Virginia Beach Circuit Court
Civil Division

IN RE: GENDER QUEER, A MEMOIR (Case No. CL22-1985)

&

IN RE: A COURT OF MIST & FURY (Case No. CL22-1984)

PETITIONER'S OMNIBUS BRIEF IN OPPOSITION OF RESPONDENTS' MOTIONS

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I. Introduction

This case concerns two obscene books, as established by a probable cause finding by the Virginia Beach Circuit Court and established Supreme Court standards. The books, *A Court of Mist and Fury* by Sarah J. Maas, and *Gender Queer, A Memoir* by Maia Kobabe, have been previously or are currently still available for unrestricted viewing to minors in Virginia Beach Public School libraries and are actively marketed to children by adults having influence over children, particularly the American Library Association and its librarian members who are employed by Virginia Beach Public Schools and are available for sale commercially to minors.

This brief for both petitions seek limited and identical relief: ***To find both books obscene to minors and to restrict the commercial distribution of these books to minors*** which is specifically authorized by 18.2-384(J) of the Code of Virginia wherein the code allows the Court to find the books obscene by class of individuals:

> "If he finds the book obscene, the court shall order the clerk of court to enter judgment that the book is obscene, but the court, in its discretion, may except from its judgment a restricted category of persons to whom the book is not obscene."

The Petitioner specifically is asking the Court to find both books obscene to minors and issue a restricted category of persons to whom the book is not obscene: **adults**. Because the relief is narrowly tailored to restrict one class – minors – from purchasing materials obscene to minors and does not restrict adults in any way from purchasing or having access to the books, all of the arguments raised in opposition should be denied. Respondents argue a one-size-fits-all obscenity standard for adults and minors should apply and while that has worked in the past as courts have addressed this issue, times have changed, and that standard no longer is effective. Long gone are the days of the minor sneaking a "girly" magazine from their dad's dresser as the sole method of obtaining adult content. Now, the American Librarian Association, school librarians and school

administrators readily make sexual materials available to minors and recommend them for children as young as 12 years old to read in schools without parent knowledge, consent or veto. Petitioner argues the totality of the work standard should be judged with a different lens for minors than adults and that graphically or textually sexual content in the amount contained in both of these books meets the obscenity standard under Virginia Code § 18.2-372 through the eyes of a minor. Sexually charged books marketed to children by trusted adults should be carefully scrutinized as to how a young mind may inappropriately interpret not only the images and words but why a trusted adult is recommending the material to them.

II. Statement of Facts

Respondents have generally alleged five core arguments: (1) the books are not obscene by Supreme Court definitions; (2) Virginia Code § 18.2-384 is unconstitutional; (3) Virginia Code § 18.2-384 improperly grafts Virginia Code 18.2-391 to adopt a "harmful to juveniles" standard; (4) Petitioner does not have standing; and (5) Petitioner's claims are barred by laches. Petitioner will argue in this brief that material obscene to minors can be as little as one sexually charged image such as graphic fellatio or text that describes sexual content.

Petitioner Tommy Altman filed a Petition with the Virginia Beach Circuit Court on April 28, 2022, requesting the Court declare the books "A Court of Mist and Fury" and "Gender Queer, A Memoir" obscene for distribution to minors and for the issuance of a restraining order against distribution, sale, rent, or loan to minors pursuant to § 18.2-384 of the Code of Virginia. On May 18, 2022, the Court entered an Order to Show Cause pursuant to § 18.2-384 of the Code of Virginia after finding probable cause that the aforementioned books were obscene for unrestricted viewing by minors.

Davis Wright Tremaine LLP appeared on behalf of Barnes & Noble Booksellers, Inc. ("Barnes & Noble"); Christian & Barton LLP appeared on behalf of Bloomsbury Publishing, Inc. ("Bloomsbury") and Sarah J. Maas ("Sarah Mass"), filing a Joint Motion to Vacate the Show Cause Order and to Dismiss Petition, and a Joint Plea in Bar; Sykes, Bourdon, Ahern & Levy, P.C. appeared on behalf of Maia Kobabe, filing an Answer; Bischoff Martingayle appeared on behalf of Oni-Lion Forge Publishing Group, LLC ("Oni-LF"), filing an Answer and Demurrer and Motion to Dismiss; Merritt Law, PLLC appeared on behalf of Barnes & Noble, filing a Motion to Dismiss Petition and Vacate Order to Show Cause for both cases CL22-1984 and CL22-1985; and the American Civil Liberties Union Foundation ("ACLU") and American Civil Liberties Foundation of Virginia appeared on behalf of interested persons represented by the American Civil Liberties Union Foundation of Virginia, the booksellers/book-related trade associations, and organizations amicus curiae/interested persons: Movants Prince Books, Read Books, One More Page Books, bbgb tales for kids, American Booksellers for Free Expression, Association of American Publishers, Inc., Authors Guild, Inc., American Library Association, Virginia Library Association, and Freedom to Read Foundation, filing a Motion for Leave to Appear as Amici Curiae or, in the Alternative, to Appear as Persons Interested in the Sale of Commercial Distribution of the Book with Supporting Memorandum, and a Motion to Dismiss and to Vacate Order to Show Cause.

Petitioner makes a narrow request in both Petitions: to protect minors from having unfettered access to obscene books without parental consent so that parents may continue to provide for the best interests of their child. Materials deemed obscene by Supreme Court standards have no place being marketed to children through Virginia Public School libraries and

provided awards by the American Library Association to promote readership as young as twelve years old.

Virginia Beach Public Schools received four months of complaints from concerned parents regarding obscene library books, one of which that included *Gender Queer* due to obscene graphic and vivid illustrations of minors performing fellatio on each other, among other disturbing and obscene images, innuendos, and excessive content that is sexual in nature that consumes the majority of the book. After a thorough review of the complaints regarding obscene books, school officials found that the graphics in *Gender Queer* did not meet the division's "expectations for instructional value,"[1] and in May 2022, the Virginia Beach School Board also reviewed *Gender Queer* and found that the illustrations of "genitalia, bodily functions, and sexual acts" were "pervasively vulgar" and removed *Gender Queer* from public school library shelves.[2]

III. Summary of Argument

> "While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults." *Ginsberg v. New York*, 390 U.S. 629, 640 (1968). -Justice Brennan

Both the Supreme Court and Virginia Code have explicitly recognized that parents have the fundamental right to direct the upbringing, care, and education of their children.[3] It is not

[1] https://www.pilotonline.com/news/education/vp-nw-virginia-beach-banned-books-20220212-ibj5flyrp5hwtfiidipylfgs74-story.html

[2] https://news.yahoo.com/virginia-beach-school-board-group-204700087.html

[3] § 1-240.1 Code of Virginia

only a parent's right to decide what music, video games, television shows, movies, and books are appropriate for their child, it is the parent's responsibility to make these decisions in the best interests of their child. Respondents point to literary awards for the subject materials issued by the American Library Association ("ALA") as a self-serving seal of validation of literary value. However, the ALA has no legal right to override or circumvent a parent's decision to shield their child from "pervasively vulgar" and obscene content by introducing materials into school libraries to create commercial demand for either of the books being challenged in the Petitions. Parents know best their child's physical, educational, mental, and emotional capacity to digest and process information and are in the best place to make the decision for when their child should be introduced to such material. Obscene movies, music, and video games are held to a universal obscenity standard and are regulated by organizations who encourage artists' voluntary participation in open and honest labeling of obscene media to prevent minors from having unfettered access to obscene materials. When rating other media, the process involves collaborating with parents so that parents hold the right to make age-appropriate decisions for their children. The only exception is when it comes to books, because the ALA and Virginia Beach Public Schools refuse to allow parents to make these decisions and markets obscene books to children that include graphic and vivid illustrations of fellatio, sexual intercourse and vivid textual descriptions of abusive sexual encounters by force. The ALA essentially demands that parents be removed of their decision-making power and have no rights or voice regarding when obscene content is provided to their children, in clear defiance with firmly established standards set by Supreme Court and the state of Virginia and virtually every other form of media.

The question of why is the ALA endorsing content in both of these books for children? The ALA is now led by a self-described Marxist and has lost all legitimate credibility:[4]

Many of the arguments by the respondents rely on the "Alex Award" issued by the ALA to legitimize the status of *Gender Queer*, but the ALA has lost its objectiveness if it believes either of these books are appropriate for children as young as twelve years old. The leaders of the ALA have aligned with Marxist ideology as they stamp awards on books that are mentally harmful for children to digest then amplify the harm by encouraging librarian members in Virginia Beach to recommend them to children in school libraries which subsequently creates interest and demand from minors to purchase the books at retail commercial outlets within Virginia Beach. Marketing obscene books to children is harmful, dangerous and against public policy and potentially sets the stage for sexual and pornographic addictions in brains that are not fully formed. The obscenity standard cannot be waived, nor parental rights ignored simply because a book receives a stamp of approval from any organization. Allowing children to have

[4] https://twitter.com/basedlibrarian/status/1514927421820219393?lang=en

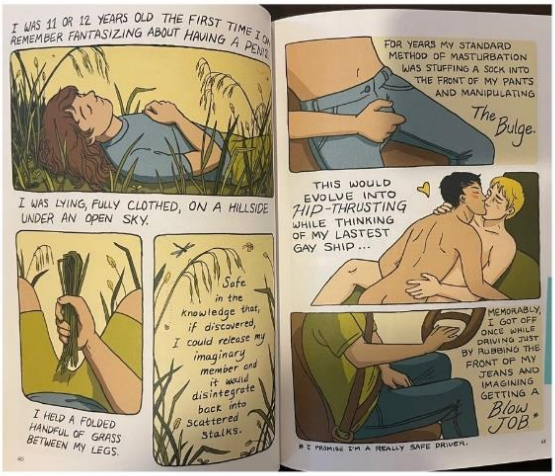
unfettered access to consume obscene materials at school libraries or bookstores without the capacity or wisdom to understand the risk it poses to the undeveloped prefrontal cortex is not permissible under the First Amendment nor allowed by any prior court when addressing this issue.

Society has shifted over the past two decades and books featuring extreme, graphic sexual content that had not traditionally been provided to children not only are in school libraries but are being promoted by ALA member librarians to minors in Virginia Beach. Accordingly, as times have changed, the law must evolve and grant the relief the Petitioner seeks restricting children from having access to obscene materials without the consent of their parent or guardian, just as a minor would be identically restricted when seeking access to an R rated movie.

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

The following pages from *Gender Queer* is one of many examples as to why school officials and board members arrived at the correct conclusion to remove this book from school libraries: "I cannot wait to have your cock in my mouth – I'm going to give you the blow job of your life," followed by a graphic illustration of exactly this encounter and followed later in the book to have graphic images of fellatio. The ALA awarded this book its "Alex Award" and recommended this book for children as young as twelve years old and this book was found in many Virginia Beach High Schools prior to its removal. [5]

[5] The purpose of the Alex Awards is to identify those adult titles that have the most interest and appeal to teens (ages 12 - 18). https://www.ala.org/yalsa/booklistsawards/bookawards/alexawards/alexawardpolicies



These images alone meet the definition of sexually explicit material found various other sections of the Virginia Code when the General Assembly has defined it.[67]

At the time of filing the petition *A Court of Mist and Fury* was found in a Virginia Beach Middle School. It appears the book has been removed based on a recent search.[8] *A Court of Mist and Fury*, while not a graphic novel, still sensualizes abusive sexual relationships, overstimulates young readers with extreme sexual words, phrases, and ideology, and is obscene in the context of

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[6] Author describes being eleven or twelve years old in picture 1, followed by graphic sexual intercourse on the next page. The second picture images depict graphic fellatio.18.2-374.1 defines "sexually explicit material" as "a picture, photograph, drawing…which depicts sexual bestiality, a lewd exhibition of nudity, as nudity is defined in § 18.2-390, or sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390, or a book, magazine or pamphlet which contains such a visual representation."

18.2-374.4(B) defines grooming materials as: a cartoon, animation, image, or series of images depicting a child engaged in the fondling of the sexual or genital parts of another or the fondling of his sexual or genital parts by another, masturbation, sexual intercourse, cunnilingus, fellatio, anilingus, anal intercourse, or object sexual penetration.

[7] 22.1-16.8 of the Code of Virginia incorporates the definition of sexually explicit material in 2.2-827 of the Code of Virginia as "Sexually explicit content" means (i) any description of or (ii) any picture, photograph, drawing, motion picture film, digital image or similar visual representation depicting sexual bestiality, a lewd exhibition of nudity, as nudity is defined in § 18.2-390, sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390, coprophilia, urophilia, or fetishism."

[8] Books in school libraries can be found at this website: https://www.gofollett.com/aasp/ui/pick/pick which indicated A Court of Mist and Fury was in Lynnhaven Middle School at the petition filing date but is no longer there as of the date of this brief.

the content presented to a minor. When the author writes "I leaned down and put him in my mouth," describing an act of fellatio, this coupled with the book being marketed to children in sixth grade in Virginia Beach Public School libraries should shock the conscience of the Court and any adult that understands the dangers of presenting hypersexual material to children. A deeper look into this book reveals an attempt to normalize an abusive relationship between the main male and female characters. *A Court of Mist and Fury* is obscene in nature when viewed through the eyes of a ten-year old child in a sixth-grade public school library in Virginia Beach not just because of the graphic words but also the perverse messaging to normalize abuse. [9]

Both books are commercially available for sale by various booksellers, specifically Barnes and Noble in Virginia Beach, Virginia. Both books rise to the definition of obscenity, specifically for minors twelve to seventeen, due to the extreme level of exposure to adult sexual content contained in these materials that violates the standard of customary limits established in the community by presenting only extreme views on sexually explicit topics found in *Gender Queer*, as well as abusive and intrusive sexual contact by force found in *A Court of Mist and Fury* that serves no literary purpose beyond eliciting gratuitous elicitation of arousal in its audience. Here, this specifically is true because children are more easily influenced from exciting and emotionally charged events due to the lack of experience and ability to contain these extremes. Children are highly susceptible to the influence of such exposures due to the heightened response of the dopamine reward system which causes strong emotional responses to a child's undeveloped prefrontal cortex which is constantly developing and changing, resulting in the child's inability to reason through or regulate overwhelming emotions and experiences. This results in supernormal or overstimulation of the dopamine reward system which disrupts

[9] At the time of the filing of this brief, *A Court of Mist and Fury* was in the Lynnhaven Middle School library.

development of neuropathways and remaps the brain, setting up arousal addiction to supernormal stimuli. A child's exposure to obscene materials stimulates the child to desire more exposure. The beginning of pornography addiction is typically seen in children between ten to twelve years old. For these reasons, children require protection from overwhelming and damaging exposures while their brains are continuing to form into an adult understanding of the world around them. Children are not able to make decisions with the wisdom of future risks and must be protected by their parents who can assess their child's ability to process the information they have been given.

IV. Preliminary Questions from the Court

A. <u>The Court should find that all persons interested in the sale or commercial distribution can be properly determined and notified by publication in accordance with the Code of Virginia § 8.01-324.</u>

General arguments have been made that the Petition is defective because it does not make a good faith effort to identify all other persons interested in the sale or commercial distribution, nor does the Petition make claims to have engaged in efforts to identify such persons.

The Code of Virginia § 8.01-324 sets forth proper standards for whenever an ordinance, resolution, notice, or advertisement is required by law, regulation, or judicial order to be published in a newspaper, newspaper of record, or newspaper of general circulation. Under § 18.2-384(B)(3) of the Virginia Code, the Petitioner must list the names and addresses, *if known*, of the author, publisher, and all other persons interested in its sale or commercial distribution. Under § 18.2-384(D)(3), after the Order to Show Cause has been published once a week for two successive weeks in a newspaper of general circulation within the county or city in which the proceeding is filed, the Petitioner must serve the Order to Show Cause ("Order") by registered mail upon the author, publisher, and all other persons interested in the sale or commercial

distribution of the book. Only after the Order has been published may *all other persons interested* make their identities known. *Publishers Weekly* estimates that 201 bookstores existed in the state of Virginia in 2012.[10] The U.S. Census Bureau estimates that 6,045 bookstores existed in the United States in 2019.[11] It is unrealistic for Petitioner to attempt to identify, locate, and serve by registered mail each of the 201 bookstores within the state of Virginia as well as an estimate at any other organizations that may be one of all other persons interested. Because § 18.2-384(D)(3) gives instruction that is to be followed after the Order has been published for two consecutive weeks, the legislature understood that all other interested persons would be provided the opportunity to discover the proceedings through publishing and be make their identity known to the Petitioner and be included in proceedings by the process outlined in (D)(3), which has occurred by reviewing the certificate of service of this brief. Under Virginia Code § 8.01-324, a newspaper of general circulation must meet the following requirements: (1) have a bona fide list of paying subscribers; (2) have been published and circulated in printed form at least once a week for at least 50 of the preceding 52 weeks; (3) provide general news coverage of the area in which the notice is required to be published; (4) be printed in the English language; and (5) have a periodicals mailing permit issued by the United States Postal Service (USPS). *The Virginian-Pilot* was founded in 1865 and is Virginia's largest daily newspaper with a daily circulation of 142,476 copies as of 2016.[12] The Order was published in *The Virginian-Pilot* on May 26, 2022, for two consecutive weeks in accordance with Virginia Code § 8.01-324. In addition to the publication of the notices, these cases have obtained nationwide press coverage since April 2022.

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[10] https://www.publishersweekly.com/pw/by-topic/industry-news/bookselling/article/57631-where-the-stores-are.html#Virginia

[11] https://www.census.gov/library/stories/2021/12/do-not-turn-the-page-on-bookstores.html

[12] https://www.pilotonline.com/about/vp-about-us-20190816-jkbysbeesfhqbbya777xfrblli-story.html
https://ballotpedia.org/The_Virginian-Pilot

B. The Court should apply the community standard of the Virginia Beach locality where the proceeding was brought.

The Supreme Court of Virginia holds that the community standard to be applied is that of the locality, rather than that of the state or nation. *Price v. Commonwealth*, 214 Va. 490, 491 (1974) (citing *Miller v. California*, 413 U.S. 15 (1973)). The Court noted that although *Miller* had no occasion to consider whether the use of local standards was constitutionally permissible, it held that national standards were not constitutionally required and that state standards were constitutionally acceptable. *Id.* at 492. In reaching that result, the court noted that the diversity of the nation would prevent the effective formulation of a national standard of obscenity. The reasons given in *Miller* for holding that national standards are not constitutionally required in obscenity cases compelled the Supreme Court in *Price* to come to the same conclusion with respect to statewide standards. It would be difficult, if not impossible, for a Virginia jury to formulate a statewide standard of obscenity. Materials that do not offend the community standards of urban areas might well be regarded as obscene by the standards of rural communities.[13] Further, in *Price*, the main thrust of Price's argument was that the Virginia obscenity statute was void for vagueness or overbreadth under part (b) of the *Miller* test because the statute did not define with specificity the conduct which a work must portray to be held obscene. *Id.* The Court concluded that the Virginia obscenity law was not void for vagueness and further stated that a statute regarding obscene materials is not void for vagueness if it provides "fair notice to a dealer in such materials that his public and commercial activities may bring

[13] Recently a town in Pennsylvania defunded its entire library because of books the community found obscene, including *Gender Queer*. This is an example of one community having different standards then other communities in the same state. https://www.bridgemi.com/michigan-government/upset-over-lgbtq-books-michigan-town-defunds-its-library-tax-vote

prosecution." *Price* at 493 (citing *Miller* at 27). "All that is required is that the language of the statute conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *Id.* (citing *Roth v. United States*, 354 U.S. 476, 491 (1957)). The Court found the Virginia obscenity statute, as construed, gave fair notice of the meaning of obscenity and that a person of ordinary understanding would have no difficulty in determining what sorts of material would be regarded as obscene under the statute. *Id.* In determining the contemporary community standard, jurors rely on the community in which they sit. The standard of the court would be no different then, drawing from their own community. Expert testimony regarding community standards is not required because the fact finder may apply his or her knowledge in ascertaining the acceptable standard in the community. *Copeland v. Commonwealth*, 31 Va. App. 512, 515 (2000).

This Court should apply the contemporary community standard of Virginia Beach, specifically the standard found by the elected officials of the Virginia Beach School Board as *Gender Queer* and generally as to *A Court of Mist and Fury*. The argument by various respondents that obscenity is a one-size-fits-all standard for adults and children must be modified because there has never been a time where books as graphic as the two before the Court, are not only available to children, but are actively being solicited to children by adults previously trusted to protect them from such material. Graphic images of fellatio and sexual intercourse is obscene to both adults and children, as depicted in *Gender Queer*; however, printed phrases such as "our mouths met, I slid onto him, the fit so much deeper, and murmured my name into my mouth, I kissed him again and again and rode him gently," is obscene to a child in sixth grade where *A Court of Mist and Fury* was currently promoted by middle school librarians this year.

V. Argument

A. *A Court of Mist and Fury* and *Gender Queer, A Memoir* are obscene by Supreme Court standards, the Supreme Court of Virginia, and the Code of Virginia, and the restriction of obscene books does not violate the First Amendment or Article I, Section 12 of the Constitution of Virginia.

Barnes & Noble, Maia Kobabe, and Oni-LF have generally alleged that *Gender Queer* is not obscene, that it does not have as its dominant theme or purpose an appeal to the prurient interest of adults or minors, that the "conclusory assertions" are unfounded when considering the entirety of the work, that the work is grossly mischaracterized, that it does not substantially go beyond customary limits of candor in description or representation of such matters for either adults or minors, that it does not portray sexual conduct in a patently offensive way for adults or with respect to prevailing standards in the adult community with respect to what is suitable material for minors, and that *Gender Queer* is not obscene because seven of 240 pages were identified with the remaining context ignored.

Obscene material in any form is not protected by the First Amendment. In *Miller*, the Supreme Court recognized the inherent danger in undertaking to regulate any form of expression and acknowledged that any state statute attempting to regulate obscenity must be carefully limited however limitations are not absolutely prohibited. The Supreme Court clarified the confusion surrounding the regulation of obscenity by applying a three-part test: (1) Would the average person, looking at the work as a whole under contemporary community standards, find that it appeals to the prurient interest; (2) does the work depict or describe sexual conduct specifically defined by state law, and is that done in a patently offensive way; and (3) does the work, taken as a whole, lack serious literary, artistic, political, or scientific value? *Miller* at 39. In *Miller*, the Court recognized that a work may be found obscene even though it possesses some value, which abandoned the prior "utterly worthless" test in *Roth* in defining obscene materials. Community standards provide the test for the first two elements of the *Miller* definition that

involve prurient interest and patent offensiveness. The third element, serious value, is a universal standard that will exist or cease to exist at all times and places. The proper inquiry is not whether an ordinary member of any given community would find serious value in obscene material, but whether a reasonable person would find such value in the material, taken as a whole *Pope v. Illinois*, 481 U.S. 497, 500 (1987) and in the cases of both books, how would the ordinary member of society accept either book being marketed to and viewed by children. Children are not a part of the community for this purpose, but sensitive adults are. *Pinkus v. United States*, 436 U.S. 293, 300 (1978). A general definition of obscenity that limits materials satisfactory for children is constitutionally defective, but a more inclusive definition of obscenity for children than adults is not objectionable. *Goldstein v. Commonwealth*, 200 Va. 25, 28 (1958).

The state's interest in protecting children is preemptive when considering a case of child pornography, even if seen as some form of protected artistic expression and was subject to regulation. *Freeman v. Commonwealth*, 223 Va. 301, 307 (1982). As a result, the permissible scope of such regulation is confined to works which depict or describe sexual conduct. The basic guidelines in determining whether material is obscene are whether the average person, applying contemporary community standards would that the work, taken as a whole, appeals to the prurient interest, whether work that depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.* Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. *Id.*

Here, in *Gender Queer, A Memoir*, although seven pages specifically were selected out of 240 in the filing of the Petition, these pages encompass the theme of the book as a whole –

portraying sexual conduct in a patently offensive way with respect to what is suitable for minors or adults. These seven pages specifically highlight the worst parts of the book and the intended effects on the reader that is so far outside the realm of what is considered acceptable or customary for minors in a written work, as evidenced by the fact that parents in Virginia Beach school districts were outraged and complained for four months until the book was removed from school libraries. The Virginia Beach School Board – comprised of elected officials of all levels of political ideology – deemed the images included in the Petition patently offensive by deeming the book pervasively vulgar.

Similarly, *A Court of Mist and Fury* contains vivid descriptions of physical and sexual activities, often depicted as abusive and intrusive sexual contact by force. The content presents aggressive sexual interaction as acts of love but ignores the underlying trauma of the protagonist and her trauma-driven needs. Submission to humiliation and objectification is thematically normalized by the author. The book serves no literary purpose beyond gratuitous elicitation of arousal in its audience. Consequently, in both books, members of the Hampton Roads community find that both books appeal to the prurient interest and the sexual conduct depicted patently offensive and is specifically defined by Virginia law is the decision ultimately for this Court to make at trial and not to be dismissed summarily in pre-trial motions. The books equally lack serious value and serve only to serve the prurient interest by the dominant theme being sexually offensive in nature due to unnecessary graphic illustrations of genitalia engaged in sexual acts and vivid descriptions of abusive and intrusive sexual contact by force attempting to be normalized and embraced, both of which grossly exceed customary limits of candor, specifically through the eyes of a minor who lacks experience to digest the material properly.

The graphic novel is a relatively new concept that exploded in popularity beginning in 2020 with over $1 billion in annual sales, with top sellers moving 150,000 units a week.[14] Children are being trained to think both visually and verbally and the convergence of these two elements produces a powerful experience that simply cannot be obtained through words on a page and graphic novels are catered to males more than females as males interact with visual materials more favorably. The impact of the visual and verbal elements reaches deeply and is an active mental act. *Id.* Children are influenced by printed words and even more so by printed pictures.[15] Pornography is defined as the "depiction of erotic behavior (sexual display in pictures or writing) that is intended to cause sexual excitement in the viewer."[16] Children can't help being influenced by what they see. Exposure to sexual content or images only stimulates sexual desire in a child by the presentation format, creating a desire to translate "fantasy" into reality. *Id.* Research has repeatedly shown that media has tremendous capacity to teach, particularly when sexually explicit, potentially skews a child's worldview, and increases high-risk behaviors.[17] Children and youth are more vulnerable to pornographic images than adults because of mirror neurons in the brain, which convince them that they are actually experiencing what they see. *Id.* Mirror neurons play an important role in how children learn and since children learn in large part by imitation, mirror neurons are involved in the process of observing what other people do and imitating those behaviors. *Id.* Pornographic images have stronger effects among children and youth than other forms of media because they show a much higher degree of sexual explicitness,

[14] https://news.asu.edu/20170214-creativity-asu-capitalizes-novels-get-graphic

[15] https://psychotherapy.psychiatryonline.org/doi/pdf/10.1176/appi.psychotherapy.1996.50.4.431

[16] https://acpeds.org/position-statements/the-impact-of-pornography-on-children

[17] https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-33/may-2014/how-pornography-harms-children--the-advocate-s-role/

and schools know this because they are directed to have internet policies protecting children from accessing sexual materials similar to content both books contain.[18] Exposure to sexual content can compromise a child's ability to establish and maintain healthy intimate relationships. Sexual socialization theory suggests that frequent exposure to consistent themes about gender and sexual behavior can affect a young person's developing sense of what is expected sexually for men and women and may also affect later behavior. *Id.* Further, exposure to sexually explicit images is addictive for children and medical literature supports the premise that a person with one addiction is likely to have another. *Id.* Sexual addiction for children and youth sets them up for a life-long struggle in which the child's focus, biological reward system, and behavior are interwoven with themes of sexual pleasure. *Id.*

B. The Constitutionality of §§ 18.2-372 and 18.2-384 of the Code of Virginia have already been tested, established, and held to be Constitutionally valid

The ACLU, Oni-LF, Bloomsbury Publishing, Sarah Maas, Maia Kobabe, and Barnes & Noble have generally alleged that the Petition fails to allege grounds required under § 18.2-384 and in the context of other literary works, that the statute is unconstitutional and abridges free speech protected by the U.S. Constitution and Article 1, § 12 of the Virginia Constitution, that the statute is unconstitutional under Article 1, § 11 of the Virginia Constitution, that the statute is vague and overbroad, that the relief requested would constitute an unconstitutional restraint on speech, that the statute violates the Dormant Commerce Clause because it authorizes state restrictions on the sale or distribution of books in interstate commerce, that the statute violates the Due Process Clause of the Fourteenth Amendment by failing to join necessary parties and by authorizing injunctive restrictions against "any person" and imposes a binding presumption of

[18] § 22.1-70.2. Acceptable Internet use policies for public and private schools.

scienter, even as to individuals who lack proper notice or opportunity to participate in judicial proceedings and that the deadline is unclear, that the statute fails to require proper notice to interested parties before the initial presentation and determination was made in court prior to a full adversary hearing and determination, that it fails to require adequate service of process, that it fails to provide clear and objective standards, that the statute applies local, not statewide community standards to determine obscenity, that the statute does not authorize the Court to declare the book is obscene for unrestricted viewing by minors, that the additional elements of the obscenity test in the statute are not in alignment with the standards set by *Miller*, particularly the ”degree of local public acceptance of the book” rather than the “average person, applying contemporary community standards, would find that the work as a whole appeals to the prurient interest,” and finally, that it is unclear whether parties could appeal obscenity judgment or whether the issue of the book’s obscenity could be relitigated in the future because the statute creates strict liability for speech.

i. Constitutionality of statutory obscenity standards and scienter

For the purpose of testing the constitutionality of Virginia’s § 18.2-372 obscenity statute, the interpretation of the Supreme Court is as definitive as if the statute had been amended by the legislature. *Grove Press, Inc. v. Evans*, 306 F. Supp. 1084, 1086 (1969). Because obscene material is outside the protection of the First Amendment, the states may prohibit its dissemination to adults as well as children. Even though such material may be entitled to the protection of the First Amendment insofar as adults are concerned, the states may, within a carefully defined framework, restrict the access of minors to such material. *Commonwealth v. American Booksellers Asso.*, 236 Va. 168, 175 (1988). The basis of the states’ authority to control the dissemination of such “borderline obscenity” to minors is based upon the states’

legitimate concern with the protection of minors from material deemed to be "harmful" to them. *Ginsberg* at 636. In *Ginsberg*, the court discussed a tripartite test for the determination of material deemed to be "harmful to minors." Material may be found obscene for children even though the appeal is not to the prurient interest of the average person, the sexual content is not patently offensive, and only a portion of the whole is objectionable without regard to the totality of the item. *Ferber v. New York*, 458 U.S. 747, 765 (1982).

Virginia cases followed the federal lead after *Miller*, and Virginia Code 18.2-372 defines obscenity consistent with the Supreme Court's ruling in *Miller*. Virginia Code §§ 18.2-373 and 18.2-384 define obscenity in greater detail, listing specific standards in accordance with the *Miller* test that has been held to give citizens adequate notice of the criminal standard for obscenity. *United States v. Pryba*, 674 F. Supp. 1504, 1511-12 (E.D. Va. 1987). The constitutionality of § 18.2-384 was determined by the Supreme Court of Virginia, which found that this section provided a sufficiently definite procedure for determining whether certain materials alleged to be obscene are, in fact, obscene, and is therefore not unconstitutionally vague. *Alexander v. Commonwealth*, 214 Va. 539, 541 (1974).

The constitutionality of Virginia Code § 18.2-372 has likewise already been determined. In *Pryba*, the court discussed § 18.2-372 passing constitutional muster more than once as the statute frames the offense in language that conveys and sufficiently describes the proscribed conduct when measured by common understanding and practices, gives adequate warning, and marks the boundaries sufficiently distinct for judges fairly to administer the law. *Pryba* at 1511 (citing *Roth v. United States*, 353 U.S. at 491-92 quoting *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947)). *Pryba* further stated, "To be sure, there may be some fuzziness at the boundaries, but absolute precision is neither practical nor constitutionally required." *Pryba* at 1512. In *Roth*, it

was argued that the statutes did not provide reasonably ascertainable standards of guilt and therefore violate the constitutional requirements of due process. *Roth* at 492. The federal obscenity statute under discussion in *Roth* made punishable the mailing of material that was "obscene, lewd, lascivious, or filthy … or other publication of indecent character." The California statute made punishable, inter alia, the keeping for sale or advertising material that was "obscene or indecent." The thrust of the argument was that the words were not sufficiently precise because they did not mean the same thing to all people, all the time, everywhere. *Roth* at 491. Many decisions recognized that these terms of obscenity statutes are not precise. The Supreme Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. *Id.* The Constitution does not require impossible standards; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Id.* (citing *Petrillo* at 7-8. These words, applied according to the proper standard for judging obscenity, give adequate warning of the conduct proscribed and mark boundaries sufficiently distinct for judges and juries fairly to administer the law. *Roth* at 491.

A general definition of obscenity which limits adults to materials satisfactory for children is constitutionally defective, but a more inclusive definition of obscenity for children than for adults is not objectionable. In stark contrast to *Miller*, material may be found obscene for children even though the appeal is not to the prurient interest of the average person, the sexual content is not patently offensive, and only a portion of the whole is objectionable without regard to the totality of the item. Scienter in this regard is mere knowledge of content, not necessarily of the legality. *American Booksellers* at 175. The constitutional requirement of scienter, in the sense of knowledge of the contents of the material, rests on the necessity "to avoid the hazard of self-

censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity." *Ginsberg* at 644 (citing *Mishkin v. New York*, 383 U.S. 502, 511 (1966)). State laws that followed *Ginsberg* by including a scienter requirement were not violated unless the person providing the material to the minor had knowledge that it was harmful to minors. The constitutional problem with statutes that don't require scienter is that persons affected by the statute must somehow be notified as to which materials are considered "harmful" to minors. This was a deficiency in a Washington statute and the reason the statute was found unconstitutional. Virginia has corrected that constitutional deficiency by adding a scienter requirement.

ii. Due process claims

Nothing on the face of § 18.2-384 denies a prompt adversary hearing on the issue of obscenity after temporary seizure or restraint. *Alexander* at 539. In *Alexander,* appellants argued that an obscenity statute permitted prior restraint on literary material by authorizing a temporary restraining order without an adversary hearing. There is no absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized. *Id.* The Supreme Court held that constitutional requirements were met where the Georgia civil procedure for determining obscenity guaranteed prompt judicial review and placed no restraint on the exhibition of films until an adversary hearing had been held and a final determination of obscenity had been made. *Paris Adult Theatre I v. Slayton*, 413 U.S. 49 (1973). The Supreme Court found that such a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation. *Id.* at 55. In *Heller v. New York*, the Supreme Court firmly stated that the Court has "never held, or even implied" there is

an absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized. *Heller v. New York*, 413 U.S. 483, 488 (1973). Further, the Court in *Alexander* found nothing on the face of the Virginia statute denies a prompt adversary hearing on the issue of obscenity after temporary seizure or restraint. *Alexander* at 541. Further, no temporary restraint was issued in *Alexander*. Sale or distribution of the allegedly obscene magazines was not enjoined until after a full adversary hearing. The object of an adversary hearing is to ensure that expression will not be suppressed without consent and justification and provides an opportunity for one to be afforded First Amendment protections. However, allegedly obscene publications or movies are not to be treated the same way as narcotics, gambling paraphernalia, and other contraband. The legal rules governing the former are different from the latter. *Tyrone, Inc. v. Wilkinson*, 294 F. Supp. 1330, 1333 (1969).

iii. Summary

The Constitutionality of Virginia Code § 18.2-384 has already been tested and found to be valid. The Petition in question does not violate the Dormant Commerce Clause because Petitioner is not seeking to ban books or prohibit the sale of books. Petitioner is only seeking the Court to restrict their sale to minors under the age of seventeen. Commerce will not come to a crashing halt because minors under the age of seventeen cannot purchase books without parental consent any more than R-ratings on movies or Parental Advisory labels on music violate the Dormant Commerce Clause. Virginia Code § 18.2-386 criminalizes any person to preview a motion picture with a rating that prohibits that person from viewing it, yet commerce is still alive and well within the Commonwealth of Virginia. Movies are to be accorded the same constitutional protection as books yet movie ratings requiring minors to obtain parental consent are constitutionally acceptable without claims of “censorship” or being the “end to free speech.”

Ultimately, the parties' claims that minors obtaining parental consent is equivalent to an unconstitutional restraint on speech or a violation of the Dormant Commerce Clause is ludicrous. Books are not being tossed into bonfires or confiscated from bookstore shelves. Petitioner is only seeking the Court to carve out a reasonable exception requiring parental approval for children under the age of seventeen to consume obscene materials.

Lastly, the ACLU asserts that it is unclear whether the parties may appeal the obscenity judgment or whether the issue of the books' obscenity could be relitigated in the future because the statute creates strict liability for speech. This argument need not be addressed comprehensively because Virginia law provides that all civil proceedings are appealable.[19]

The basis for the "harmful to juveniles" standard was established by the Supreme Court, not Virginia Code § 18.2-391, which determined that obscene material is harmful to juveniles.

Barnes & Noble, Maia Kobabe, Bloomsbury Publishing, and Sarah Maas have generally alleged that the Petition references or improperly attempts to graft provisions Virginia Code § 18.2-391 regarding a "harmful to juveniles" standard and that nothing in Virginia Code § 18.2-384 authorizes the Court to issue a ruling under or fashion a remedy that limits access to minors while showing full access to adults.

While respondents cite § 18.2-391 as the basis for the "harmful to juveniles" standard, the Petitioner is not proceeding under this statute, which was formerly declared unconstitutional due to its overbreadth in violation of the First Amendment to the United States Constitution. *PSINet Inc. v. Chapman*, 167 F. Supp. 2d 878 (2001). The Virginia Code's "harmful to juveniles" standard and current definition is a modification of *Miller* where the Court held that "it was not

[19] Va Code §8.01-675.3

irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." *Miller* at 39. In *Ginsberg*, the Court determined that the concept of obscenity might vary according to the group to whom the material was directed and that the state had an interest in preventing distribution to children of objectionable material recognized to be suitable for adults. *Ginsberg* at 1279. Further, the Court upheld the constitutionality of the New York criminal statute which prohibited the sale to minors of material defined to be obscene because it was rational for the legislature to find that minors' exposure to such material might be harmful even if such material would not be obscene to adults. *Id.* In *Ginsberg*, a store owner was found guilty of selling two "girly" magazines to a minor in violation of New York law even though the magazines were not obscene for adults. The Supreme Court affirmed the judgment, finding that the statute did not invade the area of freedom and expression constitutionally secured to minors and that it was rational for the legislature to find that minors' exposure to obscene material might be harmful. Further, the Court determined that the concept of obscenity might vary according to whom the material was directed and that the state had an interest in preventing distribution of objectional material to children even though suitable for adults.

The Petitioner is not proceeding under § 18.2-391 in any capacity. Similar to the statute in question in *Ginsberg,* Virginia's legislature finds it rational and reasonable to protect minors from exposure to obscene material that may be harmful even though it may be suitable for adults. Just as in *Ginsberg,* Petitioner is not seeking to prohibit the sale of obscene materials but rather to have the Court carve out a reasonable exception to protect minors from harmful material without parental consent.

C. Petitioner Tommy Altman has standing to bring the Petition for Declaration of Obscenity before the Virginia Beach Circuit Court and the Court has subject matter jurisdiction.

Maia Kobabe, Oni-LF, and Barnes & Noble generally have alleged that the Petitioner lacks standing, has not pled sufficient facts to establish standing, and that the Court lacks subject matter jurisdiction because no provision of Virginia law authorizes a preemptive ruling that the books at issue are obscene for unrestricted viewing by minors.

Virginia Code § 18.2-384 provides the procedure for a proceeding against books alleged to be obscene and establishes by statute who has standing to bring the action. Whenever there is reasonable cause to believe that any person is engaged in the sale or commercial distribution of any obscene book, *any citizen* of any county or city in which the sale or commercial distribution of such book occurs may institute a proceeding *in the circuit court in said city or county* for adjudicating of the obscenity of the book. The proceeding is instituted by filing a petition with the court directed against the book by name or description, alleging the obscene nature of the book, and listing the names and addresses, if known, of the author, publisher, and all other persons interested in its sale or commercial distribution.

Here, Petitioner Tommy Altman is a citizen of the city of Virginia Beach. As a citizen of the city of Virginia Beach, Petitioner meets the requirements of Virginia Code § 18.2-384 to bring a proceeding against the books alleged to be obscene and has proper standing. The Virginia Beach Circuit Court has personal and subject matter jurisdiction.

D. Petitioner Tommy Altman's Claim was timely brought and is not barred by Laches.

Bloomsbury Publishing, Sarah Maas, and Oni-LF have generally alleged that Petitioner's claims are barred by laches.

Petitioner's claims are not barred by laches. Under Virginia Code § 8.01-230, in every action for which a limitation period is prescribed, the right of action shall be deemed to accrue, and the prescribed limitation period shall begin to run from the date the injury is sustained.

Here, the obscene books are now a part of Virginia Public School libraries and have just recently been marketed by ALA members to children in public schools. Petitioner is not bringing the action to prohibit or ban the sale of the books to adults in the community, so Respondents' claims that the action is barred by laches is without basis. The present action concerns a Petition for Declaration of Obscenity seeking to restrict the audience to provide for parental approval before minors have access to the materials. Because the obscene books were recently readmitted to Virginia Public School libraries and the audience of the books is fluid, changing every school year with each group of new students, coupled with the fact that parents were just made aware of the books with Gender Queer being removed from school libraries in May 2022 when the Virginia Beach School Board declared it "pervasively vulgar," Petitioner's Petition was timely brought and is not barred by laches.

VI. The Regulation of Radio, Wire, Satellite, Cable Television, Analog Television, Movies, Video Games, and Music is Constitutional, and the Supreme Court's Obscenity Standard is Universally Acknowledged by all.

The regulation of radio, wire, satellite, cable television, analog television, movies, video games, and music is standard across the board as every other industry accepts the fact that material appropriate for adults may not be appropriate for children. Each industry has its own regulatory system to protect children in accordance with obscenity and indecency standards set by the Supreme Court of the United States and each system ensures compliance with Supreme Court standards. Penalties and fines punish violations and non-compliance.

A. Radio, television, wire, satellite, and cable television regulations.

Radio, television, wire, satellite, and cable are regulated by the Federal Communications Commission (FCC). Federal law prohibits obscene, indecent, and profane content from being broadcast on the radio or television and the FCC relies on the Supreme Court's 1964 landmark

case on obscenity and pornography, quoting Justice Stewart Potter, "I know it when I see it"[20] and requests that parents and viewers inform the FCC of objectionable material so that it may be reviewed. The FCC follows the Supreme Court's test in determining what is obscene, indecent, or profane for broadcast. Indecent content portrays sexual or excretory organs or activities in a way that is patently offensive but does not meet the three-prong test for obscenity. Profane content also includes "grossly offensive" language that is considered a public nuisance.

Broadcasting obscene content is prohibited by law at all times of the day. *Id.* Indecent and profane content are prohibited on broadcast TV and radio between the hours of 6:00 A.M. and 10:00 P.M. when there is a reasonable risk that children may be in the audience. Obscene content is likewise prohibited on cable, satellite, broadcast television, and radio.

Enforcement of the obscenity, indecency, and profanity rules begins with complaints from the public. If the FCC finds a violation, it has the authority to revoke a station license, impose a fine, or issue a warning. Courts have said that indecent material cannot be banned entirely but can be restricted when there is a reasonable risk that children may be in the audience. Similarly, the FCC further prohibits profane material during this time frame. *Id.* It is of noteworthy interest that a local television station when covering the story was prohibited from broadcasting the images contained in *Gender Queer* filed with this petition because of potential FCC violations in broadcasting the images over the television airwaves in Virginia Beach.[21]

B. Motion picture and film regulations

Film ratings are regulated and set by the Motion Picture Association (MPA). The MPA and National Association of Theatre Owners (NATO) established the Classification and Rating

[20] https://www.fcc.gov/consumers/guides/obscene-indecent-and-profane-broadcasts

[21] https://bit.ly/39BDPOa WTKR May 10, 2022- Va Delegate Seeks Restraining Order

Administration (CARA) as part of a voluntary system for parents to aid them in determining the suitability of motion pictures for viewing by their children.[22] Ratings are determined by CARA, via a board comprised of an independent group of parents. Movies do not have to be rated and submitting a movie for a rating is a voluntary decision made by filmmakers. However, the overwhelming majority of filmmakers opt to have their movies rated, and each member of the MPA has agreed to have all its theatrically released movies rated. In conjunction with the process of reviewing and rating movies, the MPA takes every step possible to ensure that all advertising content is suitable for the particular audience that views it. Sanctions are issued for violations.

C. Video game and digital content regulations

Video games are regulated by the Entertainment Software Rating Board (ESRB) and the International Age Rating Coalition (IARC).[23] The ESRB is a non-profit, self-regulatory body for the video game industry. Established in 1994, the primary responsibility is to assist parents to make informed choices about games their children play. Each game is reviewed prior to release with a detailed questionnaire revealing content that includes violence, sex, language, gambling, etc. Digital game content is classified and rated through the IARC to ensure parents have trusted age ratings across devices. The enforcement system contains sanctions and fines up to $1 million that may be imposed on publishers who don't fully disclose content to ESRB during the rating process. The Advertising Review Council (ARC) works with publishers to ensure that correct and complete rating information is displayed on game packaging and marketing materials.

[22] https://www.filmratings.com/Content/Downloads/rating_rules.pdf

[23] https://www.esrb.org

Music regulations

The Recording Industry Association of America ("RIAA") advocates for recorded music and worked to address concerns regarding explicit content in sound recordings. The RIAA recognizes that children have access to media in ways their parents never imagined and provides parents with the tools they need to make the right decisions for their children. The RIAA owns the "parental advisory explicit content" trademark (the "PAL Mark"). If strong language or depictions of violence, sex, or substance abuse are present, the PAL Mark must be prominently applied to music packaging. To assist parents, retailers prohibit the sale of records displaying the PAL Mark to those younger than 18, and online retailers also implement parental control mechanisms. The PAL Mark is a voluntary initiative by record companies and artists to help parents recognize when inappropriate content may be present."[24]

VII. Conclusion

Petitioner requests the Court carve out a reasonable exception for children and ultimately restrict minors under the age of seventeen to have unfettered access to obscene materials, just as a minor seeking access to a restricted movie or compact disc labeled with a "Parental Advisory" would be required to do. These Petitions are not about banning books or preventing children from having access to books – they are about protecting children from obscene content in these two particular books. A parent's fundamental right to decide what is appropriate, and when, for their child consistent with other forms of media.[25] The adversarial motions filed collectively should be summarily denied and this case should proceed to hearing as the Court has statutorily authorized authority, not prohibited by any case cited by Respondents, to conclude that *Gender Queer* and *A Court of Mist and Fury* are obscene to minors and should not be sold to minors.

[24] https://www.riaa.com/resources-learning/parental-advisory-label/
[25] Troxel v. Granville, 530 U.S. 57 2000

Respectfully submitted,

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