey do not establish that the message, '*considered as a whole*,' either (1) *'[had] as its dominant theme* . . . an appeal to the prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct,. . . excretory functions or products thereof" or (2) *went*

'substantially beyond the customary limits of candor in description or representation of such matters." *Id.* (emphasis in the original).

The Petition itself conveniently identifies only seven pages of a 240-page book. The Petition alleges that these seven pages depict "extreme graphic sexual acts of felonious sexual conduct between minors" that, as a result, allegedly make the book "obscene." *See* Petition at ¶ 5. The seven pages in question are attached as a standalone exhibit to the Petition. *See* Exhibit D. However, the statute and controlling constitutional precedent require this Court to consider the entire 240-page book, not isolated passages taken out of context. The entire book is attached to the Petition as Exhibit A, so the Court must consider it in ruling on a motion to dismiss. *Ward's Equip. v. New Holland N. Am.*, 254 Va. 379, 382 (1997) (finding exhibits attached to a complaint are deemed to be part of that pleading).

A review of the entire book makes clear that its "dominant theme" does not (1) "appeal to prurient interest in sex"; (2) go "substantially beyond the customary limits of candor" or (3) lack "serious literary, artistic, political or scientific value." § 18.2-372. Taken as a whole, and ignoring Petitioner's obvious mischaracterizations, the book simply describes, from adolescence to adulthood, the author's own journey in discovering the author's gender identity and sexuality. The book culminates in the self-realization that Kobabe is nonbinary and asexual. The book offers important life lessons to individuals struggling with their own gender identity, providing examples from Kobabe's own experiences—such as visiting the doctor, getting friends to use preferred pronouns, and selecting clothing for school trips. It explores society's attitudes towards individuals who may decide not to identify with the gender binary and the challenges those individuals face. The book also sends a message to other similarly situated individuals that they

are not alone and offers heartfelt guidance. While the Petitioner may not agree with the book's dominant theme and message, that alone does not warrant a determination of "obscenity."

Moreover, the Petition on its face establishes that *Gender Queer* possesses literary and educational value. The Court need look no further than Exhibits A and C2 attached to the Petition. The first page of Exhibit A identifies one of the most recent awards that Gender Queer received. Exhibit C2 is equally damning to the Petition's viability. Exhibit C2 is a VIRGINIAN PILOT article which details the Virginia Beach School Board's approval of *Gender Queer* to be included in its educational collection for older Virginia Beach students. As alleged in the Petition, the Virginia Beach School Board committee unanimously voted to allow *Gender Queer* to be provided in school libraries. The process concluded in a finding that *Gender Queer* was one of several books that could "provide students with different perspectives and life experiences and support instructional material taught across other class subjects. . . ." Petition at Exhibit C2. While one committee member was hesitant about allowing the book in school libraries, the member ultimately voted to keep the book after hearing a high school student speak "about the benefits of the book helping students who struggle with self-identity." *Id.* In the end, the approval committee formally noted the following recommendations:

- "The graphic novel allows a visual representation of the author's thoughts/feelings in a way that simple text would not convey."
- "Students will see the protagonist is experiencing much of what they do—growing up, feeling awkward in a variety of situations, following the path of education that is laid out for them, and deep-diving on subjects that interest them."
- "[T]he book is a memoir of someone's life and not fiction."
- "For high school level students, this is a great fit. The images are not gratuitous or created in a way that less mature students would use [as] an excuse to poke fun or laugh at. Growing up is such a confusing time, I think it's important to have books like this available for students to relate to."

Id.

Accordingly, Exhibits A and C2 acknowledge that *Gender Queer* is an award inning book, is not obscene as to minors, and possesses serious literary and educational value. Because this article contradicts the Petition's allegations, the Court can ignore those allegations in considering this Motion. *Ward's Equip., Inc.*, 254 Va. at 382 ("a court considering a demurrer may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings").

Moreover, while the Petition alleges that the book contains passages that are sexual in nature and depict female excretory functions, these few pages alone cannot be enough for the Court to deem the book obscene in its entirety. *Allman*, 596 S.E.2d at 535 (finding that while there were references to "excretory functions or products thereof," when taken in context, the message was not "obscene"); *Lofgren*, 684 S.E.2d at 226 (finding that although certain words may have sexual connotations, "the appellant's use of these words 'considered as a whole' and in the context in which they were spoken, did not establish that the communication had 'as its dominant theme or purpose an appeal to the prurient interest in sex."); *Airhart v. Commonwealth*, 1219-05-2, 2007 WL 88747 (Jan. 16, 2007) (unpublished) (finding that although the words used were "sexually explicit" the way they were used was "not erotic and did not have the purpose to appeal to a prurient interest in sex").

That being said, Petitioner's mischaracterizations of the seven pages when viewed in the context of the pages that surround them are blatant. The following summary chart exposes the mischaracterizations, unsupported by the text of the complete book:

PARAGRAPH 5 ALLEGATION	**ACTUAL CONTEXT**
a. "Page 61—Illustrates two minors engaged in sexual intercourse."	Picture depicts two nude men embracing. There is no illustration or accompanying text

	that identifies the two males embracing as minors.
b. "Page 62,63 – Illustrates minors tasting their own sexual fluid."	Referenced pages depict one female friend encouraging author to taste a bodily fluid. The author refuses to do so, reflecting repulsion to the idea.
c. "Page 135—Illustrates minors providing stimulation of genitals with hands."	Picture replicates image contained on classic Greek artifact noting "An elaborate fantasy based on Plato's Symposium." Recreation features one nude bearded adult male and a nude male without facial hair.
d. "Page 128 and 129 Illustrates a naked minor."	The drawings reflect how the author's first medical pelvic examination (which occurred while the author was an adult) made the author feel in the immediate aftermath of the procedure.
e. Page 167 Illustrates two pictures of minors performing fellatio.	Drawings reflect the author's experience as a post-graduate student with another post-graduate student.

Contrary to the Petitioner's baseless assertions, none of the drawings depict sexual acts involving minors. Indeed, several of them depict experiences the author had in college and post-graduate school, including the aftermath of a non-sexual medical diagnostic examination. Taken in context, the pages cited by Petitioner are not arousing and are not meant to be arousing.

Rather, they are biographical and meant to educate the reader on the author's self-discovery. Indeed, the Author does not condone or encourage these acts, much less sexual interaction between minors. Rather, the author consistently concludes that these experiences were not appealing. Thus, despite the descriptive adjectives and adverbs Petitioner attempts to affix to these seven pages, the Petition fails to allege that the book, taken as a whole, has a dominant theme or purpose appealing to the prurient interest. As such, the book cannot be found to be "obscene" as a matter of law. *Lofgren v. Commonwealth*, 684 S.E.2d 223, 225 (Va. 2009) (Virginia Supreme Court determining as a matter of law that a communication was not obscene because it was clear that when 'considered as a whole' and in the context in which they were spoken, did not establish that the communication had 'as its dominant theme or purpose an appeal to the prurient interest in sex"). This Court must reach the same conclusion here.

B. Petitioner has Failed to Identify and Join All Necessary Parties.

Virginia Code §18.2-384(B)(3) requires that a petitioner list "the names and addresses, if known, of the author, publisher, and all other persons interested in [the book's] sale or commercial distribution." There is no effort to identify the distributors or retailers of *Gender Queer* in the Petition. Other than the author and the publisher, the Petition fails to list <u>any</u> of the "other persons interested in [the] sale or commercial distribution" of the subject book, nor does the Petition even make a claim to have engaged in any effort to identify such persons.

This non-compliance with the statute is not trivial. Va. Sup. Ct. R. 3:12 requires the Petitioner to join all necessary and indispensable parties. The Virginia Supreme Court has historically defined "necessary parties" "broadly." *Asch v. Friends of Mt. Vernon Yacht Club*, 251 Va. 89, 90 (1996). "Necessary parties include all persons having a legal or beneficial interest in the subject matter of a suit." *Id.* (internal citations omitted). "The purposes of this

rule are to prevent a multiplicity of litigation and to avoid depriving a person of his property without giving him an opportunity to be heard." *Id.* (internal citations omitted).

> Necessary parties include all persons, natural or artificial, however numerous, materially interested either legally or beneficially in the subject matter or event of the suit and who must be made parties to it, and without whose presence in court no proper decree can be rendered in the cause.

Atkisson v. Wexford Assos., 254 Va. 449, 455 (1997) (internal citations omitted).

A plain reading of Virginia Code §18.2-384(B)(3) and the face of the Petition make it clear that the Petition is legally defective, and this litigation cannot proceed. It is well-established that "[a] court cannot render a valid judgment when necessary parties to the proceedings are not before the court." *McDougle v. McDougle*, 214 Va. 636, 637 (1974) (internal citations omitted).

C. The Statute Violates Due Process Requirements Facially and In Application.

Virginia Code §18.2-384 violates due process in that it permits a legal determination against "any person who publishes, sells, rents, lends, transports in intrastate commerce, or commercially distributes or exhibits the book, or has the book in his possession with intent to publish, sell, rent, lend, transport in intrastate commerce, or commercially distribute or exhibit the book..." *See* Virginia Code §18.2-384(K). Despite the broad impact of Virginia Code §18.2-384, the statute only requires service by registered mail of those identified in the petition, leaving the multitude of impacted persons involved in the commercial distribution of the book with only notice by publication in a local newspaper in the county or city where the matter is filed. The statute does not require any attempt to effectuate other service as a precondition to use of service via publication. *See* Virginia Code §18.2-384(D)(3) and (D)(4).

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise

interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S. Ct. 652, 94 L.Ed. 865 (1950). Similarly, "[i]t is elementary that one is not bound by a judgment in personam resulting from litigation . . . to which he has not been made a party by service of process." *McCulley v. Brooks & Co. Gen. Contractors, Inc.*, 295 Va. 583, 589, 816 S.E.2d 270 (2018) (quotation omitted). "The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant." *Id.*

Courts are increasingly skeptical that service by way of publication is an effective means of providing actual notice to interested parties. Indeed, in *Mullane v. Central Hanover Bank & Trust Co.*—the seminal case on this issue—the U.S. Supreme Court held:

> It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts.... Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed.

339 U.S. at 315. "In subsequent cases, [the] Court has adhered unwaveringly to the principle announced in *Mullane*." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 797, 103 S. Ct. 2706, 77 L.Ed.2d 180 (1983); *see also Schroeder v. City of New York*, 371 U.S. 208, 213, 83 S. Ct. 279, 9 L.Ed.2d 255 (1962) (observing that " 'notice by publication is a poor and sometimes a hopeless substitute for actual service of notice,' and that 'its justification is difficult at best'") (alterations and citation omitted)). Moreover, *Mullane* was decided in 1950, when newspaper readership was high, and thus skepticism of service by order of publication "will likely grow given the precipitous decline in print newspaper readership, the increasing mobility of the

population, and the Internet's ever-expanding ability to locate and communicate with individuals." *Evans v. Evans*, 300 Va. 134, 860 S.E.2d 381, 389 (2021).

The Virginia Supreme Court's recent decision in *Evans* provides a good summary on this subject. 860 S.E.2d 381. In *Evans*, the Court examined Virginia's statutes governing service of process, which allow service by order of publication if other methods of service fail. *See id.* (Examining Code § 8.01-296, Code § 8.01-320). While the Court found that it need not rule on the constitutionality of service by way of newspaper publication, it did explain its criticism of the method and implied that it may not provide defendants' due process. *Evans*, 860 S.E.2d at 388. It found that "[b]ecause statutes authorizing constructive service are in derogation of the common law, 'the order of publication and the statute authorizing it both must be strictly construed.'" *Id.* Indeed, a plaintiff may only rely on this method "in situations in which all other alternatives have been diligently exhausted." *Id.* ("As an 'inferior method' of providing notice, service by order of publication ***may not be employed without a convincing showing that there was no realistic 'ability to get the better service.'***") (emphasis added). Though it declined to broadly rule that the method was unconstitutional, it found the plaintiff's "ineffectual method of constructive service by order of publication . . . reveal[ed] a lack of due diligence rendering the entire exercise inferior to the substituted-service option available under the long-arm statute." *Id. Evans* further highlighted, absent a showing of inability to obtain better service, the extent of jurisdiction that can be achieved through service of publication, "as conferring only in rem, not in personam, jurisdiction, *see, e.g., Cranford*, 208 Va. at 690-91, *Bailey*, 172 Va. at 21-22. *Evans*, 860 S.E.2d at 386.

Here, the statute requires the petitioner to file a petition, and request a show cause order from the judge as to "why the book should not be adjudicated obscene." § 18.2-384(C). That

order shall then be "[p]ublished once a week for two successive weeks in a newspaper of general circulation within the county or city in which the proceeding is filed." § 18.2-384(D). If their names and addresses are known, the author, publisher, "and all other persons interested in the sale or commercial distribution of the book" shall be served by registered mail. *Id.* All interested persons are permitted to answer the petition. If the book is found to be obscene and banned from circulation, the Court's order is enforced against all persons involved in the commercial distribution of the work, as well as all libraries. § 18.2-384(C) & (J). Moreover, if a finding of obscenity is entered, the statute imputes knowledge of the work's status and exposes even the unwary to the risk of prosecution for the illegal distribution of obscenity. § 18.2-384(K). This risk is further compounded by the fact that many interested persons are based outside of the county and the Commonwealth. Accordingly, the statute purports to bind parties that were not personally served by permitting service of the order to show cause by publication in a local newspaper. § 18.2-384(F).

Setting aside that the statute is unconstitutional, Petitioner failed to even attempt the minimal service prescribed in § 18.2-384(D)(3). For example, the Petition contains express references to "Barnes and Nobel" (sic) and Amazon. However, Petitioner neglected to include them in the Petition as respondents or the Order to Show Cause as known interested parties. *See* Petition ¶ 6. *See* Order to Show Cause.

Petitioner has failed to establish personal jurisdiction over any person who publishes, sells, rents, lends, transports in intrastate commerce, or commercially distributes or exhibits the book, or has the book in his possession with intent to publish, sell, rent, lend, transport in intrastate commerce, or commercially distribute or exhibit the book. Tellingly, the only litigants in this proceeding other than the author and Oni-LF are Barnes & Noble and the Virginia Beach

School Board. Those parties were named in the motion for TRO and served via registered mail, even though they were not named in the Petition or Order to Show Cause. Simply put, the statute and the proceedings thus far do not meet the requirements of *Evans* and fail to provide a means that is reasonably calculated to provide notice to all impacted parties, exposing them to potential criminal prosecution based on knowledge the statute imputes on them without any actual notice. *See* § 18.2-384(K).

This runs afoul of the principles of due process, and thus, the statute is unconstitutional both facially and as applied under both the United States and Virginia Constitutions.

D. Petitioner has Failed to Allege Facts Sufficient to Confer Legal Standing.

The Petition must be dismissed because the Petitioner has failed to allege legal standing. To establish standing, a complaining party seeking relief "must allege facts demonstrating a particularized harm to some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally." *Friends of the Rappahannock v. Caroline County Bd. of Supervisors*, 286 Va. 38, 49 (2013) (internal citations and quotation marks omitted) (affirming circuit court dismissal on demurrer where purportedly aggrieved parties failed to allege facts sufficient to confer standing).

Conclusory allegations that a party is "aggrieved" or has the "right" to proceed are insufficient. "Indeed, no one would suggest that a person can be awarded relief against a defendant based on a complaint asserting a claim belonging to another." *Va. Marine Res Comm'n v. Clark*, 281 Va. 679, 686 (2011), overruled on other grounds by *Woolford v. Va. Dep't of Taxation*, 294 Va. 377 (2017). The Petitioner "must demonstrate that they stand to suffer a particularized harm not shared by the general public." *Friends of the Rappahannock*, 286 Va. at

49, citing *Va. Beach Beautification Comm'n v. Bd. of Zoning Appeals*, 231 Va. 415, 419-20 (1986).

In this matter, Petitioner has not alleged any facts establishing that he has suffered or is likely to suffer any form of harm whatsoever relating to the sale or availability of *Gender Queer*. Petitioner's failure to allege standing is so complete that he failed to even allege what is required in the plain text of the statute. Virginia Code §18.2-384 (Petitioner required to allege that he is a citizen of the Commonwealth). Even though Virginia Code §18.2-384 purports to allow any citizen to file suit, this does not confer standing on any citizen of the Commonwealth. The cases from the Virginia Supreme Court are clear in requiring that demonstrating the existence of an actual and meaningful interest in the subject matter of the litigation is a prerequisite to being entitled to maintain a legal action. Statutory provisions cannot be interpreted to override the fundamental requirement that courts exist for the resolution of actual controversies between parties with a legitimate interest in the outcome. Petitioner has not alleged any such interest and there is no reason to believe that he can do so apart from any interest that he may have as a general member of the public. As the Supreme Court has made plain, any interest he asserts must be "different from that suffered by the public generally." *Va. Marine Res. Comm'n,* 281 Va. at 687.

E. Virginia Code § 18.2-384 Violates Free Speech Protections Under Constitutions of the United States and the Commonwealth.

In support of its argument that the statute is unconstitutional both facially and as-applied, Oni-LF adopts and incorporates herein the arguments made by Barnes & Noble Booksellers, Inc., in sections C and D of its Brief in Support of Motions to Dismiss and Show Cause.

IV. CONCLUSION

For the above reasons, this Court should grant Oni-LF's Demurrer and Motion to Dismiss the Petition and vacate its Show Cause Order. Additionally, it should declare Virginia Code § 18.2-384 unconstitutional both on its face and as applied here under both the United States and Virginia Constitutions.

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CERTIFICATE

I hereby certify that on this 26th day of July, 2022, a true copy of the foregoing was sent via electronic mail to Timothy Anderson, Esq., Kamala H. Lannetti, Deputy City Attorney, Dannielle Hall-McIver, Associate City Attorney, Craig T. Merritt, Esq., David B. Lacy, Esq., L. Steven Emmert, Esq., Jeff Trexler, Esq., Robert Corn-Revere, Esq., Laura R. Handman, Esq., Linda Steinman, Esq., Amanda Levine, Esq., Edward H. Rosenthal, Esq., Nichole Bergstrom, Esq., Molly G. Rothschild, Esq. and Maura J. Wogan, Esq.

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