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August 16, 2022

VIA HAND DELIVERY

Hon. Tina E. Sinnen, Clerk
Virginia Beach Circuit Court
2425 Nimmo Parkway
Building 10 & 10B, 3rd Floor
Virginia Beach, VA 23456-9017
Attn: Civil Division

Re: In re: Gender Queer, A Memoir; CL22-1985

Dear Ms. Sinnen:

Enclosed for filing on behalf of Oni-Lion Forge, LLC, please find a Reply in Support of Oni-Lion Forge LLC's Demurrer and Motion to Dismiss.

As instructed by Ms. Catoe, a copy of this filing is being delivered to Judge Baskervill by FedEx overnight mail at the Dinwiddie address provided to counsel.

Thank you for your assistance and please do not hesitate to contact me should you have any questions.

Sincerely,

Ariel L. Stein

/ALS
Enclosure
Cc: All Counsel in Case No. CL22-1985 (via email).

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

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

REPLY IN SUPPORT OF ONI-LION FORGE LLC'S DEMURRER AND MOTION TO DISMISS

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

INTRODUCTION

Petitioner's Omnibus Brief in Opposition to Respondents' Motions ("Response") confirms that Petitioner lacks legal or factual basis to support his request to ban *Gender Queer*[1] from consumption by minors. Rather than grapple with the legal arguments attacking his Petition for failing to state a claim, Petitioner injects a multitude of allegations and supporting documents that do not appear in his Petition and thus cannot be considered. *See In re Volkswagen "Clean Diesel" Litig.*, 94 Va. Cir. 189 (2016) (finding that the demurrer analysis is "bound by the four corners of the Complaint").[2] Likewise, he makes several attempts to muddy the waters between the statute at issue in this case and various other Virginia statutes that do not apply here and attempts to blur the

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[1] Capitalized terms take the definition set out in Oni-LF's opening brief.

[2] While Petitioner's last-minute additions are not even remotely relevant, there are many that fall outside of the Petition's text are improper and must be ignored. For example, the following allegations in Petitioner's Response appear nowhere in the "four corners" of his Petition: (i) the description of the ALA as "led by a self-described "Marxist;" (ii) the references to society "shifting" to more extreme sexual content; (iii) the tutorial in child neurology; (iv) the history of the graphic novel; (v) theories of sexual socialization; (vi) norms of music, video game, and movie regulatory bodies; (vii) his assertion of Virginia citizenship; and (viii) the post-Petition history of Virginia Beach school boards' review of Gender Queer not referenced in the Petition or its exhibits.

distinction between what is allowed by the statute and what is allowed under the U.S. and Virginia Constitutions.

However, even after muting this extraneous noise, this Court will still find that Petitioner's Response fails to address the arguments Respondents raised in their opening briefs. Oni-LF's demurrer and motion to dismiss must be granted on the short-comings of the Petition alone. The statute simply does not allow for the relief Petitioner seeks, and even if it did, *Gender Queer* cannot be considered "harmful to minors," much less "obscene" as required under Virginia Code § 18.2-384. Nor does the Petition allege, as it must, that *Gender Queer*, taken as a whole, has a dominant theme appealing to the prurient interest. Moreover, Oni-LF's motions must be granted on the other substantive and constitutional grounds raised in its opening brief. Due to facial deficiencies of the statute, Petitioner has failed to satisfy due process notice requirements, serve all interested parties, establish the Court's subject matter jurisdiction, or even allege standing to bring this proceeding.[3]

ARGUMENT

A. Virginia Code § 18.2-384 does not allow the relief Petitioner seeks.

Petitioner's Response underscores his fundamental mischaracterization of the statutory framework at issue in this case. The Court need look no further than the text of the statute and the relief Petitioner seeks: an order finding "both books obscene to minors and issue a restricted category of persons to whom the book is not obscene: **adults**." *See* Response at p. 1.

As stated in the Respondents' opening briefs, this goes beyond the authority the General Assembly gave the courts of the Commonwealth through Virginia Code § 18.2-384. This statute only allows this Court to consider whether a book is "obscene." Under the plain text of Virginia Code § 18.2-384, the Court can only enter a judgment that a book is "obscene" and bar commercial

[3] On-LF adopts and incorporates the arguments set forth in Barnes & Noble's reply brief.

distribution of the book based on the principles set out in *Miller v. California*, 413 U.S. 15 (1973), which the General Assembly codified in its definition of "obscenity" in Virginia Code § 18.2-372 as interpreted by the Virginia Supreme Court. The principles of *Miller* require that the question of obscenity be determined through the eyes of the average adult, not children. Then, and only then, may this Court fashion a limited "carve out" or class of persons that can have access to the work. *See* Virginia Code § 18.2-384 (G) and (J).

Here, Petitioner seeks to put the proverbial "cart before the horse," seeking a "carve out" before alleging obscenity as defined by the statute. Petitioner asserts Virginia Code §§ 18.2-384(G) and (J) permit the Court to bypass the first step and declare the book obscene for minors and "carve out" an exception for all adults. That is not what subsections (G) and (J) permit. Those subsections refer to a carve-out for a "restricted category of persons to whom the book is not obscene." Indeed, the statute expressly mentions examples of "restricted classes" who may be permitted access to include "scholars, scientists, and physicians." These are all small subsets of adults who may need to review work that would otherwise be considered obscene. However, "all Virginia adults" cannot be reasonably considered a "restricted category of persons." Yet even if "all Virginia adults" can be considered a permissible "restricted category of persons," the Court must first make a determination of whether the book is obscene under the adopted *Miller* standard.

Petitioner cites *Commonwealth v. American Booksellers Association, Inc.*, for the proposition that "states may, within a carefully defined framework, restrict the access of minors to such material." Response at 19 (quoting *Commonwealth v. Am. Booksellers Ass'n*, 236 Va. 168, 175, 372 S.E.2d 618, 623 (1988)). Importantly, Oni-LF does not disagree with this proposition. However, *American Booksellers* interpreted Virginia Code § 18.2-390 and § 18.2-391, which specifically involve distribution of materials "harmful to juveniles." *See* 236 Va. at 175. As set

out in Respondents' opening brief, Virginia Code § 18.2-391 authorizes a locality's Commonwealth Attorney to commence criminal charges if a defendant knowingly permits minors access to materials that are "harmful to juveniles" as defined by that statute. Virginia Code §18.2-391 does not contain a private right of action. Given this fact, Petitioner tries to bring this claim under Virginia Code § 18.2-384, using the standard of Section 18.2-390. Simply put, this case is not an attempt by Petitioner to utilize Virginia's "carefully-defined framework" to restrict access to material that may be harmful to minors, but rather, it is Petitioner's attempt to rewrite the statutory framework so it allows for the relief he desires.[4]

Indeed, Petitioner does not hide his desire for this Court to supplant the role of the General Assembly and re-legislate the Commonwealth's statutory framework in light of what he perceives to be a change in societal norms. *See* Response at 1 & 7. While Petitioner states that "times have changed" and "the law must evolve" so that his requested relief can be granted, Response at 1 & 7, this Court is not permitted to do what the General Assembly has failed to do.

While Petitioner asks this Court to declare *Gender Queer* obscene "as to minors," he brought this case under Virginia Code § 18.2-384, which applies to all readers in Virginia, whether adult or minor. Accordingly, this Court cannot grant the relief Petitioner seeks, and must grant demurrer and dismiss the Petition.

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[4] Petitioner references various statutes that he alleges contain definitions for "sexually explicit material," "grooming materials," and "sexually explicit content." Response at 8. Importantly, these statutes involve other unlawful acts and are not actionable under Virginia Code § 18.2-384, nor do they create private rights of action. *See* Virginia Code § 18.2-374 (defining "sexually explicit *visual* material" in the context of making illegal the production of child pornography), § 18.2-374.4(B) (defining "grooming materials" and making illegal the display of child pornography), § 22.1-16.8 (giving the authority to the Department of Education to develop and make available to school boards policies regarding "sexually explicit content."). These definitions appear nowhere in Section 18.2-384 or 18.2-372's definition of obscenity and are irrelevant. These other statutes do not apply and must be ignored here.

B. Even if the statute allowed the relief sought, the book cannot be considered "obscene."

Petitioner's Response concedes that the standard articulated in *Miller* applies here. However, the Petition's allegations fail to allege any facts to support the bald legal conclusions that *Gender Queer* "should be deemed obscene as to be viewed unrestricted by minors." Petition ¶ 6. A review of the actual book coupled with Petitioner's Response confirm that there are only seven pages of a 240-page book that Petitioner takes issue with. Petitioner labels these the "worst parts of the book." Response at 16.

However, as stated in Oni-LF's opening brief, this Court cannot conduct its review in a vacuum. Indeed, the very case cited by Petitioner states, "A publication must be judged for obscenity as a whole, however, and not on the basis of isolated passages." *Am. Booksellers*, 372 S.E.2d at 622 (citing *Roth v. United States*, 354 U.S. 476, 489, 77 S.Ct. 1304, 1311, 1 L.Ed.2d 1498 (1957)); *see also Lofgren v. Commonwealth,* 55 Va. App. 116, 120, 684 S.E.2d 223, 226 (2009) (considering the words "as a whole" and "in the context in which they were spoken"). "Published material may have an explicit sexual content which, while perhaps pornographic, falls short of obscenity." *Id.*

When viewed as a whole, as a matter of law, *Gender Queer* does not appeal to the prurient interests and has serious literary, artistic, or scientific value to readers, young and old, that are similarly situated. This graphic novel depicts the author's journey of self-identity, including grappling with coming out to friends and family, navigating childhood crushes as an asexual person, communicating with medical personnel about their gender identity, and keeping and maintaining friendships. In fact, the author is *asexual*, so to suggest the message of their autobiography is to encourage minors to engage in sex defies logic. Rather, its main theme is an auto-biographical account of a person navigating life as an asexual nonbinary person.

Indeed, of the seven pages Petitioner take issue with, Oni-LF has established those cited pages are taken out of context and are mischaracterized. Oni-LF addressed each of the seven pages in its moving brief. (Oni-LF Br. at 13-14). However, Petitioner's submission failed to respond. Rather, Petitioner re-prints two of the seven pictures in his brief, and doubles down on the mischaracterizations. Response at 8.[5]

The Petition's shortcomings are fatal to this proceeding. While the three prongs of the *Miller* test involve both legal and factual questions, there are issues that courts can consider "as a matter of law" and grant demurrer. *See Lofgren*, 684 S.E.2d at 225 (determining as a matter of law that the alleged obscene communication did not meet the legal definition of obscenity because the dominant theme, when taken as a whole, did not appeal to the prurient interest); *see also Am. Booksellers Ass'n*, 372 S.E.2d at 176 (1988) (finding that as a matter of law, the 16 works at issue did not meet requirement that the works lacked "serious literary, artistic or scientific value" to a legitimate minority of juveniles).

In short, even assuming Virginia Code § 18.2-384 could allow a carve-out for minors, the Court should dismiss Petitioner's claim because he has failed to plead any facts required to meet all three prongs of the *Miller* test. *See Lofgren*, 684 S.E.2d at 225; *Am. Booksellers*, 236 VA at 176-77 (1988).

C. Petitioner admits to his failure to meet due process notice requirements and joinder of necessary parties.

Petitioner admits that he has failed to meet the requirements of Virginia Code § 18.2-384(D)(3) and, if "known" name "all other persons interested in the sale or commercial

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[5] Even if Petitioner's gross mischaracterizations of the seven images were correct, which they are not, this does not change the analysis under *Miller*. Petitioner may still not cherry-pick an image. The illustrations are still protected speech which must be view in context of the work as whole. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 240 (2002) (holding that illustrations and computer-generated images of minors subject to the *Miller* standard).

distribution" of *Gender Queer*.[6] Petitioner argues that it is "unrealistic" for him do so. Putting aside that the Petitioner failed to name and serve Barnes & Noble or Amazon, both of whom were expressly named in paragraph 3 of the Petition, Petitioner admits that there are at least 201 Virginia bookstores that he is aware of (not to mention the distributors or sellers physically located outside of the Commonwealth). This exercise to locate potential persons interested in the sale or commercial distribution was long overdue and should have occurred prior to filing the Petition. Rather than comply with the procedural rules or the statute, he admits that he made no efforts identify, locate or serve them. These entities and their respective addresses are determinable to Petitioner through basic research on the internet or through the Corporation Commission. According to Petitioner, it is enough that these interested parties can, if luck has it, find out about the litigation from the internet and then seek to join the proceedings. Response at 11. In doing so, Petitioner admits that he has failed to meet not only Virginia Code §18.2-384, but the fundamental due process requirement of notice and the joinder of all necessary parties to the litigation.

The requirement that Petitioner serve all interested parties may be burdensome, but it is difficult for good reason. If the Court declares a book obscene, it must then impose a state-wide ban on its distribution and sale, and it creates a presumption of knowledge that those engaged in the commercial distribution and sale of the book are committing a crime, *i.e.*, distributing an "obscene" work within the Commonwealth. Virginia Code §18.2-384(K). Thus, interested parties must be identified and given reasonable notice so they can, at minimum, be aware that they should stop distributing and selling the work upon a finding of obscenity.

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[6] For the purposes of this Chapter of the Virginia Code, "knowingly" is defined as "having general knowledge of, ***or reason to know, or a belief or ground for belief which warrants further inspection***..." Va. Code Ann. § 18.2-390(7) (Emphasis added).

Petitioner attempts to hide behind Virginia Code §18.2-384(D)(2). He claims that the order of publication authorizing notice to appear in the Virginia Pilot absolves his short comings. Far from it. At the very least, this argument underscores that Virginia Code §18.2-384 is unconstitutional facially and as-applied. *See Evans v. Evans*, 300 Va. 134, 860 S.E.2d 381 (2021). Virginia Code §18.2-384, as read by Petitioner, permits service by publication without any effort to first effect actual service, and then allows substituted service via a means that is not reasonably calculated to apprise an interested party of the existence of the litigation. Despite its broad application to all persons interested in the sale and distribution of the book in Commonwealth, the statute requires only publication in a newspaper within the county or city where the proceeding is brought. This deficiency is further underscored by the facts here. The Virginia Beach area has a population in the millions, yet the Virginian Pilot has a paid circulation of under 200,000. While the Virginian Pilot has a website, its contents are behind a paid wall. Given this structural statutory deficiency, and the lack of any reasonable Petitioner diligence, constitutional due process requirements have not been met and necessary parties have not been joined. Accordingly, the Petition must be dismissed.

D. Petitioner lacks standing.

As established in Oni-LF's opening brief, Petitioner has also failed to establish standing to bring this proceeding. Petitioner argues that he has alleged standing because Virginia Code §18.2-384 creates a private right of action for a citizen of the county to institute a proceeding challenging the obscenity of a book. The Petition fails to allege that Mr. Altman was a citizen. (*Compare* Petition ¶ 1 *with* Response at 26). Even assuming Petitioner could amend his petition via his brief, Petitioner still failed to establish standing. A legislate grant of a private action does not create standing under the law of Virginia. The putative plaintiff must still demonstrate an actual and meaningful interest in the subject matter of the litigation and "stand to suffer a particularized harm

not shared by the general public." *See Friends of the Rappahannock v. Caroline County Bd. of Supervisors,* 286 Va. 38, 49 (2013) (demurrer granted where alleged facts failed to establish standing). The Petition is barren of any fact other than Mr. Altman resides in Virginia Beach. From this one allegation, the Court cannot divine what unique "particularized harm" Petitioner would suffer absent the requested relief. Even in his opposition brief, Petitioner has failed to supply any. As such, the demurrer should be granted, and the Petition dismissed for lack of standing.

CONCLUSION

For the foregoing reasons, Oni-LF requests this Court grant its Demurrer and Motion to Dismiss and Motion to Dismiss the Petition for Declaration for Adjudication of Obscenity Pursuant to 18.2-384 of the Code of Virginia and for any such other, further relief this Court deems necessary.

ONI-LION FORGE PUBLISHING GROUP, LLC

By 
Of Counsel

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CERTIFICATE

I hereby certify that on this 16th day of August, 2022, I served a copy of this brief on all counsel of record.

Ariel L. Stein