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July 26, 2022

By Overnight Delivery

Hon. Tina E. Sinnen, Clerk
Circuit Court of the City of Virginia Beach
2425 Nimmo Parkway
Building 10 & 10B, 3rd Floor
Virginia Beach, VA 23456-9017

**Re: *In re: A Court of Mist and Fury*
Case No. CL22-1984**

Dear Ms. Sinnen:

Enclosed for filing please find the original and one copy of *Bloomsbury and Sarah Maas' Memorandum In Support of Joint Motion To Vacate Show Cause Order and To Dismiss Petition*. We would be obliged if you would date stamp the copy and return it in the enclosed self-addressed envelope.

Please contact me if you have any questions or if we can be of assistance.

Sincerely,



David B. Lacy

Enclosures

cc: Counsel of Record (*by email w/encl.*)
Ms. Norma L. Catoe (*by email w/encls.*) (nlcatoe@vbgov.com)
Ms. Terri R. Driskill (*by reg. mail w/encl.*)

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

In Re: A Court of Mist and Fury

Case No. CL22-1984

**BLOOMSBURY AND SARAH MAAS'
MEMORANDUM IN SUPPORT OF JOINT MOTION TO VACATE
SHOW CAUSE ORDER AND TO DISMISS PETITION**

Bloomsbury Publishing, Inc. (“Bloomsbury”) and Sarah Maas (“Ms. Maas” and, together with Bloomsbury, the “CoMF Author and Publisher”), by counsel, pursuant to the Court’s First Scheduling Order, entered June 30, 2022, submit this memorandum in support of their joint motion to vacate the Order To Show Cause Pursuant To 18.2-384 of the Code of Virginia entered May 18, 2022 (the “Show Cause Order”), and to dismiss the Petition For Declaration For Adjudication Of Obsenity [*sic*] Pursuant To 18.2-384 Of The Code Of Virginia (the “Petition”) filed by Petitioner Tommy Altman (“Petitioner”), against the book *A Court of Mist and Fury* (the “Book”).

INTRODUCTION

Petitioner brings this action claiming to seek to protect minors from a fantasy novel by a much celebrated *New York Times* bestselling author. Petitioner asks this Court to declare, pursuant to Virginia Code Section 18.2-384, that *A Court of Mist and Fury* is “obscene for distribution to minors.” But, Section 18.2-384 does *not* permit such a finding. The statute only authorizes a court to declare that a book is obscene *for all audiences*. As a matter of law, *A Court of Mist and Fury* is not obscene. In substance, Petitioner asks this Court to apply the harmful to juveniles standard covered by a separate provision of the Code which, if applied, would run afoul of established First Amendment precedent.

In making this request, Petitioner cherry picks approximately a dozen passages from the more than six-hundred-pages in the Book, and asserts that these excerpts are inappropriate for ten-

year-olds. This approach, however, does not comply with the requirement that, under any standard, a work must be judged *as a whole*, or with the requirement that the relevant audience be a reasonable adult person. The same holds true if the analysis is made under the statutory provisions regarding harm to minors, which is inapplicable under Section 18.2-384. There, the question is whether the Book is harmful to all persons under the age of 18, not the small subset of very young children proposed by Petitioner.

In addition, Section 18.2-384 itself is unconstitutional. Not only is the statute unconstitutional on its face, but as applied, it is overbroad and would amount to a prior restraint that is barred by the First Amendment. The “scienter” facet of the statute also runs afoul of the knowledge requirement for First Amendment crimes.

In short, this Petition is precluded by both Section 18.2-384 and the Constitution. It should be dismissed and the Show Cause Order issued on May 18, 2022 should be vacated.

BACKGROUND

I. CoMF Author and Publisher

Sarah Maas is a #1 *New York Times* Bestselling and award-winning author who has written 17 books. Her books have sold approximately 14 million copies in the United States to date, and have appeared on several bestseller lists including *USA Today*, *Publishers Weekly*, *The New York Times*, and *The Wall Street Journal*.¹

¹ See, e.g., *Best-Selling Books Top 150*, USA Today (July 17, 2022), <https://content-static.usatoday.com/editorial/life/booklist/usatodaybooks.pdf>; *Top 10 Overall*, Publishers Weekly (last visited July 14, 2022), <https://www.publishersweekly.com/pw/nielsen/index.html>; *The New York Times Bestsellers*, The New York Times (March 6, 2022), <https://www.nytimes.com/books/best-sellers/2022/03/06/>; *Best-Selling Books Week Ended Oct. 28*, The Wall Street Journal (Nov. 2, 2018), <https://www.wsj.com/articles/best-selling-books-week-ended-oct-28-1541164479>.

Bloomsbury publishes adult and children’s fiction and non-fiction books, as well as an extensive collection of academic titles. In addition to publishing Ms. Maas’s books, Bloomsbury’s parent company publishes other bestsellers like J. K. Rowling’s Harry Potter series worldwide, except for in the United States and its territories and dependencies.²

II. *A Court of Mist and Fury*

Ms. Maas is known for “crafting rich, thoroughly lived-in fantasy worlds” with “multifaceted female characters full of heart and grit.”³ The second of five books in Ms. Maas’ *A Court of Thorns and Roses* series, *A Court of Mist and Fury* continues the story of Feyre Archeron, a human huntress who kills a fairy, and finds herself living in the fairy realm as punishment. The Book picks up after Feyre has saved the fairy world from an evil general, having been made High Fae herself in the process. As Feyre adjusts to her new life and comes to terms with what she had to do to save the fairies, she must now make good on the deal she made with the dark and complicated High Lord of the Night Court, Rhysand—in a tale loosely based on the ancient Greek myth of Hades and Persephone. The Book follows Feyre as she navigates the complicated politics of the fairy world and determines her own future. *See* Exhibit A to Petition (the Book). The *School Library Journal* wrote that in *A Court of Mist of Fury* “Maas continues to uphold her reputation for building alluring and breathtaking worlds and creating characters who feel so real they could

² Bloomsbury (last visited July 23, 2022), <https://www.bloomsbury.com/us/>.

³ Lacy Baugher Milas, *Sarah J. Maas Talks Writing Her New Sequel Crescent City: House of Sky and Breath*, Paste (Feb. 8, 2022), <https://www.pastemagazine.com/books/sarah-j-maas-/sarah-j-maas-talks-writing-her-new-sequel-crescent/>.

walk off the pages of the book.”⁴ *A Court of Mist and Fury* is widely available in Virginia.⁵ In addition to retailers such as Barnes & Noble, the Book is sold at dozens of stores across the state, many of whom have appeared as amici in this case in support of the Book.⁶

III. The Petition

The Petition seeks a declaration under Virginia Code § 18.2-384 that *A Court of Mist and Fury* is “obscene for distribution to minors” and asks for “issuance of a restraining order for distribution, sale, rent or loan of the Book to minors.” Petition at 3. Petitioner alleges that the Book is available, at least, in Hampton Roads at Barnes & Noble, and at Lynnhaven Middle School in Virginia. *Id.* ¶ 4. Petitioner contends that the Book “illustrat[es] intense sexual acts” and contains “extreme sexual content not suitable for children as young as ten years old.” *Id.* ¶¶ 3, 5. Although the Book is over 600 pages long, Petitioner cites only approximately a dozen passages from the Book—most from a single chapter—and thirteen instances of the word “stroke.” Petition ¶ 5. From this, Petitioner claims that “[t]he sexual content” in the Book “exert[s] a dominant perverse theme to promote felonious sexual encounters when exposed to minors and the words go substantially beyond customary limits of candor in description or representation of such matters

⁴ *A Court of Mist and Fury*, School Library Journal (last visited June 27, 2022), <https://www.slj.com/review/a-court-of-mist-and-fury>.

⁵ See generally *A Court of Mist and Fury*, Prince Books (Norfolk, VA) (last visited July 5, 2022), <https://www.prince-books.com/book/9781635575583>; *A Court of Mist and Fury*, Old Town Books (Alexandria, VA) (last visited July 5, 2022), https://oldtownbooks.com/item/BQ7V_Xv-HEBuovNdP9yD5A; *A Court of Mist and Fury*, Scrawl Books (Norfolk, VA) (last visited July 5, 2022), <https://www.scrawlbooks.com/book/9781635575583>; *A Court of Mist and Fury*, The Book Dragon Shop (Staunton, VA) (last visited July 5, 2022), <https://www.thebook-dragon.com/product/a-court-of-mist-and-fury-sarah-j-maas/6359?cp=true&sa=true&sbp=false&q=false>.

⁶ See Motion for Leave to Appear as Amici Curiae or, in the Alternative, to Appear as Persons Interested in the Sale or Commercial Distribution of the Book (June 22, 2022).

and accordingly have no serious literary, artistic, political or scientific value” and that the Book “contains extreme sexual conduct not suitable for minors and exposure to such sexual conduct is not appropriate for minors.” *Id.* ¶¶ 6-7.

Petitioner, Tommy Altman, filed his Petition less than two months before losing his bid for the Republican nomination for Congress from the 2nd District of Virginia.⁷ In the days after filing, Altman posted several campaign videos to his Instagram account about this action.⁸ Altman emphasized that the case was “about parental rights,” a theme in recent Virginia politics.⁹ Remarkably, in one of his posts, on May 19, 2022, Altman shared the allegedly “obscene” pages of *A Court of Mist and Fury* on his public Instagram page, freely available for minors to view, despite claiming that the Book should be declared “obscene for distribution to minors.”¹⁰

⁷ 2022 June Republican Primary, Virginia Department of Elections (last visited July 7, 2022), [https://results.elections.virginia.gov/vaelections/2022%20June%20Republican%20Primary/Site/Member_House_of_Representatives_\(02\).html](https://results.elections.virginia.gov/vaelections/2022%20June%20Republican%20Primary/Site/Member_House_of_Representatives_(02).html).

⁸ Tommy Altman (@tommyaltman), Instagram (May 25, 2022, May 26, 2022), <https://www.instagram.com/tommyaltman/?hl=en>.

⁹ Petitioner and his counsel seem unlikely to stop with this Book. Both before and after this Petition was filed, Petitioner’s counsel posted on his Facebook page about a number of other books, claiming that “lawsuits need to start being filed.” Virginia Law Office, Facebook (last visited July 25, 2022), <https://www.facebook.com/virginialawoffice/videos/1148121025973791>. The books include Brian K. Vaughan, *Saga*, Margaret Atwood, *Handmaid’s Tale*, Patricia McCormick, *Sold*, Ashley Hope Pérez, *Out of Darkness*, Sarah J. Maas, *A Court of Mist and Fury*, Elana K. Arnold, *What Riley Wore*, Alex London, *Battle Dragons City of Thieves*, George M. Johnson, *All Boys Aren’t Blue*, Iris Gottlieb, *Seeing Gender*, and Jonathan Evison, *Lawn Boy*. In other words, *A Court of Mist and Fury* and *Gender Queer*, which is the subject of a nearly identical petition, may only be the beginning for Petitioner and his counsel.

¹⁰ Tommy Altman (@tommyaltman), Instagram (May 19, 2022), <https://www.instagram.com/tommyaltman/?hl=en>.

ARGUMENT

This Court should dismiss the Petition and vacate the Show Cause Order because they are fatally flawed. *First*, the Petition and Show Cause Order are defective because the plain language of the statute does not authorize a finding that a book is obscene for distribution to minors. *Second*, the Petition fails as a matter of law because the Book is neither obscene or harmful to juveniles. *Third*, the statute violates the Constitution both on its face and as applied to the allegations in the Petition.

I. Virginia Code Section 18.2-384

Virginia Code Section 18.2-384 was enacted in 1960.¹¹ The statute allows any Virginia citizen to institute a proceeding in a Virginia circuit court for an “adjudication of the obscenity of [a] book.” Va. Code § 18.2-384(A). Once a petition is filed under Section 18.2-384, the court must review the book and determine whether there is probable cause “to believe the book is obscene.” Va. Code § 18.2-384(C). If the court finds there is probable cause that a book is obscene, the court must issue an order to show cause, and “[o]n or before the return date specified in the order to show cause, the author, publisher, and any person interested in the sale or commercial distribution of the book may appear and file an answer.” Va. Code § 18.2-384(C) and (F). The action then proceeds to a “prompt hearing” during which the court hears evidence including:

1. The artistic, literary, medical, scientific, cultural and educational values, if any, of the book considered as a whole;
2. The degree of public acceptance of the book, or books of similar character, within the county or city in which the proceeding is brought;
3. The intent of the author and publisher of the book;
4. The reputation of the author and publisher;
5. The advertising, promotion, and other circumstances relating to the sale of the book;
6. The nature of classes of persons, including

¹¹ See 1960 Va. Acts. ch. 233 (H.B. 40).

scholars, scientists, and physicians, for whom the book may not have prurient appeal, and who may be subject to exception pursuant to subsection G.

Va. Code § 18.2-384(H)(1-6).

If the court determines that a book is obscene, “any person who publishes, sells, rents, lends, transports in intrastate commerce, or commercially distributes or exhibits the book, or has the book in his possession with intent to publish, sell, rent, lend, transport in intrastate commerce, or commercially distribute or exhibit the book, is presumed to have knowledge that the book is obscene”—despite having no notice of the proceeding—as the statute is “intended only to establish scienter.” Va. Code § 18.2-384(K) and (M).¹²

Section 18.2-384 does not define “obscene.” Rather, the statute, which appears in Article 5 of Title 18.2, Chapter 8 of the Virginia Code, incorporates the definition of “obscene” in Virginia Code Section 18.2-372. *See* Va. Code § 18.2-372 (definition applies wherever “obscene” is used in Article 5 of Title 18.2, Chapter 8 of the Code); *Barson v. Commonwealth*, 284 Va. 67, 72 (Va. 2012). Section 18.2-372 defines “obscene” as a work

which, considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex, that is a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits of candor in description or representation of such matters and which, taken as a whole, does not have serious literary, artistic, political or scientific value.

Va. Code § 18.2-372.

The General Assembly adopted this definition in response to the United States Supreme Court’s decision in *Miller v. California*, 413 U.S. 15 (1973). *See Barson*, 284 Va. at 72. *Miller*

¹² “It is expressly provided that the petition and proceeding authorized under this article, relating to books alleged to be obscene, shall be intended only to establish scienter in cases where the establishment of such scienter is thought to be useful or desirable by the petitioner; and the provisions of § 18.2-384 shall in nowise be construed to be a necessary prerequisite to the filing of criminal charges under this article.” Va. Code § 18.2-384(M).

established the minimum requirements under the First Amendment for defining obscene for purposes of regulation, and Section 18.2-372 “expressly applies the ‘*Miller* test.’” *See id.*

II. The Statute Does Not Permit the Relief Sought

The Petition should be dismissed, and the Show Cause Order vacated, because Section 18.2-384 does not permit the relief Petitioner seeks. Petitioner brings this action seeking a finding, purportedly under Section 18.2-384, that the Book is “obscene for distribution to minors.” Petition at 3. However, Section 18.2-384 only permits a finding that a book is obscene for all audiences. The statute does not mention the words “minor” or “juvenile” and instead adopts the obscenity standard articulated by the Supreme Court in *Miller*, which is a general obscenity standard. 413 U.S. at 24 (measuring obscenity by the “average person”).

Giving the statute its “ordinary meaning,” as Virginia courts must, the plain language of this statute under which the Petition was filed provides only for a finding of obscenity for *all* audiences and not one limited to minors. *Phelps v. Commonwealth*, 275 Va. 139, 142 (Va. 2008); *see also Gen. Acc. Fire & Life Assur. Corp. v. Aetna Cas. & Sur. Co.*, 208 Va. 467, 474 (Va. 1968) (instructing that Virginia courts must not “rewrite” statutes by adding words). Virginia has a separate statutory scheme, Section 18.2-390, *et seq.*, restricting the distribution of materials deemed “harmful to juveniles.” However, the fact that the General Assembly enacted two separate statutes—one restricting the sale and distribution of obscene books and the other restricting the sale or loaning of material deemed harmful for juveniles—underscores the legislature’s intent to apply a different statutory scheme with respect to distribution of certain materials to minors.

To the extent Petitioner relies on the provision of Section 18.2-384 authorizing the reviewing court to “except from its judgment a restricted category of persons to whom the book is not obscene,” such reliance is misplaced. *See* Va. Code § 18.2-384(J). By its plain language, this provision only permits the court to make exceptions from its “judgment” for a category of persons

otherwise “restricted” by the judgment. In other words, the reviewing court must first make a judgment that the book is obscene under the applicable definition, and only then may the court make exceptions to its judgment for a category of persons. A contrary rule not only would disregard the plain language of Sections 18.2-384 and 18.2-372, but would also be unconstitutional under the established rule that the potential for harm to minors cannot, in and of itself, justify a finding of obscenity.

In *Goldstein v. Commonwealth*, the Virginia Supreme Court struck down as unconstitutional a statute that purported to restrict the sale and distribution of “books and other things containing obscene language and prints and pictures or description manifestly tending to corrupt the morals of youth.” 200 Va. 25, 26 (Va. 1958). The Virginia Supreme Court held that Virginia’s statute was not “reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of [Virginia] to reading only what is fit for children.” *Id.* at 28 (quoting *Butler v. State of Mich.*, 352 U.S. 380 (1957), in which a unanimous Supreme Court struck down a similar Michigan statute). The Petition effectively asks this Court to do the same thing that the Virginia Supreme Court has already found to be unconstitutional: declare a book obscene for all persons only because it allegedly is harmful to minors.

Accordingly, because it fails to allege that *A Court of Mist and Fury* is obscene under the controlling standard, the Petition should be dismissed, and the Show Cause Order should be vacated because it fails to find probable cause to believe that the book is obscene under the controlling standard. The CoMF Author and Publisher join Barnes & Noble’s argument that this Court lacks jurisdiction over this matter for these reasons.

III. The Petition Fails as a Matter of Law

In addition to the fact that the statute does not permit the relief sought, the Petition fails to plead that the Book is obscene—or even harmful to juveniles.

A. *A Court of Mist and Fury* is Not Obscene

As shown above, the standard for obscenity is whether the Book, taken as a whole, lacks serious literary, artistic, political, or scientific value. *See Miller*, 413 U.S. at 24; *see also* Va. Code § 18.2-372. Petitioner asks this Court to focus solely on a dozen snippets from the Book, alleging that:

The sexual content contained in [the Book] exert a dominant perverse theme to promote felonious sexual encounters when exposed to minors and the words go substantially beyond customary limits of candor in description or representation of such matters and accordingly have no serious literary, artistic, political or scientific value to minors pursuant to 18.2-374 of the Code of Virginia.

Petition ¶ 6. He further alleges that this specific content is not suitable for minors.

The standard for obscenity under Section 18.2-384 is whether *A Court of Mist and Fury*, “considered as a whole” lacks serious literary, artistic, political, or scientific value. *See* Va. Code § 18.2-372. Under *Miller*, courts must look at: “(a) whether the average person, applying contemporary community standards would find that the work, *taken as a whole*, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, *taken as a whole*, lacks serious literary, artistic, political, or scientific value.” *Miller*, 413 U.S. at 24 (internal citation and quotation marks omitted) (emphasis added). In other words, the fact that Petitioner finds that some content in the Book may be objectionable is not sufficient to render the Book obscene.

In cherry picking passages he considers obscene for minors, Petitioner appears to be relying on an outdated obscenity standard. “The early leading standard for obscenity allowed material to

be judged merely by the effect of an isolated excerpt upon particularly susceptible persons.” *Roth v. United States*, 354 U.S. 476, 488-89 (1957) (citing *Regina v. Hicklin*, L.R.3 Q.B. 360 (1868)). That is no longer the case. As the Court held in *Roth*, “[t]he *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press.” *Id.* at 489 (emphasis added); *see also Commonwealth v. Am. Booksellers Ass’n, Inc.*, 236 Va. 168, 175 (Va. 1988) (“A publication must be judged for obscenity as a whole, however, and not on the basis of isolated passages.”).

The Supreme Court expanded on this standard in *Miller* and has since made clear that material with social value is not necessarily obscene simply because it contains explicit scenes. *See United States v. Williams*, 553 U.S. 285, 288 (2008). For example, in *Jenkins v. Georgia*, the Supreme Court overturned a criminal conviction based on the distribution of an allegedly obscene film even though the subject matter of the film was sex. 418 U.S. 153, 161 (1974). The film at issue had “occasional scenes of nudity,” but the Court held that as a matter of law the movie “could not be found under the *Miller* standards to depict sexual conduct in a patently offensive way.” *Id.* (emphasis added).

The Virginia Supreme Court has likewise held that explicit content does not necessarily render material obscene. *See House v. Commonwealth*, 210 Va. 121, 127 (Va. 1969). In *House*, the Virginia Supreme Court examined certain magazines, which contained an article relating “to the experiences of a callgirl [sic] prostitute” and “pictures of nude and partly clothed men and women.” *Id.* Based on its independent examination of the materials and in light of *Roth*, the Virginia Supreme Court concluded that as a matter of law, the Commonwealth failed to prove that the materials were obscene. *Id.* at 125, 127. The Court found that the magazines at issue were not

obscene because there was no evidence that the magazines offended contemporary community standards in their “description or representation of sexual matters.” *Id.* at 126. Therefore, simply depicting sex, in an otherwise worthy work, does not make the work obscene.

As a matter of law, this Court should dismiss the Petition and vacate the Show Cause Order because Plaintiff fails to allege that the Book, taken as a whole, as it must be considered following *Miller*, is obscene.

B. The Book is Not Harmful to Juveniles

Section 18.2-390 *et seq.*, which governs material that is harmful to juveniles, is wholly inapplicable to an action brought under Section 18.2-384, which deals with obscenity. Even if brought under those provisions, however, the Book, taken as a whole, does not lack serious literary, artistic, political or scientific value for all juveniles.

Virginia Code Section 18.2-390, *et seq.* regulates the distribution and sale of material harmful to juveniles. *See* Va. Code § 18.2-391. The General Assembly adopted the harmful-to-juveniles scheme in response to *Ginsberg v. State of N. Y.*, 390 U.S. 629, 635 (1968), in which the Supreme Court validated a statutory scheme in New York. *Am. Booksellers Ass’n, Inc.*, 236 Va. at 171. Virginia Code defines “Harmful to juveniles” as “that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (a) predominantly appeals to the prurient, shameful or morbid interest of juveniles, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles.” Va. Code § 18.2-390.

In order to pass Constitutional muster, “the indirect burden on adults’ First Amendment right to have access to material not obscene for adults must be narrowly drawn.” *See Am. Booksellers v. Webb*, 919 F.2d 1493, 1501 (11th Cir. 1990). For example, in *Commonwealth v.*

American Booksellers, the Virginia Supreme Court held that material allegedly “unsuitable for young children” but “suitable for older adolescents” is not, as a matter of law, harmful to juveniles. *See* 236 Va. at 176-77. At issue in the case was whether 16 books were “harmful to juveniles.” *Id.* at 174.¹³ One of the books at issue was Judy Blume’s *Forever*, a story about two high school seniors who “fall in love, decide together to have sex, and act responsibly.”¹⁴ Margaret Sheffield’s *Where Do Babies Come From?*, another book at issue, provides information “on physical maturation, sexual intercourse, fetal development, and the birth process” and helps young people “understand human sexuality.”¹⁵ The Virginia Supreme Court held as a matter of law that despite material that might be questionable for the youngest minors, the 16 books did not lack “‘serious literary, artistic, political or scientific value’ for a legitimate minority of older, normal adolescents” and thus were not “harmful to juveniles” under Section 18.2-391. *Id.* at 177. The Court held that the standard for determining whether material is harmful to minors is “that if a work is found to have a serious literary, artistic, political or scientific value *for a legitimate minority of normal, older adolescents*, then it cannot be said to lack such value for the entire class of juveniles taken as a whole.” *Id.* (emphasis added). *American Booksellers* instructs that if a “legitimate minority”

¹³ The 16 books included Ruth Bell, *Changing Bodies, Changing Lives*, Jeanne Betancourt, *Am I Normal?*, Judy Blume, *Forever*, Philip Blumstein and Pepper Schwartz, *American Couples*, Jackie Collins, *Hollywood Wives*, Alex Comfort and Jane Comfort, *The Facts of Love*, Stephen Donaldson, *Lord Foul’s Bane*, *The Family of Woman*, Pamela Haines, *The Diamond Waterfall*, James Joyce, *Ulysses*, Johanna Lindsey, *Tender is the Storm*, *The New Our Bodies, Ourselves*, Larry Niven and Jerry Pournelle, *Lucifer’s Hammer*, *The Penguin Book of Love Poetry*, Margaret Sheffield, *Where Do Babies Come From?*, and John Updike, *The Witches of Eastwick*.

¹⁴ *Forever*, Judy Blume (last visited July 11, 2022), <https://judyblume.com/judy-blume-books/ya-books/ya-forever/>.

¹⁵ *Where do Babies Come From?*, Amazon (last visited July 11, 2022), <https://www.amazon.com/Where-Babies-Come-Margaret-Sheffield/dp/0394484827>.

of “older, normal adolescents” would find “serious” value in the material, then the material is not harmful to juveniles. *Id.*

A Court of Mist and Fury does not lack “serious literary, artistic, political or scientific value’ for a legitimate minority of older, normal adolescents,” nor does the Petition even allege as much. *See generally* Petition. Petitioner alleges only that the content he cherry picks from the entire book is “not suitable for children as young as 10 years old,” inviting the Court to apply a standard directly contrary to the Virginia Supreme Court’s holding in *American Booksellers*. *See id.* ¶ 5. This Court should not determine whether the Book is obscene by looking at a group of very young readers. Instead, under *American Booksellers*, the question is whether the Book is *not obscene* because it would be *appropriate* for a minority group of older adolescents. 236 Va. at 177 (“[T]he focus of the inquiry is not upon the youngest members of the class, not upon the most sensitive members of the class, and not upon the majority of the class.”); *see also Miller*, 413 U.S. at 33 (explaining that “so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one”).

Even if Petitioner alleged that the Book was harmful to minors under Section 18.2-390, *et seq.*, *A Court of Mist and Fury*—a creative story about a fairy realm with a strong, female leading character—would have value for a “legitimate minority of older, normal adolescents,” at the very least.

IV. Virginia Code § 18.2-384 is Unconstitutional

Beyond the procedural and substantive issues with the Petition and the Show Cause Order, the statute upon which they are based—Section 18.2-384—is unconstitutional as applied and on its face.

A. Section 18.2-384 is Unconstitutional as Applied

This Court should dismiss the Petition and vacate the Show Cause Order because Section 18.2-384 is unconstitutional as applied to this case. The Petition seeks “an order to show cause declaring all statutory relief pursuant to 18.2-384 of the Code of Virginia to include declaring the book *A Court of Mist and Fury* as *obscene for distribution to minors* and for the issuance of a restraining order for distribution, sale, rent or loan of this book to minors pursuant to 18.2-384(J) of the Code of Virginia.” Petition at 3 (emphasis added). The Show Cause Order states that the Book is “obscene for unrestricted viewing by minors.” Show Cause Order at 1. Petitioner’s proposed application of Virginia Code § 18.2-384 is overbroad as applied because it directly regulates speech that is not obscene and, at the same time, creates a chilling effect on protected speech. *See, e.g., Soundgarden v. Eikenberry*, 123 Wash. 2d 750, 778 (Wa. 1994) (finding a statute overbroad because “it reaches conduct which is constitutionally protected”); *see also Webb*, 919 F.2d at 1501 (holding that “a state may not prohibit an adult’s access to material that is obscene for minors but not for adults”).

Here, the statute authorizes a Court to “enter judgment that the book is obscene,” but does not authorize the Court to make a probable cause or final determination that the Book is “obscene for unrestricted viewing by minors.” Show Cause Order at 1. As applied, the statute creates a chilling effect on speech that is not obscene, because business owners abiding by this application will not be able to display or sell the Book, which is not obscene, or even alleged to be obscene. *See supra* Section III. Petitioner’s proposed application of this statute as applied “reaches” speech “which is constitutionally protected” and, therefore, is unconstitutional as applied. *See Soundgarden*, 123 Wash. at 778.

B. Section 18.2-384 is Unconstitutional On its Face

In addition to the statute being unconstitutional as applied, Section 18.2-384 is unconstitutional on its face.

First, Section 18.2-384 is impermissibly overbroad. Under established First Amendment precedent, the state cannot enact a law that “reduces the adult population to reading and viewing only works suitable for children.” *Virginia v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383, 389, *certified question answered sub nom. Am. Booksellers Ass’n, Inc.*, 236 Va. 168. In *Soundgarden*, for example, the Supreme Court of Washington analyzed a statute that regulated the display and labeling of certain music deemed “erotic.” 123 Wash. 2d at 761. The court held that the statute was unconstitutionally overbroad because the law, aimed at protecting minors, restricted constitutionally protected material for adults. *Id.* at 761-764, 778.

Here too, if the Court allows Petitioner’s proposed application of Section 18.2-384, such a ruling would hamper adults’ and older minors’ access to constitutionally protected speech. In permitting a probable cause finding that the Book is obscene for a subset of the population under Section 18.2-384, the Court is restricting more speech than the Constitution permits. *Id.* at 761-762.

Second, the relief requested by the Petitioner pursuant to Section 18.2-384 would constitute an unconstitutional prior restraint on speech in violation of the First Amendment and Article I Section 12 of the Constitution of Virginia. The Supreme Court has adopted procedural safeguards to keep non-obscene expression outside the sweep of obscenity regulations. *See Lee Art Theatre, Inc. v. Commonwealth*, 210 Va. 315, 317 (Va. 1969) (citing *Marcus v. Search Warrants of Prop. at 104 E. Tenth St., Kansas City, Mo.*, 367 U.S. 717, 732 (1961)) (explaining that “the Constitution requires a procedure ‘designed to focus searchingly on the question of obscenity’ before speech can be regulated or suppressed”). Key among these safeguards is a protection against “prior

restraints of indefinite duration” on material that has not yet “been finally adjudicated to be obscene.” *Vance v. Universal Amusement Co.*, 445 U.S. 308, 309, 316 (1980); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63 (1989) (“[T]he publication may not be taken out of circulation completely until there has been a determination of obscenity after an adversary hearing.”).

Section 18.2-384 purports to authorize a court to issue a temporary restraining order for an indefinite duration prior to any final adjudication of obscenity. Va. Code § 18.2-384(E) (“When an order to show cause is issued pursuant to this article, and upon four days’ notice to be given to the persons and in the manner prescribed by the court, the court may issue a temporary restraining order against the sale or distribution of the book alleged to be obscene”). Under clear Supreme Court precedent, Section 18.2-384 is unconstitutional. *See Fort Wayne Books*, 489 U.S. at 62; *Vance*, 445 U.S. at 316.¹⁶

Third, Section 18.2-384’s scienter provision is constitutionally impermissible. Section 18.2-384 states that it “shall be intended only to establish scienter in cases where the establishment of such scienter is thought to be useful or desirable by the petitioner,” and imputes knowledge to “any person who publishes, sells, rents, lends, transports in intrastate commerce, or commercially distributes or exhibits the book” or intends to do so. Va. Code § 18.2-384(M) and (K). In other words, this section is designed to be used to support a criminal proceeding even if the offender had no actual knowledge of the obscenity finding. The CoMF Author and Publisher join Barnes &

¹⁶ While the Virginia Supreme Court held that Section 18.2-384 was constitutional when it was challenged in the 1970s, the Court left the door open to challenging the constitutionality of a temporary restraining order issued before a final evidentiary hearing, reasoning that “no temporary restraint was issued in the case at bar. Sale or distribution of the subject magazines was not enjoined until after a full adversary hearing.” *See Alexander v. Commonwealth*, 214 Va. 539, 541 (Va. 1974).

Noble's argument that Section 18.2-384 is facially unconstitutional because it imposes a defective scienter standard on the same grounds.

Finally, in addition to the fact that Virginia Code § 18.2-384 violates the First Amendment, it also contravenes the Due Process Clause. The CoMF Author and Publisher join Barnes & Noble's arguments that Section 18.2-384 violates Due Process on the same grounds.

CONCLUSION

WHEREFORE, for the foregoing reasons, the CoMF Author and Publisher respectfully request that the Court vacate the Show Cause Order, dismiss the Petition with prejudice, and award the CoMF Author and Publisher any additional relief that the Court deems fair and just.

Dated: July 26, 2022

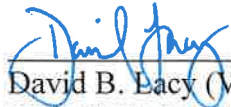
Respectfully submitted,

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I hereby certify that on July 26, 2022, a true and accurate copy of the foregoing was sent

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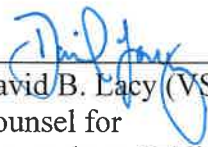
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