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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' Reply 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/encl.*) (nlcatoe@vbgov.com)
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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’
REPLY 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, in further support of their joint motion to vacate the Show Cause Order and to dismiss the Petition, submit this Reply Memorandum in response to Petitioner’s Omnibus Brief in Opposition to Respondents’ Motions (the “Opposition” or “Opp.”).¹

PRELIMINARY STATEMENT

As the CoMF Author and Publisher demonstrated in their Opening Brief, as a matter of law, *A Court of Mist and Fury* is not obscene and Petitioner’s attempts to misuse Virginia Code Section 18.2-384 to have it found obscene for minors—a finding the statute does not permit—should be rejected. Petitioner’s Opposition does nothing to change this conclusion.

First, Petitioner asks this Court for relief it cannot grant, in the form of a finding that the Book is obscene only for minors and either a ban on sales to minors or a “Parental Advisory” warning. However, as the CoMF Author and Publisher demonstrated in their Opening Brief, Section 18.2-384 does not permit a finding of obscenity only for minors, and nothing permits this

¹ All capitalized terms not otherwise defined herein shall have the same meaning as set forth in the CoMF Author and Publisher’s opening brief (the “Opening Brief” or “Br.”).

Court to craft the type of voluntary, self-regulating rating system for books that has been created by the motion picture industry.

Second, Petitioner asks the Court to ignore the obscenity standard established by the Supreme Court and codified in Section 18.2-384 because he personally believes that times have changed. Whether or not times have changed, the Supreme Court’s First Amendment precedent remains the same, and this Court must follow it.

Finally, Petitioner fails entirely to meaningfully respond to the CoMF Author and Publisher’s other Constitutional arguments. Because the Opposition cannot overcome the flaws in the Petition—and Petitioner’s bald attempt to misuse this Court to ban books he takes issue with—the Petition should be dismissed and Show Cause Order vacated.

ARGUMENT

I. Section 18.2-384 Does Not Permit the Relief Petitioner Seeks

As the CoMF Author and Publisher demonstrated on pages 8-9 of their Opening Brief, Section 18.2-384 does not permit the relief sought by the Petition—to have this Court declare that the Book is “obscene for distribution to minors and” issue “a restraining order for distribution, sale, rent or loan of this book to minors.” Petition at 3. In his Opposition, Petitioner argues that this Court has the authority to do so (Opp. at 1), but his argument fails.

Petitioner’s argument is two-fold. *First*, relying on Subsection J of Section 18.2-384, he argues that the Court can make an obscenity determination only as to minors and “issue a restricted category of persons to whom the book is not obscene: **adults.**” Opp. at 1 (emphasis in original). As explained in the Opening Brief (Br. at 8-9), this argument misconstrues the exception. Section 18.2-384(J) permits the Court to “except from its judgment a restricted category of persons to whom the book is not obscene” only *after* it has found, using the standard adopted from *Miller*, that the Book is obscene for all persons. *See Miller v. California*, 413 U.S.

15 (1973). It does not permit a court to remake the statute, crafting a different standard for minors than for adults. This is clarified by Subsection H, which gives examples of the types of people that might be exempt, including “scholars, scientists, and physicians, for whom the book may not have prurient appeal.” Va. Code § 18.2-384(H)(6). It is plain why scholars might find value in a book that is otherwise obscene. At no point does the statute suggest that this Court may exempt large swaths of the population, such as all adults.

Second, Petitioner attempts to rely on *Ginsberg v. State of N. Y.*, 390 U.S. 629 (1968) for the proposition that “[m]aterial may be found obscene for children even though the appeal is not to the prurient interest of the average person” Opp. at 20. However, *Ginsberg* does not permit a court to legislate from the bench or to otherwise deviate from the general obscenity test used in *Miller*, codified in Section 18.2-372 and incorporated into Section 18.2-384. See *Barson v. Commonwealth*, 284 Va. 67, 72 (Va. 2012). *Ginsberg* instead acknowledges that states can enact *separate* statutes regulating material that is obscene or harmful to minors. See *Ginsberg*, 390 U.S. at 641-43 (confirming New York’s power to enact obscenity to minors statute). In response to *Ginsberg*, the General Assembly enacted Virginia Code Section 18.2-391, which regulates content that is harmful to minors. See *Commonwealth v. Am. Booksellers Ass’n, Inc.*, 236 Va. 168, 171 (Va. 1988). Unlike Section 18.2-384, Section 18.2-391 does not permit a finding that material is obscene or allow a court to issue any sort of injunctive relief, which would create more confusion than clarity for publishers and booksellers. Perhaps for that reason, Petitioner confirms in his Opposition that he is *not* proceeding under Section 18.2-391. Opp. at 24-25. Nor is there any power granted to this Court by *Ginsberg* to craft a new statute for him where the legislature did not.

Finally, in his Opposition, Petitioner asks for different relief, not mentioned in the Petition, suggesting that he could be satisfied by applying a “Parental Advisory” sticker to the Book. Opp. at 30. Petitioner analogizes this relief to regulations for radio and television, movies, video game and digital content, and music, most of which are either imposed by the FCC (in the case of broadcast content), or are voluntary systems implemented by independent boards or self-regulatory bodies. Opp. at 27-30; *see also Tropic Film Corp. v. Paramount Pictures Corp.*, 319 F. Supp. 1247, 1253 (S.D.N.Y. 1970) (identifying movie rating system as voluntary and self-regulating). More importantly, although Section 18.2-384 allows a court to: (1) “enter judgment that a book is obscene,” and (2) “issue a temporary restraining order against the sale or distribution of a book alleged to be obscene,” Va. Code § 18.2-384(E) and (J), it nowhere permits the Court to craft a rating system for an independent industry or otherwise require labeling on the Book. Petitioner cites to no other section of Virginia law that permits such a scheme. Notably, courts have found that such attempts by legislative bodies to be unconstitutional. *See Engdahl v. City of Kenosha*, 317 F. Supp. 1133, 1135-36 (E.D. Wisc. 1970) (ordinance using film ratings to limit children’s access to theaters is an unconstitutional prior restraint).

II. Petitioner Admits That He Has Not Met the Governing Obscenity Standard

As the CoMF Author and Publisher demonstrated in their Opening Brief, the Supreme Court’s longstanding obscenity standard is whether material “considered as a whole” lacks serious literary, artistic, political, or scientific value. *See Br.* at 10; *see also Miller*, 413 U.S. 15; Va. Code § 18.2-372. Petitioner appears to admit that the Petition does not meet this standard, but instead asks this Court to ignore Supreme Court precedent and Virginia law because “as times have changed, the law must evolve and grant the relief the Petitioner seeks restricting

children from having access to obscene materials without the consent of their parent or guardian.” Opp. at 7.

It is unclear what Petitioner believes has changed since the Supreme Court issued *Miller*, and the General Assembly amended Section 18.2-372, but the law has not. Because “the U.S. Constitution and the Virginia Constitution provide the same levels of protection for individual free speech rights, and because the First Amendment is applicable to state laws, the decisions of the U.S. Supreme Court on substantive First Amendment issues have immediate and binding application in Virginia courts.” *Commonwealth v. Simone*, 2003 WL 22994238, at *3 (Va. Cir. Ct. 2003). This Court is thus bound to follow the general obscenity test of *Miller*—codified in Section 18.2-372—absent a change in the law, not what Petitioner believes that law *should* be.²

As the CoMF Author and Publisher demonstrated in their Opening Brief, under the definition of obscenity set by *Miller*, codified in Section 18.2-372, as a matter of law, *A Court of Mist and Fury* is not obscene. See Br. at 10-12. Petitioner does not meaningfully respond to this argument, but instead spins a new story about the Book that is nowhere in his Petition, claiming that it promotes an abusive relationship.³ See Opp. at 8-9 (arguing that the Book “normalize[s] an abusive relationship between the main male and female characters” and includes “abusive and intrusive sexual contact by force”); *id.* at 16 (“The content presents aggressive sexual interaction

² As he did in his Petition, Petitioner continues to claim that “*A Court of Mist and Fury* is obscene in nature when viewed through the eyes of a ten-year old.” Opp. at 9. But, this is the very formulation of a “harmful to juveniles” standard that was rejected by *American Booksellers* as unconstitutional. *American Booksellers*, 236 Va. 168 at 177 (clarifying that the appropriate harmful to juveniles standard is whether a work has “serious literary, artistic, political or scientific value for a legitimate minority of normal, *older* adolescents”) (emphasis added).

³ The CoMF Author and Publisher will not otherwise respond to the mischaracterizations of the Book, which involve a wholly inappropriate attack on the President-Elect of the American Library Association.

as acts of love but ignores the underlying trauma of the protagonist and her trauma-driven needs.”).

As a preliminary matter, this is untrue. As the CoMF Author and Publisher previously demonstrated, *A Court of Mist and Fury* is not about remaining in an abusive relationship, but about the main character, Feyre Archeron, coming to terms with her past trauma and breaking free of her prior bonds. Br. at 3, 12. Feyre does not sit in an abusive relationship, but leaves that relationship to live by her own terms. This new narrative is also missing entirely from the Petition, which focuses on approximately a dozen instances of sexual content within the more than six hundred page book. See Petition ¶¶ 5-6. More importantly, Petitioner fails to show how “normalize[ing] an abusive relationship” (Opp. at 9) makes a book obscene, particularly as obscenity is defined as “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” Va. Code § 17.2-372. To the extent Petitioner attempts to qualify this under the category of “*sadomasochistic* abuse,” he provides no examples of such abuse—or abuse at all. Va. Code § 17.2-372 (emphasis added). Indeed, the *only* specific allegation in the Opposition, which appears to come from page 538 of the Book (*compare* Opp. at 9 *with* Petition ¶ 5(i)), carries no suggestion of abuse, sadomasochistic or otherwise.⁴

Petitioner further attempts to avoid a comprehensive analysis of the Book as a whole, suggesting that this Court has already determined that the Book is obscene. Opp. at 1 (“This case concerns two obscene books, as established by a probable cause finding by the Virginia Beach Circuit Court and established Supreme Court standards.”). However, probable cause is a

⁴ Petitioner spends much of the Opposition’s thirty pages impugning the books and generalizing between them, but he devotes only one paragraph to arguing why *A Court of Mist and Fury* is allegedly obscene, and provides only one example from the Book. Opp. at 8-9.

preliminary finding based on a lesser standard; it does not mean that a final judgment has been made that *A Court of Mist and Fury* is obscene. Compare Va. Code. § 18.2-384(C) (authorizing a court to issue an order to show cause if the judge finds “probable cause to believe the book obscene”) with Va. Code. § 18.2-384(H), (J) (following probable cause finding, court must hold an evidentiary hearing regarding obscenity, and only then, if the court believes the book is obscene after the hearing, it may “enter judgment” of obscenity).

III. Section 18.2-384 is Unconstitutional

In its Opening Brief, the CoMF Author and Publisher demonstrated that Section 18.2-384 is unconstitutional as applied and on its face. Br. at 15-18. Petitioner’s sole response is to cite to *Alexander v. Commonwealth*, 214 Va. 539 (Va. 1974). Opp. at 20-23. While *Alexander* upheld certain aspects of Section 18.2-384, which are not being challenged by the CoMF Author and Publisher, it specifically left open that the statute might be challenged on other grounds. See *Alexander*, 214 Va. at 541. Neither *Alexander* nor Petitioner’s Opposition address the CoMF Author and Publisher’s arguments that the statute is overbroad: (1) as applied, because it creates a chilling effect on protected speech consistent with the Supreme Court of Washington’s finding in *Soundgarden v. Eikenberry*, 123 Wash. 2d 750 (Wa. 1994) (Br. at 15-16); and (2) on its face, as it would hamper adults’ access to the materials, ignores key procedural safeguards and because the scienter finding is constitutionally impermissible (Br. at 16-17). For the reasons stated in the Opening Brief, these issues also require dismissal of the Petition.

IV. Petitioner’s Claims are Barred by Laches

Petitioner’s Opposition addresses the CoMF Author and Publisher’s plea of laches. Opp. at 26. The plea is not before the court, however, as it requires the presentation of evidence. See *Hawthorne v. VanMarter*, 279 Va. 566, 577 (Va. 2010). The plea was not addressed in the Opening Brief, nor has it been noticed for the August 30 hearing. If the Petition survives the

CoMF Author and Publisher's motion to dismiss the Petition and motion to vacate the Show Cause Order, the CoMF Author and Publisher will address their laches plea at the appropriate time.

CONCLUSION

WHEREFORE, for the foregoing reasons and the reasons stated in their Opening Brief, 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: August 16, 2022

Respectfully submitted,

BLOOMSBURY PUBLISHING, INC.

and

SARAH J. MAAS

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CERTIFICATE OF SERVICE

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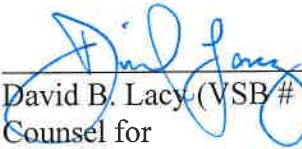
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