

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH**

**In re: A Court of Mist and Fury**

**Case No. CL22-1984**

**Barnes & Noble’s Motion to Dismiss  
and to Vacate Order to Show Cause**

Barnes & Noble Booksellers, Inc. (“Barnes & Noble”), by counsel, moves to dismiss the *Petition for Declaration for Adjudication of Obsenity* [sic] Pursuant to 18.2-384 of the Code of Virginia (“Petition”) filed April 28, 2022, and to vacate the *Order to Show Cause Pursuant to 18.2-384 of the Code of Virginia* (“Show Cause Order”) entered by the Court on May 18, 2022, on the grounds enumerated below.

**Interest of the Movant**

Barnes & Noble, with its principal place of business in New York, is a national distributor of books through its branded retail stores and online, with a direct interest in the interstate commercial distribution and sale of *A Court of Mist and Fury*. Barnes & Noble is identified as “Barnes and Nobel” [sic] in Paragraph 3 of the Petition. On May 25, 2022, Barnes & Noble was served with notice of a hearing for a temporary restraining order pursuant to Va. Code § 18.2-384 involving *A Court of Mist and Fury*, by Sarah J. Maas.

**Grounds for Dismissal**

1. This Court lacks subject matter jurisdiction, because no provision of Virginia law authorizes a preemptive ruling that the books at issue are “obscene for unrestricted viewing by minors.” See Petition at ¶ 7. Va. Code § 18.2-384 establishes a judicial procedure only for a determination regarding the circulation of “obscene” materials, a term defined in Va. Code § 18.2-372. The Petition cites Section 18.2-374 in its request for relief, which relates to the “Production,

publication, sale, possession, etc., of obscene items.” Petition at ¶ 6. However, the particular relief sought involves a different statute, Virginia Code § 18.2-391, which deals not with obscenity, but with material deemed to be “harmful to juveniles.” Nothing in Va. Code § 18.2-384 authorizes the Court to issue a ruling under the “harmful to juveniles” standard, or to fashion a remedy that limits access by juveniles while allowing full access by adults.

2. The Petition seeking a declaration that *A Court of Mist and Fury* is obscene is facially defective under Virginia law. The Petition cites no provision of Virginia law that authorizes a court to declare that the book is “obscene for distribution to minors.” The Petitioner proceeded under Va. Code § 18.2-384, but that statute does not provide for a finding that a book is “harmful to juveniles” or to issue a temporary restraining order based on that standard.

3. The Petition seeking a declaration that *A Court of Mist and Fury* is obscene is fatally defective under applicable constitutional standards. The Petition’s demand for a declaration that the book is “obscene for distribution to minors” and request for a restraining order on that basis, even if they were authorized by state law, are defective, in that the Petition fails to allege facts sufficient to support either a finding of obscenity or that the book is “harmful to juveniles” under controlling constitutional requirements. The Petition does not allege that the book, taken as a whole, is obscene, as the First Amendment requires. *Roth v. United States*, 354 U.S. 476, 488-489 (1957). Nor does it allege that the other elements of the test for obscenity have been met. *Miller v. California*, 413 U.S. 15, 24 (1973). Contrary to these constitutional requirements, the Petition alleges only that the “predominant ... theme” of a handful of selected passages in a 626-page novel should be deemed “obscene for distribution to minors.” Petition at ¶¶ 5-6. The Petition’s allegations are facially deficient as a matter of law even if a “harmful to juveniles” standard could

be applied under the law. *American Booksellers Association v. Commonwealth of Virginia*, 236 Va. 168, 177 (1988).

4. Va. Code § 18.2-384 is unconstitutional on its face because it authorizes courts to issue temporary restraining orders to restrict distribution of specified books in advance of any final adjudication of obscenity, *id.*, 18.2-384(E), contrary to established First Amendment doctrine. *Fort Wayne Books v. Indiana*, 489 U.S. 46, 66 (1989).

5. Va. Code § 18.2-384 is unconstitutional on its face because a ruling on a particular book binds “any person who publishes, sells, rents, lends, transports in interstate commerce, commercially distributes or exhibits the book, or has the book in his possession,” and imposes a binding presumption of knowledge on the part of such persons that the designated book is obscene. *Id.*, 18.2-384(K). *See Smith v. California*, 361 U.S. 147, 153 (1960).

6. Va. Code § 18.2-384 on its face violates the Due Process Clause of the Fourteenth Amendment because it authorizes injunctive restrictions against “any person,” and imposes a binding presumption of scienter, even as to individuals who lack actual notice or an opportunity to participate in the judicial proceedings. *See* Va. Code §§ 18.2-384(K), (M). *See Zenith Corp. v. Hazeltine*, 395 U.S. 100, 110 (1969).

7. Va. Code § 18.2-384 on its face violates the Dormant Commerce Clause, because it authorizes state restrictions on the sale or distribution of books in interstate commerce. *PSInet, Inc. v. Chapman*, 362 F.3d 227, 239-240 (4th Cir. 2004).

8. Va. Code § 18.2-384 is unconstitutional as applied. Barnes & Noble was served with a Motion for TRO and Notice of a hearing regarding *A Court of Mist and Fury* even though Barnes & Noble is not a party to the underlying Petition and was never served with the Petition. Under Va. Code § 18.2-384, Barnes & Noble and other similarly situated book sellers may be

subjected to restraining orders banning or limiting the circulation of constitutionally protected materials prior to any final adjudication of the merits. Barnes & Noble and other similarly situated booksellers are subject to adjudication under an improper constitutional standard. As applied, Va. Code § 18.2-384 violates booksellers' free speech and press rights under the First Amendment and their Due Process rights under the Fourteenth Amendment.

9. Va. Code § 18.2-384 is unconstitutional on its face or as applied under Article I Section 12 of the Constitution of Virginia on each of the independent grounds set forth in Paragraphs 3, 4, 5, and 8 above, which are incorporated herein by reference.

10. Va. Code § 18.2-384 is unconstitutional on its face or as applied under Article 1, Section 11 of the Constitution of Virginia on each of the independent grounds set forth in Paragraph 6 above, which is incorporated herein by reference.

Wherefore, Barnes & Noble respectfully moves that the Petition be dismissed on each of the independent grounds set forth above, and that the Show Cause Order be vacated in its entirety.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

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

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