

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

In re: Gender Queer, a Memoir

Case No. CL22-1985

**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’s
Motion to Dismiss and to Vacate Order to Show Cause**

On the grounds enumerated below, Movants, by counsel, present their arguments why this Court should dismiss the *Petition for Declaration for Adjudication of Obsenity* [sic] (“Petition”) filed April 28, 2022, and to vacate the *Order to Show Cause Pursuant to 18.2-384 of the Code of Virginia* (“Order”) dated May 18, 2022; or, in the alternative, move to dismiss the Petition and the Order.

1. This case constitutes a misuse of Section 18.2-384 of the Code of Virginia (“the Law”), which additionally has severe facial constitutional problems.

2. The Law does not authorize this proceeding because it limits any proceeding to “adjudication of the obscenity of the book” *as to adults* under Virginia Code § 18.2-372. *See* Va. Code § 18.2-384(A); *see also id.* § 18.2-384(K) (establishing presumption of knowledge that book is “obscene” under statutes governing obscenity for adults and child pornography only). It does not provide the Court with jurisdiction to adjudicate whether a book is harmful to (or obscene for) minors. *See* Va. Code. § 18.2-390 (separately defining materials that are “harmful to

juveniles”). Both the Petition and the Order—which focus on the book’s “obscenity for unrestricted viewing by minors”—thus exceeded the scope of the Law.

3. *Gender Queer* is not obscene taken as a whole, as will be established by the facts should this case proceed past the jurisdictional stage—and as is demonstrated now by the fact that Petitioner did not ask that it be found to be such. *See* Petition ¶ 7. Nor did the Order find probable cause that it is, instead focusing on its “obscen[ity] for unrestricted viewing by minors.” *See* Order 1.¹

4. Even if these proceedings were authorized by Section 18.2-384, the statute is unconstitutional both on its face and as applied to the facts of this case.

5. First, the Law conflicts with the constitutional test for obscenity. *See Miller v. California*, 413 U.S. 15 (1973). Several of the evidentiary categories listed in § 18.2-384(H) have no relevance to the *Miller* test. *See, e.g.*, Va. Code Ann. § 18.2-384(H)(2) (considering “[t]he degree of [local] public acceptance of the book” rather than whether “the average person, applying contemporary community standards, would find that the work as a whole appeals to the prurient interest,” *Miller*, 413 U.S. at 24 (internal quotation marks omitted)).

5. Second, the authority that the Law vests in one court to enjoin the sale, publication, and distribution of a book across the state—whether through a

¹ The book is also not harmful to minors, as will be established by the facts should the case proceed past the jurisdictional stage.

temporary restraining order (“TRO”) issued pursuant to Va. Code. § 18.2-384(E), or by imputing knowledge of the book’s obscenity, pursuant to § 18.2-384(K), to all who publish, sell, lend, or transport the book, even if they are not parties to the proceeding, following a final adjudication—is unconstitutional.

6. The Law unconstitutionally allows a “circuit court in [the] city or county” where an obscenity proceeding is initiated to bind all persons *in the state* from publishing or even lending the challenged book. This is of particular concern to Movants—who include bookstores located throughout Virginia—because Virginia applies local, not statewide, community standards to determine obscenity. *Price v. Commonwealth*, 214 Va. 490, 491–92 (1974). This means that a book can be legally obscene in one community and not in another—yet under the Law a finding of obscenity in one Virginia community will suffice to bind retailers and publishers in *all* Virginia communities, including ones where the book would likely not be held obscene.

7. Of equally acute concern to Movants, after the issuance of a TRO or a final adjudication of obscenity, the Law provides that everyone in the state who “publishes, sells, rents, lends, transports, . . . or commercially distributes or exhibits the book” is deemed to know that the book is obscene. *See* Va. Code Ann. § 18.2-384(E). This would reach all booksellers, publishers, and other retailers working in the state—including many persons who had no previous knowledge of or connection

to the matter. And even those who learn of the matter may have been unable to appear in the matter because the deadline for participation by non-parties pursuant to the Law is unclear. *See id.* § 18.2-384(F).

8. Relatedly, many publishers, booksellers, and other distributors governed by the court's order likely will not know about any TRO or order resulting from the show cause hearing. The Law requires that, when an action is initiated, any petition must "list[] the names and addresses, *if known*, of the author, publisher, and *all other persons* interested in [the material's] sale or commercial distribution." *Id.* § 18.2-384(B)(3) (emphasis added). This means that publishers, distributors, and booksellers may receive no notice if the petitioner is not aware of their names and addresses—and the Law also fails to define "other [interested] persons." Similarly, pursuant to the Law, a court may issue a TRO against distribution of an allegedly obscene book "upon . . . notice to be given to the persons and in the manner prescribed by the court." *Id.* § 18.2-384(E). In addition to being unconstitutionally vague, this appears to allow the court to bind many persons who had no previous connection to or notice of a proceeding. While Movants have learned of this proceeding, many others impacted by it—and who would be governed by a TRO—do not know about this proceeding and are not before this Court.

9. In addition, it is not clear that such parties could appeal the obscenity judgment in the proceeding against the book, or whether they could relitigate the

issue of the book’s obscenity in a different matter, including any future criminal prosecution brought against them. *See id.* § 18.2-384(L) (allowing only “part[ies] to the proceeding . . . [to] appeal from the judgment”). If, as appears to be the case from the face of the Law, they may not, the Law creates unconstitutional strict liability for speech. *Smith v. California*, 361 US 147, 153 (1959). Critically, this would also hold for individuals located outside of the community where the proceeding against the book occurred—and, accordingly, as noted above, where the community standards governing obscenity may differ such that the book is not, in fact, obscene in their locale.

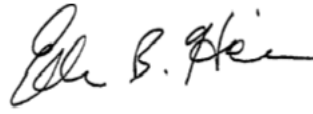
10. Finally, the Law also imposes an unconstitutional prior restraint because it authorizes the Court to issue a TRO not only without notice to all parties governed by the order, but also without requiring an adverse hearing and without an ultimate judicial determination that the book is obscene. *See, e.g., Vance v. Universal Amusement Co.*, 445 U.S. 308, 316–17 (1980), *reh’g denied*, 446 U.S. 947 (1980).

While the book in question is clearly not obscene, the deficiencies in Petitioners’ pleadings and the Court’s Order, as well as the unconstitutional nature of the Law, mean that the Court can and should resolve this case without any need to reach the merits of the claim. Should the Court determine otherwise, Movants intend to introduce evidence and argument demonstrating that the books in question are clearly not obscene.

Dated: June 22, 2022

Respectfully submitted,

Michael A. Bamberger
(*pro hac vice* pending)
Dentons US LLP
1221 Ave. of the Americas, 25th Fl.
New York, NY 10020
Tel.: (212) 768-6700
michael.bamberger@dentons.com



Eden B. Heilman, VSB No. 93554
Matthew Callahan (*pro hac vice* pending)
American Civil Liberties
Union Foundation of Virginia
701 E. Franklin St., Ste. 1412
Tel.: (804) 644-8022
eheilman@acluva.org
mcallahan@acluva.org

Vera Eidelman (*pro hac vice* pending)
Joshua Block (*pro hac vice* pending)
American Civil Liberties
Union Foundation
125 Broad St., 18th Fl.
New York, NY 10004
Tel.: (212) 549-2500
veidelman@aclu.org
jblock@aclu.org

*Attorneys for Movants Prince Books, Read Books, One More Page Books, bbg
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*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and accurate copy of the foregoing Motion to Dismiss and to Vacate Order to Show Cause was e-mailed and sent via USPS mail to the following:

Timothy Anderson
2492 N. Landing Rd. 104
Virginia Beach, VA 23456
Tel.: (757) 301-3636
Fax: (757) 301-3640
timanderson@virginialawoffice.com
Counsel for petitioner

Craig T. Merritt
R. Braxton III
Merritt Law
919 E. Main St., Ste. 1000
Richmond, VA 23219
Tel.: (804) 915-1601
cmerritt@merittfirm.com
bhill@merittfirm.com

Robert Corn-Revere
Laua R. Handman
Linda Steinman
Amanda B. Levine
Davis Wright Tremaine, LLP
Ste. 500 East
1301 K. St. NW
Washington, D.C. 2009-3317
bobcornrevere@dwt.com
laurahandman@dwt.com
lindasteinman@dwt.com
amandalevine@dwt.com
*Counsel for Barnes & Noble Booksellers,
Inc.*

Ariel L. Stein
Bischoff Martingayle, P.C.
208 E. Plume St., Ste. 247
Norfolk, VA 23150
Tel.: (757) 440-3546
Fax: (757) 440-3924
stein@bischoffmartingayle.com

Michael K. Lowman
Armstrong Teasdale, LLP
14001C. St. Germain Dr., Ste. 223
Centreville, VA 20121
Tel.: (267) 780-2034
mlowman@atllp.com
*Counsel for Oni-Lioin Forge
Publishing Group, LLC*

L. Stevern Emmert
Sykes, Bourdon, Ahern
& Levy, PC
4429 Bourdon Rd., Ste. 500
Virginia Beach, VA 23462
Tel.: (757) 499-8971
Fax: (757) 456-5445
lsemmert@sykesbourdon.com

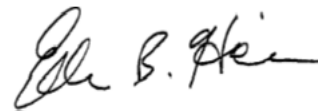
Jeff Trexler
15110 Boones Ferry Rd., Ste. 220
Lake Oswego, OR 97035
Tel.: (212) 677-4092
jeff.trexler@gmail.com

Counsel for Maia Kobabe

Kamala H. Lanetti
Deputy City Attorney
Virginia Beach City
Attorney's Office
2512 Municipal Ctr., Building 6
Virginia Beach, VA 23456
Tel.: (757) 264-1215
klannet@vbgov.com

Dated: June 22, 2022

Respectfully submitted,



Eden B. Heilman, #93554
American Civil Liberties
Union Foundation of Virginia
701 E. Franklin St., Ste. 1412
Tel.: (804) 644-8022
Fax: (804) 649-2733
eheilman@acluva.org

*Counsel for 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*