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 Reply Brief in Support of
Motions to Dismiss and Vacate Orders to Show Cause

Barnes & Noble Booksellers, Inc. ("Barnes & Noble"), by counsel, submits this reply 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.

Introduction

Petitioner's Opposition ("Opp.") offers little substantive response to Barnes & Noble's arguments. Instead, it devotes much space to discussing disputes over books in Virginia Beach schools, presenting Petitioner's theories of psychology, and launching *ad hominem* attacks on the American Library Association. Where it does try to engage on relevant legal issues, the Opposition betrays a pronounced unfamiliarity with obscenity law, and perhaps because of that, makes a number of fatal admissions. For example, Petitioner repeatedly admits—no, *insists*—that "one sexually charged image" in a book can support an obscenity finding, Opp. 2, 15-16, 21, and that the Court must evaluate the Petitions according to what is "appropriate" for 10- and 12-year-olds. Opp. 6, 7, 9, 10. These admissions alone provide ample grounds to dismiss the Petitions, whether the Court evaluates them under the obscenity standard set forth in *Miller v. California*, 413 U.S. 15 (1973), or the "harm to minors" standard articulated in *Ginsberg v. New York*, 390 U.S. 629

(1968). But Petitioner does not stop there. He avers "the law must evolve and grant the relief the Petitioner seeks," Opp. at 7, making clear Petitioner is asking the Court to *change* the law, not apply it.

Argument

I. This Court Lacks Subject Matter Jurisdiction to "Carve out an Exception" for Children

Petitioner never directly responds to the argument that Section 18.2-384 provides no jurisdiction for this Court to restrict access by minors to books. Barnes & Noble Br. at 7-11. The Opposition baldly asserts that this Court has subject matter jurisdiction, Opp. at 26, but points to nothing in Section 18.2-384 that empowers this Court to order the remedy Petitioner demands—to restrict sales of the Books to minors under the age of seventeen. *Id.* at 23. If such authority did exist in the Virginia Code, it would appear in, or at least reference, Section 18.2-391, the state's "harm to juveniles" law, but it does not. Barnes & Noble Br. at 9. Accordingly, there is no statutory basis for this Court to "carve out a reasonable exception requiring parental approval for children under the age of seventeen," Opp. at 30, because doing so would require legislating from the bench.

Petitioner misunderstands the very basic distinction between statutory powers and constitutional limits on those powers. The legislature establishes by statute what Virginia courts are empowered to do, while the applicable constitutional standards define the limits of that authority. But Petitioner appears to suggest that the Supreme Court's decision in *Ginsberg* somehow converted all Virginia's general obscenity laws into "harm to minors" laws, regardless of how the statutes are worded. Petitioner's confusion on this point is summed up in the underscored and bolded statement on page 24 of the Opposition: "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." Opp. at 24 (overemphasis corrected). Petitioner confirms unconditionally that he is "not proceeding under § 18.2-391 in any capacity," then in the next sentence claims that "[s]imilar 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." *Id.* at 25. [1]

What statute is he talking about? The only Virginia law "similar to the statute at issue in *Ginsberg*" is Section 18.2-391, on which the Petitioner has forsworn reliance. Section 18.2-391, adopted in 1970, was expressly modeled on the New York statute at issue in *Ginsberg*. *See Commonwealth v. American Booksellers Ass'n*, 236 Va. 168, 171 (1988). The issue here is straightforward: Petitioner has confirmed that he is proceeding under Section 18.2-384, which is a general obscenity statute, not a harm to minors law. And Section 18.2-384 says nothing about juveniles and contains no operative provisions that relate to juveniles or that authorize this Court to "carve out a a reasonable exception for children."

Section 18.2-384 authorizes the court to do two things: (1) "issue a temporary restraining order against the sale or distribution of the book alleged to be obscene," and (2) issue an order finding a book is obscene, pursuant to which anyone who distributes or exhibits it "is presumed to have knowledge that the book is obscene under §§ 18.2-372 through 18.2-378 of this article." Va. Code §§ 18.2-384(E), (K). Tellingly, Section 18.2-384(K) includes no cross-reference to Section 18.2-390, which defines material deemed "harmful to juveniles" under Virginia law, no doubt

[1] Petitioner states he did not proceed under Section 18.2-391 because it was declared unconstitutional, citing only the district court's decision in *PSINet, Inc. v. Chapman*, 167 F. Supp. 2d 878 (W.D. Va. 2001), *aff'd*, 362 F.3d 227 (4th Cir. 2004). Opp. at 24. In fact, the court in *PSINet, Inc.* invalidated a 1999 amendment to Section 18.2-391 that applied Virginia's law to the Internet, but citing that case should at least have alerted Petitioner to the daunting First Amendment barriers to his claims even under a "harm to minors" standard.

because it is located in a different Article of the Code of Virginia.[2] Consequently, Section 18.2-384 does not provide this Court with jurisdiction either to declare a work "harmful to minors" as defined by Virginia law, or to issue an order restricting sales to juveniles.

Petitioner's suggestion that this Court is authorized to declare the Books obscene and "to restrict the commercial distribution of these books to minors" pursuant to the "exceptions clause" of Section 18.2-384(J), Opp. at 1, finds no support in the statute. *See* Barnes & Noble Br. at 9 n.7. For starters, it gets the law backwards. This exception, mentioned in subsections (G), (H)(6), and (J), contemplates the court's discretion to carve out "a restricted category of persons to whom the book is *not* obscene." Opp. at 1 (emphasis added). This is the opposite of Petitioner's demand for an order finding "a restricted category of persons" (*e.g.*, minors) for which the Books *are* obscene. Even if the statutory language could be tortured in the way Petitioner suggests, the exception has no connection to the "harm to minors" standard under which *all adults* by definition have the right to "determine for themselves what sex material they may read or see." *Ginsberg*, 390 U.S. at 637. Giving the court discretion to exempt from its obscenity finding a "restricted category" of adults that may include specialists, like "scholars, scientists, and physicians," is inconsistent with *Ginsberg*, and does not focus on the issue of protecting only minors. Va. Code § 18.2-384(H)(6). In any event, the Virginia General Assembly plainly did not enact the exception to accommodate *Ginsberg*. The language creating the exception was added to the law in 1960—eight years *before* the Supreme Court in *Ginsberg* articulated the "harm to minors" standard. Va. Code Ann. § 18.1-236.3(7) (1950) (Replacement Volume 1960). *See The Law of Obscenity In Virginia*, 17 WASH. & LEE L. REV. 322, 327 (1960).

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[2] Section 18.2-384 is part of Article 5 of the Virginia Code (Obscenity and Related Offenses), while Section 18.2-391, the "harmful to juveniles" law, is part of Article 6 (Prohibited Sales and Loans to Juveniles).

Elsewhere, Petitioner defends the constitutionality of Section 18.2-384 based on its incorporation of the *Miller* standard, a backhanded admission that Section 18.2-384 has nothing to do with "harm to minors." Opp. at 20 (citing *Alexander v. Commonwealth*, 214 Va. 539, 541 (1974)). Having invoked *Miller* for one purpose, he asks in the next breath that the Court decide this case based a legal standard that, as he puts it, stands "in stark contrast to *Miller*." *Id.* at 21. In Petitioner's view, the Court may declare a book 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." *Id.* Of course, this formulation is plainly wrong under either *Miller* or *Ginsberg*. Barnes & Noble Br. 11-16; *see infra* at 6-8. But for purposes of statutory interpretation, the salient point is that the Virginia Supreme Court has authoritatively construed Section 18.2-384 as applying the *Miller* standard.

Finally, as Barnes & Noble initially explained, the basic rules of statutory construction preclude the Court from creating the remedy Petitioner seeks because it is not set forth in the statutory language. Barnes & Noble Br. 7-10. Petitioner neither addresses these arguments nor takes issue with any of the cases cited. Instead he asserts that "the law must evolve" and asks this Court to "carve out a reasonable exception to protect minors from harmful material." Opp. at 7, 25. That is a legislative task (within constitutional limits) and not a judicial one.

II. The Petitions' Allegations are Fatally Defective

Much of Petitioner's Opposition is an extended exposition on the merits of his claims based on conclusory assertions of fact, adjective-laden characterizations of the Books' content, and vilification of those who defend them. One need not sift through this chaff to conclude the Petitions are facially defective and fail at the threshold. Petitioner fails to plead either a statutory basis for relief or *prima facie* allegations sufficient to justify a hearing on the merits.

Petitioner claims a right to an evidentiary hearing simply because he has made allegations of fact. Opp. at 30. However, the Petitions fail *even to allege* the books contain depictions or descriptions that could satisfy the legal test for obscenity. The Supreme Court of Virginia expressly rejected Petitioner's view in *American Booksellers Ass'n*, 236 Va. at 176, holding that determining whether a work, taken as a whole, lacks serious value is a mixed question of law and fact that can be resolved by the court. *See also* Frederick F. Schauer, THE LAW OF OBSCENITY 149 (1976) ("Since there must be an independent legal determination of the issue of obscenity, it is appropriate that the issue may be decided in the context of a motion to dismiss the indictment, or similar motion, on the grounds that the material is not obscene as a matter of law."). In this case, however, beginning with the Petitions, and now amplified in his Opposition, Petitioner's claims fail at the outset, insisting, for example, that the Court can find the Books obscene based on "one sexually charged image" and on what the community believes is "inappropriate" for viewing by preteens. Opp. at 2, 9. Such allegations are facially defective as a matter of law, and the Court may resolve these cases without proceeding to an evidentiary hearing.

Petitioner's approach is an unvarnished demand for literary censorship. Book censorship ended with the development of constitutional standards governing obscenity in *Roth v. United States*, 354 U.S. 476 (1957), and *Miller*, primarily because of the requirements that the merit of a work be considered as a whole. Barnes & Noble Br. at 2-4. The Supreme Court has noted that "teenage sexual activity and the sexual abuse of children—have inspired countless literary works," and explained that a finding of obscenity cannot be justified based on the presence of one or more explicit or graphic scenes or depictions. Thus, "[u]nder *Miller*, the First Amendment requires that the redeeming value be judged by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in

isolation might be offensive." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 247-48 (2002). The same requirement applies to the "harm to minors" standard. *American Booksellers Ass'n*, 236 Va. at 175 ("A publication must be judged ... as a whole ... and not on the basis of selected passages.").

Petitioner believes the law is otherwise, so his Opposition starkly reinforces the Petitions' fatal defects. Although he does a head-fake to suggest that his allegations address the Books as a whole, the specific claims make clear that his argument is all about the few particular passages and illustrations set forth in the Petitions and nothing more. With respect to GENDER QUEER, for example, Petitioner asserts that "[t]hese seven pages [cited in the Petition] specifically highlight the worst parts of the book" and concludes with the *non sequitur* that "these pages encompass the theme of the book as a whole." Opp. at 15-16. Petitioner's claim is even more attenuated for A COURT OF MIST AND FURY, as he merely summarizes the 624-page novel by saying "[s]ubmission to humiliation and objectification is thematically normalized by the author." *Id.* at 16. These examples proceed from and illustrate Petitioner's erroneous legal premise that "material obscene to minors can be as little as one sexually charged image such as graphic fellatio or text that describes sexual content." *Id.* at 2.[3] This is not how analysis of a book "as a whole" works. *E.g.*, *Kaplan*, 413 U.S. at 116-17 ("Whether one samples every 5th, 10th, or 20th page, beginning at

[3] Petitioner uses the word "fellatio" no fewer than eight times in the Opposition, and even reproduces a page from the book GENDER QUEER including two panels that purport to depict such activity. Opp. at 8. However, these simple, non-detailed line drawings hardly meet the requirement of "graphic" or "hard core" depictions as required by *Miller*. *United States v. Hillie*, 39 F.4d 674, 682-83 (D.C. Cir. 2022). *See Kaplan v. California*, 413 U.S. 115, 116-17 (1973) (describing such material as "repetitive descriptions of physical, sexual conduct, 'clinically' explicit and offensive to the point of being nauseous"); Schauer, *supra*, at 109 ("only hard-core pornography may be included within the regulation of obscenity"). Even if some individual depictions were to cross that threshold, they must be considered in context of the entire work. *American Booksellers Ass'n*, 236 Va. at 175 ("Published material may have an explicit sexual content, which, while perhaps pornographic, falls short of the definition of obscenity.").

any point or page at random, the content is unvarying."); Schauer, *supra*, at 105 ("If the sexual theme is minor or subordinate, then there can be no finding of obscenity").

Petitioner compounds this error by insisting that the Books should be evaluated by whether they might be considered "appropriate" for ten and twelve-year-olds. Opp. at 2, 6, 7, 9, 10, 13. That is the wrong standard under *Miller*, which Section 18.2-384 purports to implement, and it would be facially invalid even if a "harm to minors" standard applied (which it does not). *American Booksellers Ass'n*, 236 Va. at 177. *See American Booksellers v. Webb*, 919 F.2d 1493, 1504-05 (11th Cir. 1990) (*Pope v. Illinois*, 481 U.S. 497 (1987), "teaches that if any reasonable minor, including a seventeen-year-old, would find serious value, the material is not 'harmful to minors.'").

Finally, Petitioner repeatedly asks the Court to base its ruling on extraneous factors that have no connection to either the obscenity or "harm to minors" standards. *See, e.g.*, Opp. at 13 ("This court should apply ... the standard found by the elected officials of the Virginia Beach School Board"); 16 (the Virginia Beach School Board deemed GQ "pervasively vulgar"); *id.* ("Submission to humiliation and objectification is normalized by the author" of A COURT OF MIST AND FURY.). The suggestion that this Court should defer to the opinions of local school board members on a legal standard ignores a basic premise of our system that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

The claim that the Books should be condemned because they portray improper attitudes about sex has been roundly rejected as an exercise in "thought control." *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); *Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 685 (1959) (rejecting as unconstitutional

regulation of film *Lady Chatterly's Lover* based on argument "the whole theme of this motion picture" is "adultery as a desirable, acceptable and proper pattern of behavior"). *Hudnut* is particularly germane to Petitioner's asserted concerns about themes of "humiliation" and "objectification." The Seventh Circuit there struck down an ordinance defining obscenity based on themes of "subordination" and "humiliation," and it concluded "no construction or excision of particular terms could save it." 771 F.2d at 332. The same is true of the Petitions—they are flawed at the root, and nothing can same them.

III. Section 18.2-384 is Facially Unconstitutional

Petitioner does not specifically respond to the grounds identified by Barnes & Noble in support of its argument that Section 18.2-384 is facially unconstitutional. He maintains that the law as a general matter "has already been tested and found to be valid," Opp. at 23, based on a two-page 1974 ruling by the Virginia Supreme Court holding that Section 18.2-384 was consistent with *Miller*. *See id.* at 20 (citing *Alexander v. Commonwealth*, 214 Va. 539 (1974)). However, that case did not address the challenge to the facial validity of the particular provisions of the law that authorize: (1) imposing a TRO on publications in advance of any adversary hearing, (2) issuing an obscenity finding that conclusively establishes scienter for anyone who may distribute the affected works, and (3) authorizing orders that bind non-parties to the proceeding without actual notice. Barnes & Noble Br. 16-21. Any orders this Court might issue pursuant to Section 18.2-384 would be the product of statutory provisions that, on their face, are unconstitutional.

Prior restraint. Petitioner does not dispute that Section 18.2-384 authorizes a TRO prior to any adversary hearing or finding of obscenity, but asserts that this matter was settled in *Alexander v. Commonwealth*. Opp. at 22. That is incorrect. The question was not squarely presented in *Alexander* because "no temporary restraint was issued" in that case. Moreover, what little the Virginia Supreme Court had to say—that it found "nothing on the face of the statute which

denies a prompt adversary hearing on the issue of obscenity *after* temporary seizure or restraint." 214 Va. at 541 (emphasis added)—was superseded by subsequent authority The United States Supreme Court made clear fifteen years later, in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 66 (1989), "[m]ere probable cause to believe a legal violation has transpired is not adequate to remove books or films from circulation." *See City of Cadillac v. Cadillac News & Video, Inc.*, 221 Mich. App. 645, 651-53 (Mich. Ct. App. 1997) (applying *Fort Wayne Books* to invalidate a state law similar to Va. Code § 18.2-384).

Petitioner also relies on *Heller v. New York*, 413 U.S. 483 (1973), Opp. at 23, but it provides no support. *Heller* dealt only with seizing a single copy of a work to use as evidence, and the Court stressed that circulation of expressive materials generally could not be restrained until *after* a "judicial determination of the obscenity issue in an adversary proceeding." 413 U.S. at 492-93. *See Fort Wayne Books*, 489 U.S. at 63 ("the publication may not be taken out of circulation completely until there has been a determination of obscenity after an adversary hearing").

Scienter. Section 18.2-384(K) provides that, after a ruling on the merits, anyone who distributes (or even possesses the book with the intent to lend it) "is presumed to have knowledge that the book is obscene." Barnes & Noble explained how presuming scienter in this way violates the First Amendment, Barnes & Noble Br. at 19-20, and Petitioner's only response is to assert that Section 18.2-384 resolved any constitutional deficiency "by adding a scienter requirement." Opp. at 22. Of course, that is no answer. What Section 18.2-384 says about scienter *is the problem*, not the solution.

Petitioner further insists that these cases should be decided based on the local community standards of Virginia Beach. Opp. at 12. He cites *Price v. Commonwealth* for this conclusion, where the Court explains: "It would be difficult, if not impossible for a Virginia jury to formulate

a statewide standard of obscenity, for our state comprises communities with a vast diversity of life styles. Materials which do not offend the community standards of our metropolitan areas might well be regarded as obscene by the standards of some of our rural communities." 214 Va. 490, 492 (1974). This simply reveals the magnitude of the problem. Any ruling on the Petitions would apply to anyone in the state "who publishes, sells, rents, lends, transports in intrastate commerce, commercially distributes or exhibits the book, or who has the book in his possession with intent [to distribute or exhibit it]," Va. Code § 18.2-384(K), even in areas with different community standards than Virginia Beach. Any such ruling could be wielded like a cudgel by pro-censorship activists like the Petitioner, with profound chilling effects. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70-71 (1963).

Due Process. Petitioner does not specifically respond to the argument that due process prohibits imposing burdens on non-parties. Barnes & Noble Br. at 21. His discussion of the due process issue focuses instead on prior restraint, where he states "[n]othing on the face of § 18.2-384 denies a prompt adversary hearing on the issue of obscenity *after temporary seizure or restraint*." Opp. at 22 (emphasis added). This not only fails to address the due process argument as presented, it concedes the substance of the prior restraint issue discussed above—the hearing is available only *after* the TRO is issued. *See supra* at 9-10.

Petitioner's Opposition only illustrates the magnitude of the constitutional due process problem. In arguing that all relevant parties have been properly notified, the Petitioner estimates there are 201 bookstores in Virginia (as of 2012), and states "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 "any other organizations that may be one of all other persons interested." Opp. at 11. That is precisely the point. All of these bookstores and other organizations would be

bound by a ruling based on the community standards of Virginia Beach without ever having been parties to the proceeding. Petitioner evidently believes such a result is fine, and that fundamental fairness to those non-parties should give way to his desire to avoid the "unrealistic" demand that he identify them in advance before criminalizing their conduct.

In any event, the notice provision of Section 18.2-384 does not solve this problem. Petitioner states notice appeared in *The Virginian-Pilot*, which has a daily circulation of 142,476 copies. Opp. at 11. However, Virginia has a population of 8,642,274 people, all of whom would be bound by the court's orders. *See* U.S. Census Statistics (https://www.census.gov/quickfacts/VA). In this circumstance, such notice by publication is insufficient. *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950) ("It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts."); *In re Petition of Landmark Commc'ns, Inc.*, No. L00-1814, 2002 WL 31431516, at *2 (Va. Cir. Ct. Apr. 8, 2002) ("When notice is a person's due, process which is a mere gesture is not due process."). And notice alone, without being made a party or having a full opportunity to participate in adversary proceedings, is not due process. *McCarthy v. Leiser*, No. 190672, 2020 WL 2565903, at *2 (Va. May 21, 2020).

IV. The Opposition Reveals the Petitions' Improper Purpose and Erroneous Premises

Petitioner's obsessive focus on what books may be available in public schools and libraries lays bare the improper purpose underlying this effort. *See* Opp. at 1-2, 3-4, 5, 6, 7, 8 & n.8, 9, 13, 16, 27. Such allegations lack the slightest relevance to this proceeding, as both Va. Code § 18.2-384 and 18.2-391 expressly *exclude* public schools and libraries from their reach. *See* Va. Code §§ 18.2-383, 18.2-391.1. What's more, Petitioner claims that efforts to force schools to remove books were successful. *See* Opp. at 16, 27. So why are we here? Petitioner is seeking to channel a political dispute about school books into court where it does not belong, using a statute that does

not authorize the relief he claims to seek. *See* Hannah Natanson, *Books targeted, beyond schools*, WASH. POST, May 21, 2022 at B1, 3.

The degree of overreach motivating the Petitions is perhaps best revealed by the shotgun arguments demanding that books be brought into line with regulation of film, broadcasting, video games, and music, and that this Court remove "the only exception ... when it comes to books." Opp. at 5, 23, 27-30. This line of argument confuses voluntary private ratings systems with government regulation and fails to grasp the governing constitutional rules for the various media.

Film ratings. Petitioner acknowledges that film ratings are voluntary, *id.* at 28-29, but fails to appreciate that the Motion Picture Association's voluntary system was adopted after the Supreme Court struck down governmental review boards and classification systems as prior restraints. *Freedman v. Maryland*, 380 U.S. 51 (1965); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968) (striking down system that classifies films as "suitable for young persons" or as "not suitable for young persons"). After the private ratings systems were adopted, various courts have held that such ratings cannot be used as content standards enforceable by government bodies. *See, e.g., Engdahl v. City of Kenosha*, 317 F. Supp. 1133, 1135 (E.D. Wisc. 1970) (ordinance using MPA film ratings to limit children's access to theaters is an unconstitutional prior restraint); *MPAA v. Specter*, 315 F. Supp. 824 (E.D. Pa. 1970) (same). Nothing about Petitioner's demand is "voluntary," and it should be rejected for the same reason.

Broadcasting. Contrary to Petitioner's assumptions, indecency regulations enforced by the Federal Communications Commission are by definition (and constitutional rule) inapplicable to other media. Opp. at 28-29. *See FCC v. Pacifica Found.*, 438 U.S. 726 (1978). More importantly (and more recently), courts found the FCC's indecency regime to be unconstitutional in its application, so that even if that body of law were relevant to this case, it would not support

the Petitioner's claims. *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 335 (2d Cir. 2011) ("By prohibiting all 'patently offensive' references to sex, sexual organs, and excretion without giving adequate guidance as to what 'patently offensive' means, the FCC effectively chills speech, because broadcasters have no way of knowing what the FCC will find offensive."), *aff'd on due process grounds*, 556 U.S. 502 (2012).

Video games. Petitioner also cites private ratings systems for video games, Opp. at 29, but fails to note that the Supreme Court has held that efforts to enforce such regulations by government, or, specifically, to impose a "harm to minors" standard on video game regulation, violate the First Amendment. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011). Just as private movie ratings cannot be enforced by government edict, neither can video game ratings.

Music. The same goes for music ratings. *See* Opp. at 30. Once again, Petitioner points to voluntary record labeling initiatives by the Recording Industry Association of America, but fails to acknowledge that laws seeking to make such labels mandatory are unconstitutional, *e.g.*, *Soundgarden v. Eikenberry*, 123 Wash. 2d 750, 777-78 (1994) (*en banc*) (declaring unconstitutional the "Erotic Sound Recordings" statute), as are efforts to declare music obscene. *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992) (reversing obscenity conviction for members of rap group *2 Live Crew*).

As the Supreme Court has made clear, books have a "preferred place in our hierarchy of values, and so it should be." *Kaplan*, 413 U.S. at 119. But regardless of what media paradigm Petitioner wants to apply, the remedy he is seeking from this Court is unconstitutional.

Conclusion

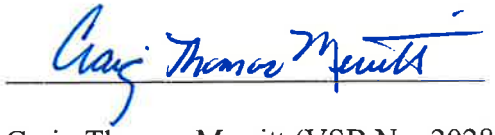
Petitioner asks this Court to conduct a hearing and issue an order he characterizes as a modest proposal—to "carve out a reasonable exception for children and ultimately restrict minors

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." Opp. at 30. No big deal. Nothing to see here. But he fails to appreciate that to do so would require the Court to rewrite Virginia law and ignore the past six decades of First Amendment jurisprudence.

Not to worry, Petitioner insists, because "[b]ooks are not being tossed into bonfires or confiscated from bookstore shelves." Opp. at 24. This glib reassurance is not heartening. *See, e.g.*, John Haltiwanger, *Virginia school board members call for books to be burned amid GOP's campaign against schools teaching about race and sexuality*, BUSINESS INSIDER, Nov. 10, 2021 (https://www.businessinsider.com/virginia-school-board-members-call-for-books-to-be-burned-2021-11). Petitioner, and others like him, have already indicated they have many more books in mind. He has publicly maintained "[s]uits like this can be filed all over Virginia. There are dozens of books. Hundreds of schools." Preston Steger, *2 Republicans seek to limit sales of books deemed 'obscene' to minors in Virginia Beach*, 13NEWS 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).

This Court should draw a firm line now. For as Justice Robert Jackson cautioned, "the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings." *Barnette*, 319 U.S. at 641. Accordingly, Barnes & Noble respectfully requests that the Court dismiss the Petitions and vacate the Show Cause Orders. 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.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

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

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