VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

In re: A Court of Mist and Fury	**Case No. CL22-1984**
In re: Gender Queer, A Memoir	**Case No. CL22-1985**

Barnes & Noble's Brief in Support of
Motions to Dismiss and Vacate Orders to Show Cause

Barnes & Noble Booksellers, Inc. ("Barnes & Noble"), by counsel, submits this brief in support of its motions to dismiss the *Petitions for Declaration for Adjudication of Obsenity* [sic] *Pursuant to 18.2-384 of the Code of Virginia* filed on April 28, 2022 ("Petitions"), and to vacate the *Orders to Show Cause Pursuant to 18.2-384 of the Code of Virginia* ("Show Cause Orders") entered by the Court on May 18, 2022, in these two cases.

Introduction

The Petitions are not authorized by Virginia Code § 18.2-384, the statute under which they were filed, and fall woefully short of the constitutional standards governing obscenity. Although Petitioner seeks to avoid this obvious legal conclusion by substituting a "harmful to juveniles" standard in place of obscenity, that standard does not appear in Virginia Code § 18.2-384. Yet even if it did, the Petitions' allegations remain defective as a matter of well-settled law. *Commonwealth v. American Booksellers Ass'n*, 236 Va. 168, 175-77 (1988). As a consequence, the Petitions should be dismissed with prejudice and the Show Cause Orders vacated.

Petitioner's claims must be understood both in their current and historical contexts. The Petitions exemplify efforts to ban books that have featured prominently in recent Virginia political

campaigns.[1] While most of these controversies have focused on the availability of books in public schools, here, the Petitioner seeks to move beyond just the schools and deploy an antiquated statute to limit access to books generally in bookstores and elsewhere.[2] In doing so, the Petitions ignore well-settled principles of First Amendment law developed over the past seven decades.

In a series of cases beginning in the late 1950s and continuing through the mid-1970s, the Supreme Court defined the constitutional boundaries that limit the concept of obscenity. Before those cases, it was not uncommon for publishers of popular and mainstream books to face the threat of prosecution for publications that contained a few lewd passages or "improper" themes. *See generally* Robert Corn-Revere, THE MIND OF THE CENSOR AND THE EYE OF THE BEHOLDER – THE FIRST AMENDMENT AND THE CENSOR'S DILEMMA 21-25, 40-51 (Cambridge, UK: Cambridge University Press, 2021) (hereinafter "MIND OF THE CENSOR"). Books like LEAVES OF GRASS, by Walt Whitman, LADY CHATTERLY'S LOVER, by D.H. Lawrence, and ULYSSES, by James Joyce, among numerous others, had been prominent targets of obscenity charges. But in 1957, the

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[1] *See, e.g.*, Mark Hand, *Banning Books In Schools Becomes Rallying Cry For VA Republicans*, PATCH (Oct. 12, 2021), https://patch.com/virginia/fallschurch/banning-books-schools-becomes-rallying-cry-va-republicans; Meagan Flynn, *Va. Republican congressional hopefuls pull from Youngkin playbook on education*, WASH. POST (Mar. 14, 2022), https://www.washingtonpost.com/dc-md-va/2022/03/12/virginia-education-congressional-races-youngkin/.

[2] *See* Hannah Natanson, *Books targeted, beyond schools*, WASH. POST, May 21, 2022, at B1, 3; Tim Cushing, *Virginia Attorney, Congressional Hopeful File Doomed Lawsuit Against Barnes & Noble Over 'Obscene' Books*, TECHDIRT (May 25, 2022), https://www.techdirt.com/2022/05/25/virginia-attorney-congressional-hopeful-file-doomed-lawsuit-against-barnes-noble-over-obscene-books/. Press reports suggest that the Petitioner plans to challenge numerous other books if this gambit succeeds. *See, e.g.*, Preston Steger, *2 Republicans seek to limit sales of books deemed 'obscene' to minors in Virginia Beach*, 13 NEWS NOW (May 20, 2022), https://www.13newsnow.com/article/news/politics/2-virginia-republicans-limit-sales-books-obscene-minors/291-c727089e-c2e6-4d7a-afe7-b4aec9f83822 (quoting Petitioner stating, 'We are in a major fight. Suits like this can be filed all over Virginia. There are dozens of books. Hundreds of schools.").

Supreme Court "constitutionalized" obscenity law, subjecting both state and federal prosecutors to rigorous constitutional standards, including the baseline requirement that books be judged not by isolated passages but "as a whole." MIND OF THE CENSOR at 75-78; *Roth v. United States*, 354 U.S. 476, 488-89 (1957). This effectively "ended U.S. prosecutions against literary obscenity" by the mid-1960s. Kevin Birmingham, THE MOST DANGEROUS BOOK – THE BATTLE FOR JAMES JOYCE'S ULYSSES 339 (New York: Penguin Press, 2014).

Since *Roth*, the Supreme Court "has rigorously scrutinized judgments involving books for possible violation of First Amendment rights, and has regularly reversed convictions on that basis." *Kaplan v. California*, 413 U.S. 115, 118 n.3 (1973). This is because "[a] book seems to have a different and preferred place in our hierarchy of values, and so it should be." *Id.* at 119. While the Court confirmed it is theoretically possible for a book to be obscene, it could locate only a single case between the *Roth* decision and *Miller v. California*, 413 U.S. 1 (1973), where such a ruling was made. *Kaplan*, 413 U.S. at 119 n.3. And it set forth the attributes of the type of book that might meet the current test for obscenity. It noted the book under review:

> is made up entirely of repetitive descriptions of physical, sexual conduct, 'clinically' explicit and offensive to the point of being nauseous; there is only the most tenuous 'plot.' Almost every conceivable variety of sexual contact, homosexual and heterosexual, is described. Whether one samples every 5th, 10th, or 20th page, beginning at any point or page at random, the content is unvarying.

Id. at 116-17. Since then, the Court has accepted no cases involving literary obscenity, nor has it found any book to be obscene.

Against this backdrop, the Petitions' fatal flaws stand in bold relief. The Petitions are not validly grounded in Virginia statutory law, but even if they were, they fail even to allege plausible violations of the law. They are mired in obscenity law as it existed before 1957, focusing on a handful of selected passages or themes that offend the Petitioner, but provide no legal basis for the

relief sought. Nothing in the Petitions suggests that the Books could satisfy the standards set forth in *Roth*, *Miller*, or *Kaplan*.

Background

A. The Petitioner

On April 28, 2022, Petitioner, Tommy Altman ("Petitioner"), filed two "Petitions for Declaration for Adjudication of Obsenity" [sic] with the Circuit Court for the City of Virginia Beach (the "Petitions"), in which he sought declaratory rulings that two books—*Gender Queer, A Memoir* and *A Court of Mist and Fury* (together, the "Books")—are "obscene as to minors" pursuant to Virginia Code § 18.2-384. Altman was a candidate for the United States House of Representatives from Virginia's Second Congressional District at the time. Altman lost the Republican primary on June 21, 2022 and is no longer a candidate.[3]

B. The Books

Gender Queer, A Memoir ("*Gender Queer*" or "GQ") by Maia Kobabe is an autobiography told in comic book form that deals with discovering what it means to be nonbinary and asexual. It has won numerous accolades, including the 2020 American Library Association Alex Award and the 2020 Stonewall Book Award.[4]

A Court of Mist and Fury ("ACOMF") by Sarah J. Maas is the second book in an eight-part series of fantasy-adventure novels. The series has been translated worldwide in thirty-seven

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[3] *See* Virginia Second Congressional District Primary Election Results, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/interactive/2022/06/21/us/elections/results-virginia-us-house-district-2.html.

[4] *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#:~:text=The%202020%20Alex%20Award%20winners,of%20Simon%20%26%20Schuster%2C%20Inc.; Stonewall Book Awards List, ALA.ORG, https://www.ala.org/rt/rrt/award/stonewall/honored.

languages, and the books—including *A Court of Mist and Fury*—have reached #1 on the *New York Times* best-seller list.[5]

Both Books are sold at Barnes & Noble, a bookseller founded in 1886 that currently operates over 600 retail stores across the United States and through its website *www.barnesandnoble.com*.

C. Virginia's Obscenity Statute

Virginia Code § 18.2-384 is located in Chapter 8 (Crimes Involving Morals and Decency), Article 5 (Obscenity and Related Offenses), of Title 18.2, which is the Code Title setting forth "Crimes and Offenses Generally." It provides that a Virginia citizen can institute a proceeding in a Virginia circuit court for an "adjudication of the obscenity of [a] book." "Obscenity" for purposes of Article 5 is defined as a work:

> 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 which goes substantially beyond customary limits of candor in description or representation of such matters and which, taken as a whole, does not have serious literary, artistic, political or scientific value.

Va. Code. § 18.2-372. Section 18.2-374 makes it unlawful for any person knowingly to, among other things, "print, copy, manufacture, produce or reproduce any obscene item for purposes of sale or distribution," or "publish, sell, rent, lend, transport in intrastate commerce or distribute or exhibit any obscene item."

Section 18.2-384 creates a multi-step process to obtain a judicial declaration of obscenity. First, a petitioner must file a petition with the court, directed against the book, alleging the book's obscene nature, and listing the names and addresses of the author, publisher, and all other persons

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[5] *See* Best Sellers: Young Adult E-Book, N.Y. TIMES (June 19, 2016), https://www.nytimes.com/books/best-sellers/2016/06/19/young-adult-e-book/.

interested in its sale or commercial distribution. *Id.* § 18.2-384(B). The court must examine the book alleged to be obscene and, if it finds "probable cause" to believe the book is obscene, must issue an order to show cause why the book should not be adjudicated obscene. *Id.* § 18.2-384(C). After the show cause order, upon four days' notice to the interested parties, the court may issue a temporary restraining order ("TRO") against the sale of the book alleged to be obscene. *Id.* § 18.2-384(E). Once a TRO issues, "any person" who sells or distributes the book or holds the book with an intent to sell or distribute it is deemed to "have knowledge that the book is obscene." *Id.* § 18.2-384(K). If any party files an answer to the order to show cause, the court must order a "prompt hearing" for the adjudication of obscenity. *Id* § 18.2-384(H).

At the hearing, the court must consider evidence on such matter as the artistic, literary, and educational values of the book "considered as a whole," the degree of public acceptance of the book and similar books, the intent and reputation of the author, and the book's advertising. *Id.* § 18.2-384(H)(1). Following presentation of this evidence, the court must make a written determination as to whether the book is obscene. *Id.* § 18.2-384(I). If it is deemed "obscene," the court can, "in its discretion, [] except from its judgment a restricted category of persons to whom the book is not obscene," such as "scholars, scientists, and physicians." *Id.* § 18.2-384(G), (H)(6), (J). A finding of obscenity can be used to establish scienter in other cases. *Id.* § 18.2-384(M).

D. The Present Case

The Petitions were filed on April 28, 2022. Although Barnes & Noble was not listed as a party or served with the Petitions, it was listed as one of the distributors of the Books. *See* GQ Pet. ¶ 3 (incorrectly identified as "Barnes and Nobel"); ACOMF Pet. ¶ 3 (same). The Court issued the Show Cause Orders to the author and publisher of the Books on May 18, 2022, finding that

there was "probable cause to believe that the [Books] [are] obscene for unrestricted viewing by minors." *See* Show Cause Orders.

That same day, Petitioner filed a motion for a TRO, requesting that the Court prohibit the sale or distribution of the Books to minors. *See* GQ Mot. for TRO at 1; ACOMF Mot. for TRO at 1. On May 25, 2022, Barnes & Noble was served with notices of a June 2, 2022 TRO hearing. Barnes & Noble promptly filed a letter seeking a status conference, enumerating the myriad defects and grave constitutional concerns raised by the Petitions. On June 1, the Court canceled the TRO hearing and set a status conference for July 13, 2022. Thereafter, counsel for the parties conferred and agreed to proposed scheduling orders for the resolution of initial dispositive motions, which the Court entered on June 30, 2022.

Argument

The Petitions should be dismissed and the Show Cause Orders should be vacated because: (1) this Court lacks subject matter jurisdiction to order the requested relief; (2) the Petitions are fatally defective because they fail to plead either a statutory or constitutionally-sound basis for the requested relief; (3) Virginia Code § 18-2-384 is facially unconstitutional because it authorizes prior restraint of presumptively constitutionally-protected speech, presumes scienter contrary to clear First Amendment precedent, and violates due process by authorizing orders binding-non-parties; and (4) Virginia Code § 18-2-384 is unconstitutional as applied to Barnes & Noble.

A. This Court Lacks Jurisdiction to Order the Requested Relief

It is axiomatic that the ability of a court to grant relief derives from "the power granted by the sovereignty creating the court to hear and determine controversies of a given character." *Bd. of Supervisors of Fairfax Cty. v. Bd. of Zoning Appeals of Fairfax Cty.*, 271 Va. 336, 344 n.2 (2006) (citing *Morrison v. Bestler*, 239 Va. 166, 169 (1990), and quoting *Farant Inv. Corp. v.*

Francis, 138 Va. 417, 427-28 (1924)). No Virginia law vests this Court with jurisdiction to rule that books are "obscene for unrestricted viewing by minors," as the Petitions demand. GQ Pet. ¶ 6; *see also* ACOMF Pet. Prayer for Relief (requesting that the court hold that the Book is "obscene for distribution to minors"). Subject matter jurisdiction—or "the authority granted through constitution or statute to adjudicate a class of cases or controversies"—is a necessary prerequisite for this Court to issue a valid judgment. *Morrison*, 239 Va. at 169. Such jurisdiction "cannot be waived or conferred on the court by agreement of the parties," and a "defect in subject matter jurisdiction cannot be cured by reissuance of process, passage of time, or pleading amendment." *Id.* at 169-70.

Petitioner is attempting to manufacture jurisdiction here by mashing together two statutes that employ different legal standards, that authorize different remedies, and that are subject to different levels of constitutional scrutiny. The Petitions were filed pursuant to Virginia Code § 18.2-384, which establishes a judicial procedure only for a determination regarding the circulation of "obscene" materials, a term defined in Virginia Code § 18.2-372.[6] Petitioner alleges that the Books have "no serious literary, artistic, political, or scientific value *to minors*," *see* GQ Pet. ¶ 6 (citing Va. Code § 18.2-374) (emphasis added); ACOMF Pet. ¶ 6 (same), but the term "minors" appears nowhere in Virginia's obscenity statute. The terms "obscene" or "obscenity" are used eighteen times in Section 18.2-384, while the term "harmful to juveniles" is nowhere to be found. *See generally* Va. Code § 18.2-384. Thus, by its plain terms, Section 18.2-384 applies only to adult obscenity as defined in *Miller v. California*, 413 U.S. at 24 (measured by the "average

[6] The Petitions also cite Section 18.2-374 in their request for relief, which relates to the "Production, publication, sale, possession, etc., of ***obscene*** items." Va. Code §18.2-374 (emphasis added).

person"). Nothing in Virginia Code § 18.2-384 permits this Court to fashion a ruling that a book is obscene only as to juveniles.[7]

Material deemed "harmful to juveniles" under Virginia law is governed by a different statute, Virginia Code § 18.2-391, which makes it a misdemeanor to knowingly permit juveniles to examine and peruse books containing "detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse." That law contains no provision that would authorize this Court to preemptively adjudicate a book "harmful to juveniles." Consequently, Virginia Code § 18.2-391 simply cannot be invoked through a petition to the Circuit Court against a book. This is because the subjects over which this Court has jurisdiction are "determined only by the legislature," and a statute "has no application where the court has no jurisdiction over the subject matter before it." *Lucas v. Biller*, 204 Va. 309, 312-313 (1963).

This Court's jurisdiction to make a "harmful to juveniles" determination cannot be created by implication. "Courts cannot 'add language to the statute the General Assembly has not seen fit to include.'" *Jackson v. Fid. & Deposit Co. of Md.*, 269 Va. 303, 313 (2005) (quoting *Holsapple v. Commonwealth*, 266 Va. 593, 599 (2003)). Nor can the Court "accomplish the same result by judicial interpretation." *Jackson*, 269 Va. at 313 (quoting *Burlile v. Commonwealth*, 261 Va. 501, 511 (2001)). As noted, Virginia Code § 18.2-384 makes reference only to findings of "obscenity,"

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[7] Although the Petitions make reference to Section 18.2-384(J), *see* GQ Pet. at 2; ACOMF Pet. at 3, this does not empower the Court to create a remedy based on a "harm to juveniles" standard. Section 18.2-384(J) provides that the court has discretion to exempt from any obscenity finding "a *restricted category of persons* to whom the book is not obscene" (emphasis added). This does not create a separate standard for "harmful to minors" material. The statute lists "scholars, scientists, and physicians" as examples of those who may fall in such "restricted categories," all of whom are specialized subsets of adults. Va. Code § 18.2-384(H)(6). It would be inconsistent with the statutory scheme if "all adults" could be deemed a "restricted category." *See Andrews v. Ring*, 266 Va. 311, 319 (2003) (explaining that the meaning of "words in a statute may be determined by reference to their association with related words and phrases").

not "harmful to juveniles," and "the mention of a specific item in a statute implies that other omitted items were not intended to be included within the scope of the statute." *Smith Mountain Lake Yacht Club, Inc. v. Ramaker*, 261 Va. 240, 246 (2001); *see also Halifax Corp. v. First Union Nat'l Bank*, 262 Va. 91, 100 (2001) ("[W]hen the General Assembly includes specific language in one section of a statute, but omits that language from another section of the statute, we must presume that the exclusion of the language was intentional.").

These rules of statutory construction apply with particular force in this case, where Petitioner is invoking a criminal law in seeking to restrict presumptively protected speech. This is because penal statutes "are to be strictly construed against the Commonwealth and in favor of the citizen's liberty." *Martin v. Commonwealth*, 224 Va. 298, 300 (1982); *Wade v. Commonwealth*, 202 Va. 117, 122 (1960) ("It is a cardinal principal of law that penal statutes are to be construed strictly against the State and in favor of the liberty of a person."). "Such statutes may not be extended by implication; they must be applied to cases clearly described by the language used." *Martin*, 224 Va. at 300.

B. The Petitions Are Facially Defective

Apart from the case-dispositive question of this Court's jurisdiction, the Petitions should be dismissed because they are facially defective as a matter of law.

1. The Petitions Fail to Plead Any Statutory Basis for the Relief Requested

In order to survive a motion to dismiss, a party bringing a lawsuit must plead factual allegations "with sufficient definiteness to enable the court to find the existence of a legal basis for its judgment." *A.H. ex rel. C.H. v. Church of God in Christ, Inc.*, 297 Va. 604, 613 (2019) (citation and internal quotation marks omitted). As a corollary to the jurisdictional argument above, the Petitions are facially defective because they fail to plead a statutory basis for providing the

requested relief. Additionally, their factual allegations, even if accepted as true, provide no legal basis for restricting distribution of the Books.

The Petitions cite no provision of Virginia law that authorizes a court to declare that a book is "obscene for distribution to minors." They were filed pursuant to Virginia Code § 18.2-384, but that statute does not empower the Court to adjudicate that a book is "obscene for distribution to minors" or issue a restraining order on that basis. Instead, that statute only applies to "obscene" books, and the Petitions do not assert that the Books are "obscene" as defined in Section 18.2-372 (*i.e.*, that which, "considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex"). Accordingly, the Petitions should be dismissed because they cite no legal basis for the Court to declare the Books are "obscene as to minors."

2. The Petitions Fail to Plead Any Constitutional Basis for the Relief Requested

Beyond the lack of an appropriate statutory framework for their claims, the Petitions suffer from a more fundamental flaw. Even if the Petitions had properly invoked Virginia Code § 18.2-384 to seek a finding that the Books are obscene for all readers, and even if all the Petitions' factual assertions were accepted as true, they fail to plead facts that could support a finding that either of the books meets the test for obscenity.

The Petitions focus on a few selected portions of *Gender Queer* and *A Court of Mist and Fury*. Pointing only to those passages, Petitioner asks this Court to determine that they alone support findings that the Books "should be deemed obscene as to be viewed unrestricted by minors pursuant to 18.2-374 of the Code of Virginia." GQ Pet. ¶¶ 5-6. *See also* ACOMF Pet. ¶¶ 5-7.[8] Specifically, for *Gender Queer*, the Petition highlights seven images from the 240-page memoir.

[8] As noted above, neither Virginia Code Section 18.2-372 nor 18.2-374 includes the "harm to juveniles," but relate only to obscenity.

See GQ Pet. ¶ 5. The Petition regarding *A Court of Mist and Fury* similarly lists only a handful of out-of-context quotes from the 640-page novel. *See* ACOMF Pet. ¶ 5.

The Petitions' allegations, if proven, cannot support an obscenity finding as a matter of law. By focusing entirely on selected passages and their assumed effect on minors, the Petitions are explicitly premised on a concept of obscenity the Supreme Court *rejected* in 1957. Before then, "[t]he early leading standard for obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons." *Roth*, 354 U.S. at 488-89 (citing *Regina v. Hicklin*, (1868) L.R.3 Q.B. 360). It is this outmoded obscenity standard, borrowed from Victorian England, on which the Petitions rely. *See* ACOMF Pet. ¶¶ 4-7 ("The book contains pages of extreme sexual conduct not suitable for children as young as 10 years old."); GQ Pet. ¶¶ 4-7. But as the Court held in *Roth*, "[t]he *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press." 354 U.S. at 489.

Since *Roth*, the test for determining obscenity asks, "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." *Id.* In *Miller v. California*, 413 U.S. at 24, the Court further explained the test for obscenity is "limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sex in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *See also Pope v. Illinois*, 481 U.S. 497, 500-01 (1987) (explaining that the proper inquiry is "not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole").

The Petitions do not plead that the Books "appeal to the prurient interest in sex" when considered as a whole, "portray sex in a patently offensive way," or lack "serious literary, artistic, political or scientific value." Nor could they. *Gender Queer* is an autobiographical book about the author's journey of self-identity as a nonbinary and asexual individual. It deals with weighty topics, including how to come out to family members and friends and the experience of going through puberty when one does not identify as a male or female. *A Court of Mist and Fury* is part of a best-selling series of fantasy novels that re-interpret and merge fairy tales and Greek mythology.

At most, the Petitions aver that sexual content is a small part of both Books. Such allegations are far from sufficient under the governing standard. This is because "sex and obscenity are not synonymous." *Roth*, 354 U.S. at 487. The Court has made clear repeatedly that "[t]he portrayal of sex, *e.g.*, in art, literature, and scientific works, is not itself sufficient reason to deny the material the constitutional protection of freedom of speech and press." *Id.* This follows from the recognition that sex is "a great and mysterious motive force in human life [that] has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." *Id.* Thus, it is constitutionally insufficient for Petitioner merely to point out that the Books contain some passages that depict or describe sex. *See, e.g., Lofgren v. Commonwealth*, 55 Va. App. 116, 121 (2009) (when considered "as a whole" allegations focusing on particular sexual references deemed "insufficient to permit a reasonable trier of fact to conclude the references were obscene").

3. The Petitions Are Defective Even Under a "Harmful to Juveniles" Standard

To be sure, constitutional law recognizes a separate category of material under a "harm to minors" standard that permits restricting access by those under eighteen, *Ginsberg v. New York*,

390 U.S. 629 (1968), but that is not what Virginia Code § 18.2-384 addresses.[9] But even if a "harmful to juveniles" standard could be engrafted onto Section 18.2-384, the Petitions are fatally defective as a matter of law.

Virginia's law governing material deemed "harmful to juveniles" is limited to reach only "borderline obscenity," and has been applied narrowly to avoid running afoul of the First Amendment. *Am. Booksellers*, 236 Va. at 175-76. It uses largely the same three-part test for obscenity set forth in *Miller*, with the proviso that each factor must be evaluated based its application to minors.[10] As with the obscenity standard, it requires consideration of the work as a whole, and is not geared toward the most sensitive members of the population. Thus, "[i]f a work is found to have serious literary, artistic, political or scientific value for a *legitimate minority of normal, older adolescents*, then it cannot be said to lack such value for the entire class of juveniles taken as a whole." *Id.* at 177 (emphasis added). In other words, "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." *Id.* at 176.

By this standard, the Petitions must be dismissed. Petitioner does not plead that the Books are patently offensive or lack value for "normal older adolescents," including 17-year-olds on the cusp of adulthood. Instead, the Petitions allege that *A Court of Mist and Fury* is not "suitable for children as young as 10 years old," ACOMF Pet. ¶ 5, and *Gender Queer* "intentionally targets

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[9] As noted *infra* at 11, Section 18.2-384 deals only with obscenity; the "harm to juveniles" provisions are contained in Virginia Code § 18.2-391, which does not authorize the far-reaching relief sought by Petitioner.

[10] The test under the "harmful to juveniles" statute requires a court to determine whether the challenged materials: (1) predominantly appeal to the prurient, shameful, or morbid interest of minors; (2) be patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and (3) be utterly without redeeming social importance for minors." *Am. Booksellers*, 236 Va. at 175-76.

transgender children." GQ Pet. ¶ 7. Under governing law, however, "even a minority view among reasonable people that a work has value" suffices to forestall an obscenity determination. *Am. Booksellers*, 236 Va. at 177 (quoting *Pope*, 481 U.S. at 506 (Blackmun, J., concurring in part and dissenting in part)). Additionally, and as noted above, the Petitions do not address the Books as a whole, and instead call out a few selected passages and ask this Court to declare them "harmful to juveniles" on that basis. ACOMF Pet. ¶ 5; GQ Pet. ¶ 5. The Petitions' allegations thus fail at the threshold. *Am. Booksellers*, 236 Va. at 175 ("A publication must be judged … as a whole … and not on the basis of selected passages.").

While the "harm to juveniles" standard does not apply in this case for the reasons set forth above, the Virginia Supreme Court's definitive ruling on that standard well illustrates the extent to which the Petitions are out of touch with the law. In *American Booksellers*, the Court not only clarified the governing test, it held that precisely the types of books cited by the Petitions are not "harmful to juveniles," much less obscene.

On certification from the U.S. Supreme Court, it reviewed sixteen books arguably covered by the Virginia law, "including classic literature, health texts, poetry, photography, and pot-boiler novels." *See Virginia v. American Booksellers Ass'n.*, 484 U.S. 383, 391 (1988). The list included titles that have direct analogs to the Books challenged here, including CHANGING BODIES, CHANGING LIVES, AM I NORMAL?, THE NEW OUR BODIES, OURSELVES, WHERE DO BABIES COME FROM?, ULYSSES, and HOLLYWOOD WIVES. *Am. Booksellers*, 236 Va. at 174-75. The Court noted the books "vary widely in merit" but that none "lacks 'serious literary, artistic, political or scientific value' for a legitimate minority of older, normal adolescents." *Id.* at 177.

That was not a close case, and neither is this one. The Court in *American Booksellers* observed there was no need even "to review the books in detail" for it to find that "none of the

books is 'harmful to juveniles' within the meaning of [Virginia] Code §§ 18.2-390 and 391." *Id.* This Court should apply this clear precedent to dismiss the Petitions and vacate the Show Cause Orders.

C. Virginia Code § 18.2-384 is Facially Unconstitutional

While the Petitions are fatally flawed because of jurisdictional and pleading defects, the Court also should dismiss them because the statute upon which they rely—Virginia Code § 18.2-384—is facially unconstitutional. *Toghill v. Commonwealth*, 289 Va. 220, 231 (2015) ("A facially unconstitutional statute is invalid."). *See United States v. Stevens*, 559 U.S. 460, 473 (2010) ("In the First Amendment context ... this Court recognizes 'a second type of facial challenge,' whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'") (citation omitted); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884 (1997). Section 18.2-384 is unconstitutional for at least three reasons.

1. Virginia Code § 18.2-384 Authorizes an Unconstitutional Prior Restraint

Virginia Code § 18.2-384 is facially unconstitutional because it authorizes Virginia courts to issue temporary restraining orders to restrict the distribution of specified books in advance of a final adjudication of obscenity. Section 18.2-384(E) provides that the court "may issue a temporary restraining order against the sale or distribution of the book alleged to be obscene" after a show cause order is issued and upon four days' notice to those potentially affected. The TRO may be issued upon a finding of probable cause that the challenged material is obscene, § 18.2-384(C), and before the time expires for filing an answer, § 18.2-384(D)(4), or a hearing on the merits. Va. Code § 18.2-384(H). In addition to direct restrictions on distribution of the affected books while the TRO is in effect, "any person who publishes, sells, rents, lends, transports in

intrastate commerce, or commercially distributes or exhibits the book," or even anyone who possesses the book with intent to distribute it in any way "is presumed to have knowledge that the book is obscene." Va. Code § 18.2-384(K).[11]

Section 18.2-384 thus authorizes the Court to issue a prior restraint—"the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *see also N.Y. Times Co. v. United States* ("*Pentagon Papers*"), 403 U.S. 713, 714 (1971) (per curiam). From the very beginning of free speech jurisprudence, the Supreme Court has recognized that injunctions barring the distribution of publications are classic prior restraints, the prevention of which was a primary purpose of the First Amendment. *Near v. Minnesota*, 283 U.S. 697, 713 (1931). Thus, "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (citations omitted). Likewise, prior restraints conflict with the guarantee of freedom of speech in Article I, § 12 of the Virginia Constitution.[12]

The fact that this Court made a probable cause finding at the outset of this proceeding does not overcome the presumption of invalidity. The Supreme Court has held in numerous cases that "the mere probable cause to believe a legal violation has transpired is not adequate to remove books or films from circulation." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 66 (1989). In

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[11] As discussed in the next section, the presumption of scienter is an independent basis for finding Section 18.2-384 unconstitutional. But the fact that this presumption kicks in as a consequence of a TRO is another reason why the law imposes a prior restraint. *See, e.g., Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

[12] Article I, § 12 of the Virginia Constitution provides "[t]hat the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; . . . that the General Assembly shall not pass any law abridging the freedom of speech or of the press." The Virginia Supreme Court has held that Article I, § 12 is "coextensive with the free speech provisions of the federal First Amendment." *Elliott v. Commonwealth*, 267 Va. 464, 473-74 (2004).

Fort Wayne Books, the State of Indiana filed a civil action against the owner of an adult bookstore, alleging that he had engaged in a pattern of racketeering activity by "repeatedly violating the state laws barring the distribution of obscene books and films." *Id.* at 51. Upon a showing of probable cause, the state obtained a judicial order seizing the allegedly obscene materials. *Id.* The Supreme Court voided the seizure, holding that a probable cause showing was insufficient, and that a publication "may not be taken out of circulation completely until there has been a determination of obscenity after an adversary hearing." *Id.* at 63.

In every context in which this issue has been raised, the Supreme Court has affirmed that a probable cause finding is constitutionally insufficient to support any order that impedes the circulation of expressive materials. *See, e.g., A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 210-11 (1964) (invalidating pre-hearing book seizures); *Blount v. Rizzi*, 400 U.S. 410, 420 (1971) (invalidating mail restrictions based on probable cause); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315-16 (1980) (invalidating nuisance abatement law authorizing business closure prior to final adjudication); *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135, 138-39 (9th Cir. 1980) (same), *aff'd mem.*, 454 U.S. 1022 (1981); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 239-40 (1990) (reaffirming principle that judicial finding of probable cause that speech is obscene is insufficient to justify a restriction).

The Michigan Court of Appeals applied this body of law to vacate a preliminary injunction and to strike down a state law that authorized injunctions or restraining orders to prevent the distribution of allegedly obscene materials prior to a final determination of obscenity. It held that the temporary injunction provision runs contrary to the principles set forth in *Fort Wayne Books*, "and is therefore unconstitutional under the First Amendment." *City of Cadillac v. Cadillac News & Video, Inc.*, 221 Mich. App. 645, 651-53 (1997). This Court should follow the example set by

the Michigan Court of Appeals; it should vacate the Show Cause Orders and declare that Virginia Code § 18.2-384 is unconstitutional on its face.

2. Virginia Code § 18.2-384 Imposes a Defective Scienter Standard

Virginia Code § 18.2-384 is also facially unconstitutional because a finding of obscenity with regard to a particular book binds "*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," and imposes a binding presumption of knowledge on the part of such persons that the designated book is obscene. *See* § 18.2-384(K) (emphasis added). Knowledge is an essential element of the crimes defined in Chapter 8, Article 5 of Title 18.2. *See, e.g.*, Va. Code §§ 18.2-374, 376. Notably, this presumption of knowledge applies to everyone who: (1) distributes a book after a temporary restraining order has been issued and before an adjudication on the merits; or (2) distributes a book after an adjudication on the merits, regardless of whether they have received notice of the order or been made a party to the proceeding. *Id.*

These provisions of Section 18.2-384 violate the First Amendment. To begin with, it is well established that "[s]tatutes that impose criminal responsibility for dissemination of unprotected speech must contain a knowledge requirement." *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 690 (8th Cir. 1992). *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) ("[A] statute completely bereft of a scienter requirement ... would raise serious constitutional doubts."); *Elonis v. United States*, 575 U.S. 723, 734 (2015) ("[W]rongdoing must be conscious to be criminal.") (citation omitted). In this regard, the First Amendment does not permit knowledge or intent to be presumed. *Black v. Commonwealth*, 262 Va. 764, 777-78 (2001) (statutory provision concerning prima facie evidence of intent violates the First Amendment), *aff'd in relevant part, Virginia v. Black*, 538 U.S. 343, 364-65 (2003). *See Elliott v. Commonwealth*,

267 Va. 464, 470-471 (2004) (statutory provision concerning prima facie evidence of intent is invalid on its face).

Contrary to these requirements, anyone who might distribute an affected book named in the Petitions "is presumed to have knowledge that the book is obscene" once a TRO issues or a finding is reached, whether or not they were served with notice or made a party to the proceeding. Virginia Code § 18.2-384(K). The Supreme Court invalidated a similar requirement in *Smith v. California*, 361 U.S. 147 (1959). In that case, the proprietor of a bookstore was jailed for selling a book that, upon judicial investigation, was found to be obscene. The statute under which the proprietor was jailed had no element of scienter—*i.e.*, it did not require the proprietor to have any knowledge of the contents of the book deemed to be obscene. *Id.* at 149. The Court held that this statute was unconstitutional because it would "penalize[e] booksellers, even though they had not the slightest notice of the character of the books they sold." *Id.* at 152. The likely result, the Court explained, was that a bookseller would "restrict the books he sells to those he has inspected, and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature," infringing First Amendment freedoms. *Id.* at 153.

Virginia Code § 18.2-384 paints with the broad brush that the Supreme Court rejected in *Smith*. The statute applies to *all* booksellers and imposes knowledge on those booksellers that a book is obscene even when they were not given actual notice of the court's order. Thus, the statute effectively eliminates all mental elements from the crime of distributing obscene material, tasking booksellers—like Barnes & Noble—with omniscience as to whether a specific book they distribute may be declared obscene and forcing them to censor books for fear of later being found to have violated Virginia's obscenity statute. Because this is precisely the harm the Court sought to eliminate in *Smith*, Virginia Code § 18.2-384 must be declared unconstitutional on its face.

3. Virginia Code § 18.2-384 Violates Due Process

The defective scienter provisions of Virginia Code § 18.2-384 violate not just the First Amendment and Article I, § 12 of the Virginia Constitution but also contravene the Due Process Clause of the Fourteenth Amendment and Article I, § 11 of the Virginia Constitution ("That no person shall be deprived of his life, liberty, or property without the due process of law.").

"It is elementary that one is not bound by a judgment in personam resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969). "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.* The Virginia Supreme Court has recognized as much, repeatedly acknowledging that state courts are powerless to issue judgments against non-parties to a case. *See McCarthy v. Leiser*, No. 190672, 2020 WL 2565903, at *2 (Va. May 21, 2020) ("[A] judgment against a party not before the court in any way will be as utterly void as though the court had undertaken to act when the subject-matter was not within its cognizance.").

Here, Virginia Code § 18.2-384 applies to "any person," who may distribute an obscene book, even if those individuals lack notice that the book has been deemed obscene and did not have an opportunity to participate in the judicial hearings. But because due process prohibits Virginia courts from issuing judgments against non-parties, such a holding would be unconstitutional. For that reason, this Court should dismiss the Petitions and declare that Virginia Code § 18.2-384 violates both the federal Constitution and Virginia Constitution.

D. Virginia Code § 18.2-384 Is Unconstitutional as Applied

Even if this Court does not reach the facial validity of Virginia Code § 18.2-384, it should hold that its application to Barnes & Noble in the present action is unconstitutional.

First, Barnes & Noble is not a party to the underlying Petitions and was never served with either Petition. The Court merely sent Barnes & Noble a Motion for Temporary Restraining Order and Notice of a Hearing regarding *A Court of Mist and Fury* and *Gender Queer*. Consequently, any attempt to bind Barnes & Noble through a judgment would violate its constitutional due process rights. *See Zenith Radio Corp.*, 395 U.S. at 110.

Second, were the Court to issue a temporary restraining order prohibiting the sale of *Gender Queer* or *A Court of Mist and Fury* to juveniles prior to a full evidentiary hearing and based only on the "probable cause" standard, the order would constitute an unconstitutional prior restraint against Barnes & Noble and similarly situated booksellers.[13] In order to remove expressive materials from circulation, this Court must undertake a full adjudication of obscenity, giving all parties an opportunity to be heard and considering the works in their entireties under the tests enumerated by the United States Supreme Court. *See Fort Wayne Books*, 489 U.S. at 66.

CONCLUSION

The Petitions are extraordinary. They ignore the language of the Virginia statutes under which they were filed and assume that developments in First Amendment law over the past sixty-five years never occurred. They are not well-grounded in fact; they are not warranted by well-settled law or a good faith argument for the extension, modification, or reversal of that law. The

[13] As the Court is now aware, the probable cause finding in these cases was made in response to Petitioner's legally flawed conflation of two distinct statutes to create an "obscene for minors" standard that simply does not exist. To leverage a TRO off of that finding would compound the error.

circumstances under which they were filed strongly suggest that their purposes were suspect. They have generated a great deal of public attention, but they are a misuse of legal process that should terminate at the earliest possible stage. The Court should draw a clear constitutional line now.

For the foregoing reasons, Barnes & Noble respectfully requests that the Court dismiss the Petitions and vacate the Show Cause Orders for the reasons explained in this brief. Additionally, it should declare that Virginia Code § 18.2-384 is unconstitutional both on its face and as applied to Barnes & Noble under the United States and Virginia Constitutions.

Dated: July 25, 2022

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I hereby certify that on this 25th day of July 2022, a true and accurate copy of the foregoing was served by electronic mail on the following:

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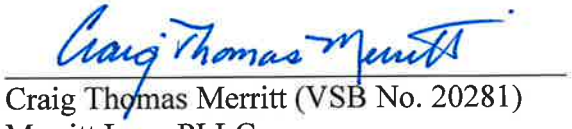

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