

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

**SHIPLEY, INC., d/b/a THAT BOOKSTORE IN
BLYTHEVILLE; ARKANSAS LIBRARY
ASSOCIATION; *et al.*,**

Plaintiffs,

v.

FLETCHER LONG, JR., *et al.*,

Defendants.

Civil No. 4-03CV0048GTE

**PLAINTIFFS' REPLY MEMORANDUM OF
LAW AND OPPOSITION TO DEFENDANTS'
CROSS-MOTION FOR SUMMARY JUDGMENT**

Of Counsel:

Burton Joseph
Joseph, Lichtenstein & Levinson
134 North La Salle Street
Chicago, IL 60602
Telephone: 312-346-9270

For the Comic Book Legal
Defense Fund

Michael A. Bamberger
Sonnenschein Nath & Rosenthal LLP
1221 Avenue of the Americas
New York, New York 10020-1089
Telephone: 212-768-6756

John L. Burnett, Esq.
Lavey & Burnett
904 West Second Street, #2
Little Rock, AR 72201
Telephone: 501-376-2269

Plaintiffs submit this memorandum of law in reply to defendants' opposition to plaintiffs' motion for summary judgment and in opposition to defendants' cross-motion for summary judgment. First it is important to reiterate the scope of plaintiffs' challenge, which is apparently not clear to defendants.

Plaintiffs challenge as unconstitutional only two aspects of Arkansas' "harmful to minors" provision.

- The first—added by recent amendment—requires that all harmful to minors material be both displayed so that the lower two-thirds not be exposed to view and "segregated in a manner that physically prohibits access to the material by minors." (Ark. Code §5-68-502(2)).
- The second prohibits allowing a minor to view—presumably permitting the minor to browse through—any harmful to minors material. (Ark. Code §5-68-502(2)).

Together these are referred to by plaintiffs as the Offending Sections. Plaintiff do not challenge the "harmful to minors" definition in Ark. Code §5-68-501(2); nor do they challenge the provisions relating to sales to minors.¹

I
**FEDERAL PRECEDENTS REQUIRE
SUMMARY JUDGMENT FOR PLAINTIFFS**

A. Upper Midwest is no longer good law.

Defendants seek to counter plaintiffs' arguments as to the unconstitutionality of the Offending Sections by repeatedly referring the Court to *Upper Midwest Booksellers v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985). They contend that, since it has not been "expressly overruled," *Upper Midwest* is binding on the Court. (Def. Opp. p. 13.) However, as a result of the U.S. Supreme Court action in *Virginia v. American*

¹ On the other hand, as discussed below (at p. ___), defendants themselves suggest a radically differing interpretation of "harmful to minors," which would make the sales provision of the statute of virtually no consequence.

Booksellers, 484 U.S. 383 (1988) and the cases which followed it, *Upper Midwest* is simply no longer good law.

On December 24, 1986, Virginia appealed to the U.S. Supreme Court from a decision enjoining the enforcement of a Virginia harmful to juveniles access law, contending, among other things, that the decision of the Fourth Circuit was in conflict with the decision of the Eighth Circuit decision in *Upper Midwest*. The U.S. Supreme Court noted probable jurisdiction and the appeal was argued on November 4, 1987. During oral argument various justices suggested limiting interpretations of the Virginia statute which might save its apparent unconstitutionality. Following that approach, the Supreme Court certified two questions to the Virginia Supreme Court. *Id.* at _____. The first related to the scope of the statute "in light of juveniles' differing ages and levels of maturity." The second related to the level of restriction and thereby the burden imposed on a retailer. It asked:

What meaning is to be given to the provision of Virginia Code § 18.20391(a) (Supp. 1987) making it unlawful "to knowingly display for commercial purpose in a manner whereby juveniles may examine or peruse" certain materials? Specifically, is the provision complied with by a plaintiff bookseller who has a policy of not permitting juveniles to examine and peruse materials covered by the statute and who prohibits such conduct when observed, but otherwise takes no action regarding the display of restricted materials? If not, would the statute be complied with if the store's policy were so announced or otherwise manifested to the public?

After briefing and oral argument, the Virginia Supreme Court responded.

Commonwealth v. American Booksellers Ass'n, 236 Va. 168 (Sup.Ct.1988) With respect to the first question, the Virginia court substantially limited the breadth of the meaning of "harmful to juveniles" holding 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.* at _____. Thus only what the Virginia Solicitor General in oral argument referred to as "quasi-obscene" materials, those having no serious value to a minority of mature 17-year olds, would thereafter be "harmful to juveniles" in Virginia. This substantially limited the scope of the statute, thereby alleviating the burden on retailers and the breadth of the possible restriction on older minors and adults.² As to the second question, the Virginia court again limited the impact of the statute. After stating that "perusal goes well beyond casual examination" *Id.* at _____, the court held that in a prosecution the state must prove "beyond a reasonable doubt that the bookseller knowingly afforded juveniles an opportunity to peruse harmful materials in his store or, being aware of facts sufficient to put a reasonable person on notice that such opportunity existed, took no reasonable steps to prevent the perusal of such materials by minors." *Id.* at _____.

On remand the Fourth Circuit sustained the Virginia statute as so limited. *American Booksellers v. Virginia*, 882 F.2d 125 (4th Cir. 1989). In each and every case subsequent to the *American Booksellers/Virginia* line of cases in which a minors' access statute was challenged, in order to uphold the statute the court found it necessary to similarly limit the challenged statutes. See *American Booksellers v. Webb*, 919 F.2d 1493 (11th Cir. 1990); *American Booksellers Ass'n v. Schiff*, 868 F.2d 1199 (10th Cir. 1989) [check cite]; *Davis-Kidd Booksellers v. McWherter*, 866 S.W.2d 520 (Tenn. Sup. Ct. 1993). The Minneapolis ordinance challenged in the *Upper Midwest* case was not

² At the same time, the redefinition—which is now being suggested in this case by defendants—means that it is no longer a crime in Virginia to sell to a 12 year-old girl sexually explicit material inappropriate and without serious value for her, if that material has serious value for a mature 17 year-old boy.

so limited. Therefore, plaintiffs submit it would not be upheld today absent comparable limitations. It therefore is not good law or a binding precedent today.

Upper Midwest is not good law for yet another reason. *Upper Midwest* upheld the Minneapolis ordinance as a time, place and manner restriction. Such a restriction, when content-based, is constitutional only when directed at undesirable secondary effects — such as crime, prostitution, etc. — rather than the undesirability of the restricted speech itself. [cites] Justifying limitations on "harmful to minors" materials as time, place and manner restrictions has since been rejected since the statute is not justified by a desire to eliminate an undesirable secondary effect. See, e.g., *Crawford v. Lundgren*, 96 F.3d 380 (9th Cir. 1996):

[The Statute], however, is not designed to remedy potential secondary effects of the "harmful matter." The statute is based only on the State's determination that reading the materials at issue will be "harmful" to minors. The statute, therefore, does not focus on the secondary impact of the speech, but rather on the direct impact of the speech on part of its potential audience. The statute is designed to prevent the materials from provoking harmful reactions in minor readers. That justification does not fall within the parameters of the secondary effects doctrine.

At p. 385 (citing *Boos v. Barry*, 485 U.S. 312 (1988)).

B. The *Ginsberg* Case Does Not Support Defendants

Defendants state that "the Court in *Ginsberg* found nothing constitutionally inform about state laws, like the Arkansas statutes at issue here, that adopt a 'variable obscenity' standard to determine what materials may or may not be sold to, or seen or viewed by, minors." Def. Brf. At 10-11 (emphasis added). That statement is incorrect.

Ginsberg upheld a harmful to minors statute used to regulate sales to minors; that part of the Arkansas statute is not challenged in this case. However, the statute

involved in *Ginsberg*, N.Y. Penal Law §484-h, prohibited only sale or loan for monetary consideration to a minor. *Ginsberg* at ___ (App. A). The case did not discuss the potential application of such a statute to restricting display or access. And, in fact, numerous statutes using the *Ginsberg* harmful to minors definition in non-sales contexts have been found unconstitutional. See, e.g., *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *American Booksellers Fdn. V. Dean*, ___ F.3d ___ (2d Cir. 2003).

C. No Statute Has Ever Been Upheld Which Required Physical Segregation of Harmful to Minors Materials

Plaintiffs have not found any statute which has been upheld which required physical segregation of harmful to minors materials. In a number of the cases involving minors' access legislation, during the litigation counsel for the plaintiffs in those cases argued that one of the practical ways a retailer could comply was to create an "adult section" in the retail establishment. In each case the attorney general's office argued to the contrary, stating that lesser means of compliance were available. [Citations]. A look at the effect of such a requirement demonstrates why.

To require the librarians and retailers of Arkansas to create "adults only" sections for constitutionally protected materials simply violates the First Amendment right of the libraries, the retailers, and their customers. According to Dwain Gordon, president of the Arkansas Library Ass'n, even if libraries had the time to review each of their books and could determine which were harmful to minors, smaller libraries have no room to create an "adults only" section and larger libraries would have to change their layout to do so, undermining the family-oriented nature of the libraries. (Gordon Aff. p. 5, ¶ 9). Libraries would have to fire their teen-age part-time employees and volunteers (*id.* at p.

4, ¶ 10). The alternative of excluding minors from the libraries “would be antithetical to a library’s function as a family, community, and educational resource (*id.* at p. 5, ¶ 11).

Mary Gay Shipley of plaintiff That Bookstore in Blytheville points out that, if the segregation requirement were upheld, she would have to cover up or rope off many sections, which would impact both on customers, and their ability and desire to purchase books. (Shipley Aff. ¶ 12). Periodicals are primarily sold in convenience stores, supermarkets and other chain stores; for those stores it is usually a physical impossibility to create an adults only section. (Wetzel aff. ¶ 8; see also Crow Aff. ¶ 6).

The evidence before the Court in the seven affidavits submitted demonstrates clearly the unconstitutional impact in many respect of the physical segregation requirement. It is no wonder that no other state has attempted to impose such a requirement.

II
CERTIFICATION NOW IS NOT APPROPRIATE

Defendants suggest that, if the Court has “doubts about whether a limiting construction of the law can reasonably be adopted to avoid any constitutional infirmity” (Def. Brf. p. 26), it should employ the certified question procedure to obtain guidance from the Arkansas Supreme Court. Defendants do not, however, propose any specific questions for the Court to certify.

Plaintiffs do not believe that certification will be required. This Court is well-qualified to decide the federal constitutional issues raised by the Offending Sections. In any event, the issue is premature. Plaintiffs have brought this action because they fear prosecution in violation of their First Amendment rights. The “State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. *American Booksellers v. Virginia*, 484 U.S. at 393.

If this Court finds that the Offending Sections, based on a reasonable reading, are constitutionally infirm on their face and desires guidance from the Arkansas Supreme Court, the appropriate procedure would be to issue preliminary relief enjoining enforcement of the facially constitutionally infirm statute and then certify the questions it deems advisable. [Citations]. In that way the plaintiffs will not be in First Amendment jeopardy while the certification procedure moves forward.

CONCLUSION

For the reasons set forth above, plaintiffs urge this Court to find the Offending Sections unconstitutional and to grant summary judgment to plaintiffs.

September 29, 2003

Respectfully submitted,

Of Counsel:

Burton Joseph
Joseph, Lichtenstein & Levinson
134 North La Salle Street
Chicago, IL 60602
Telephone: 312-346-9270

For the Comic Book Legal
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Michael A. Bamberger
Sonnenschein Nath & Rosenthal LLP
1221 Avenue of the Americas
New York, New York 10020-1089
Telephone: 212-768-6756

John L. Burnett, Esq.
Lavey & Burnett
904 West Second Street, #2
Little Rock, AR 72201
Telephone: 501-376-2269

Counsel for Plaintiffs