

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

VIRGINIA,

Appellant,

V.

AMERICAN BOOKSELLERS ASSOCIATION,

INC., ET AL.

No. 86-1034

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20540

PAGES: 1 through 53

PLACE: Washington, D.C.

DATE: November 4, 1987

Heritage Reporting Corporation

Official Reporters
1220 L Street, N.W.
Washington, D.C. 20005
(202) 628-4888

IN THE SUPREME COURT OF THE UNITED STATES

VIRGINIA,

Appellant,

v.

AMERICAN BOOKSELLERS ASSOCIATION,

INC., ET AL.

No. 86-1034

Washington, D.C.

Wednesday, November 4, 1987

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:02 o'clock a.m.

APPEARANCES:

RICHARD BAIN SMITH, ESQUIRE, Assistant Attorney General
of Virginia, Richmond, Virginia, on behalf of the
appellan.

PAUL M. BATOR, ESQUIRE, Chicago, Illinois, on behalf of
the appellees.

C O N T E N T S

ORAL ARGUMENT OF

PAGE

Richard Bain Smith, Esquire

on behalf of the appellant

2

Paul M. Bator, Esquire

21

on behalf of the appellees

Richard Bain Smith, Esquire

45

on behalf of the appellant - rebuttal

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear argument first this morning in No. 86-1034, Virginia v. American Booksellers Association.

Mr. Smith, you may proceed whenever you are ready.

ORAL ARGUMENT OF RICHARD BAIN SMITH, ESQUIRE

ON BEHALF OF THE APPELLANT

MR. SMITH: Mr. Chief Justice, members of the Court, may it please the Court, we are here this morning on a case involving a 1985 amendment to a Virginia statute shielding the exposure of juveniles to certain sexually explicit material by regulating the manner of its display, and despite outward appearances, frankly, from reading both sides' briefs, I would suggest to this Court that the issue in this case is really very simple, because we really have one issue, and the issue turns on the type of material that this amendment affects.

Now, from the start of this litigation, from literally the first page of the transcript, the plaintiffs in this case have painted a picture of a statute with a very broad range effect, a range of material involving material with great beauty and great literary value, a range of material thaty they include James Joyce's Ulysses, William Faulkner's Sanctuary, and even the Penguin Book of Love Poetry, which is an anthology of all the great poems

1 of the English language from Robert Browning to Alfred Lord
2 Tennyson.

3 If that range is correct, if they are correct
4 that this amendment involves that material, then we lose
5 the case, and I submit to the Court that we should lose
6 the case, because the Commonwealth of Virginia does not
7 desire to restrict in any way, directly or indirectly, that
8 type of material.

9 But by the same token, if the material affected
10 is not this broad range, then I would submit to the Court
11 that the plaintiffs cannot prevail, because every burden
12 that they speculate about, every terrible effect that they
13 speculate about, all of their evidence in the District Court,
14 everything in their brief, and I am sure everything that Mr.
15 Bator is going to say this morning turns on that concept of
16 this broad range material, and I would say --

17 QUESTION: This is a facial attack, is it not?

18 MR. SMITH: Yes, Justice Brenner, it is a facial
19 attack.

20 I would submit to the Court that the statute they
21 are attacking, the statute involving this broad range of
22 material is a hypothetical statute. It does not exist in
23 Virginia.

24 QUESTION: Mr. Smith, did the state concede at the
25 appellate level below that books such as Hollywood Wives

1 would be covered by the statute?

2 MR. SMITH: Justice O'Connor, I am sure today that
3 the day that I die my tombstone is going to say "Richard B.
4 Smith said Hollywood Wives was obscene." I have said it over
5 and over again. What we said was, one of their witnesses
6 said, of all the exhibits that they put in, of all their
7 exhibits, that was the only one that she said she thought
8 children should not see. And so in the Court of Appeals and
9 the brief, I think it was in a footnote, I said, of all the
10 exhibits, that was the only one that might be involved based
11 on what she had said. I have since gone back -- I came up,
12 I looked through all the exhibits. Not one exhibit they have
13 submitted falls within this statute, including Hollywood
14 Wives.

15 Now, what we suggest to the Court this statute
16 involves is not this broad range of conceded beauty,
17 conceded literary value, of very narrow range. This statute
18 deals with borderline obscenity. It deals with exactly
19 the same thing that Ginsburg v. New York dealt with,
20 borderline obscenity.

21 QUESTION: Well, what is your point, that the
22 appellees had no standing below?

23 MR. SMITH: Justice O'Connor, I would submit that --
24 I agree with what Mr. Bator said in his brief, that really the
25 standing question and the merits question here turn on the

1 same thing. If the material they are talking about is this
2 broad range, then they have standing, because concededly that
3 is the type of material that they are displaying and have
4 been selling to juveniles, and we concede that, what they
5 are talking about.

6 But the point is that the burden that they have
7 suggested exists here is that because of this broad range
8 it is impossible for them to be able to comply with the
9 statute both financially and otherwise without putting them-
10 selves out of business, or at least severely restricting
11 their business. And because of that, they -- both their
12 First Amendment rights and the First Amendment rights of
13 adults will be overly restrictive.

14 And that, I think, is the importance of this
15 broad range effect, because if we are talking about this
16 narrow range of borderline obscenity, for one thing, there
17 is nothing in the record to indicate that there is any
18 burden whatsoever placed on them by that type of material.

19 And secondly, I would suggest to the Court that
20 that is --

21 QUESTION: Well, how are we supposed to decide
22 that, by looking at the words of the statute?

23 MR. SMITH: I would suggest to the Court two ways.
24 First, the amendment and the definitional statute,
25 because that is something that the plaintiffs have purposely

1 ignored in this case. It is something that their witnesses
2 below were never shown, was the definitions of the material
3 involved in this case. And I would submit that both from
4 the face of the statute and their evidence supports that
5 there is this narrow range, and I say that for this reason.

6 The definitions involved here are the same ones
7 that the statute in Ginsburg versus New York used. It is not
8 just any sex, any sexual content that is in a book. And
9 that is where they have made their big mistake. They have
10 assumed all the way through that if there is any sexual
11 content whatsoever, then this material falls within our
12 amendment.

13 QUESTION: Where did this case come from, what
14 court?

15 MR. SMITH: District Court in Alexandria, and
16 then up to the Fourth Circuit.

17 QUESTION: Didn't those courts have some view
18 of the breadth, the reach of the statute?

19 MR. SMITH: They never really focused on it. The
20 District Court never discussed --

21 QUESTION: Well, they must have had some
22 notion of what the reach was to do what they did to the
23 statute.

24 MR. SMITH: The Fourth Circuit did a very strange
25 thing. The Fourth Circuit refused to accept any of the

1 findings of the District Court below, and then they took
2 some findings --

3 QUESTION: It seems to me they thought it was
4 much broader than you say it is.

5 MR. SMITH: Justice White --

6 QUESTION: Is that right or not? Did they view
7 it much more broadly than you do?

8 MR. SMITH: They were talking about a different
9 statute, because they were looking at a statute from
10 Georgia. That --

11 QUESTION: Well, you still don't answer my
12 question.

13 MR. SMITH: They never came to grips with this
14 issue.

15 QUESTION: With the breadth of the statute?

16 MR. SMITH: They never discussed one way or
17 the other. What they did, they talked about a case from
18 Georgia in which evidence there dealt with a statute that
19 the Court there found had this broad reach, and that is
20 what --

21 QUESTION: Well, I assume that if we found that
22 the Court of Appeals or the District Court -- the Court of
23 Appeals defined this statute more broadly than you do, we
24 might very well take the Court of Appeals view of what the
25 meaning of a state statute is.

1 MR. SMITH: As I said, if you take the broad view,
2 we lose, but I would suggest that what the Court of Appeals
3 did --

4 QUESTION: Well, did the Court of Appeals take
5 the broad view?

6 MR. SMITH: What they did was, they said, we
7 assume that there are these burdens. They never got into
8 construing the statute one way or the other, and I would
9 submit to the Court that even if the Court of Appeals had
10 actually gotten to the statute, we are asking this Court
11 to look at it a second time, because we are suggesting
12 that it is a matter of law, not as a matter of fact.

13 QUESTION: Did you ask the District Court to
14 abstain in order to obtain construction of this from the
15 Virginia courts?

16 MR. SMITH: There was a request for an extension.
17 We were -- the Attorney General's office was brought into
18 this case on the certification of 2403(b). One of the
19 other defendants and all the defendants did ask the District
20 Court to abstain. And ironically, the reason the District
21 Court refused to abstain was because he said there was no
22 unclear parts of the statute, and yet for the last two years
23 both the plaintiffs and the state have been arguing over
24 the meaning of all these terms.

25 QUESTION: Now, did you raise that question in the

1 Fourth Circuit, the District Court's failure to abstain?

2 MR. SMITH: We raised the question of the District
3 Court should have applied the narrowing constructions of the
4 statute. We did not in so many words say the District Court
5 should have abstained in the sense of Abstention Doctrine.
6 We were arguing that under the First Amendment overbreadth
7 test the District Court should have narrowed the construction.

8 QUESTION: Well, those are two quite different
9 points. So you didn't preserve the abstention argument, did you?

10 MR. SMITH: The plaintiffs say we did. The plaintiffs
11 say we have been arguing -- that is what we have been arguing
12 all along, and the Court of Appeals did in fact say that
13 abstention -- they addressed the issue and said abstention
14 was not appropriate.

15 QUESTION: The Court of Appeals decided that --
16 they passed on it.

17 MR. SMITH: They passed on it, if I am not
18 mistaken.

19 QUESTION: Didn't the Court of Appeals accepted
20 the District Court's finding that this statute would affect
21 a certain percentage of the materials in the bookstores?

22 MR. SMITH: No, sir.

23 QUESTION: I thought it accepted a finding that
24 from 5 to 50 percent.

25 MR. SMITH: What they said was this, and this is

1 what I was starting to say earlier. I have never seen this
2 done in any case. The Fourth Circuit said the evidence
3 presented below is so minimal that we can't make a determina-
4 tion from what the District Court --

5 QUESTION: Of what?

6 MR. SMITH: Of the percentage of books involved.

7 QUESTION: But the District Court found that.

8 MR. SMITH: The District Court made that finding.
9 Then the Court of Appeals say, but we assume that it does,
10 and then they went off on this tangent on the statute in
11 Georgia that has a completely different statute than
12 Virginia's, but I would suggest to the Court that the reason
13 that this statute deals with borderline obscenity and not
14 this broad range, as I said earlier, it is from the face
15 of the statute, it only involves certain very narrowly
16 restricted types of activities. It has to have --

17 QUESTION: May I just go back to Justice White's
18 question for a minute? In Footnote 9, the Court of Appeals
19 ends the footnote, saying, "The District Court found that a
20 significant percentage of the inventory of the average
21 general bookstore varying between 5 and 25 percent falls
22 within the amendment's restrictions."

23 My question is, did you ask that the Court of
24 Appeals set aside that finding as clearly erroneous on
25 appeal?

1 appeal?

2 MR. SMITH: I cannot remember. I honestly cannot
3 remember.

4 QUESTION: Because if you didn't should we not
5 accept that as a factual determination?

6 MR. SMITH: If you read on with the footnote,
7 Justice --

8 QUESTION: That is the end of the footnote.

9 MR. SMITH: If you read on with the footnote,
10 they say, and the state said there is a very miniscule
11 amount of material involved.

12 QUESTION: Yes, you argue that, and then the
13 last sentence is the one that the District Court found 5
14 to 25 percent.

15 MR. SMITH: Right, and the Fourth Circuit never
16 said who was right, and when you go back up to what that is
17 footnoted to, the Fourth Circuit said, whatever, we are going
18 to assume that there is this broad range, and they cited to
19 this case in Georgia that is a completely different statute
20 involving a completely different range of material.

21 QUESTION: Let me just put it this way. Is it
22 correct that your position in this Court depends on our
23 disagreeing with the District Court's finding of facts?

24 MR. SMITH: Yes.

25 QUESTION: So if it is 25 percent, you lose.

1 MR. SMITH: Yes.

2 QUESTION: Well, you call that a finding of
3 fact, Mr. Smith?

4 MR. SMITH: No, sir.

5 QUESTION: Are you sure that is a finding of fact?
6 whether, what books in a store are covered by a particular
7 statute? That is just a factual finding? That is all it is?

8 MR. SMITH: As I said earlier, we --

9 QUESTION: Do we have to take whatever the District
10 Court says about that?

11 MR. SMITH: -- I believe -- I think this Court
12 has made it --

13 QUESTION: Does it know how many cows there are
14 in Virginia?

15 MR. SMITH: This Court has made it clear for
16 the last three decades that the question of what is obscene
17 in a book is a matter of law, not as a matter of fact. And
18 you have to remember--

19 QUESTION: I am not talking about what is obscene.
20 I am talking about what the statute covers. Is that a
21 question of fact, what books the statute covers, whether
22 obscene or not?

23 MR. SMITH: No, Justice Scalia. I believe it is
24 a question of law. And when you have this --

25 QUESTION: But it certainly has to be based on

1 the evidence.

2 MR. SMITH: It was based on --

3 QUESTION: I mean, a court isn't going to find
4 what percentage of books in a bookstore are covered by
5 the statute without -- even if it knows what the statute
6 means, it has got to know what books are in the store.

7 MS. SMITH: It was based on an assessment of
8 two things. First, the District Court said based upon the
9 plaintiff's testimony and the exhibits, and the Court's
10 review of the exhibits, I am submitting to the Court that as
11 far as the exhibits are concerned, that is clearly a matter
12 of law whether they are obscene for juveniles.

13 QUESTION: All right, so say it is a matter of law.
14 Then what do we do with what the Court of Appeals did to
15 the District Court's statement of the law?

16 MR. SMITH: Well, there again, they never really
17 said what -- they had that in the footnote. They just threw
18 it out that that is what the District Court said, but if you
19 read the actual text of the case, they didn't accept it. They
20 just said, we are going to assume this, and they have a foot-
21 note, and the footnote says, well, the District Court says
22 this, and the state says that. They never say the District
23 Court, they never say the state was wrong, they just say,
24 we are going to assume it is based on what happened in
25 Georgia, which is a completely different situation than

1 Virginia.

2 QUESTION: In order to decide what percentage of
3 one's inventory is affected by a statute, you need to know
4 first what the inventory consists of, and second, what the
5 statute means, don't you?

6 MR. SMITH: Yes, Mr. Chief Justice, and I would
7 submit to the Court, which was the point I was trying to get
8 to with Justice White, as far as the evidence presented, it
9 was based on the testimony of two bookstore owners who
10 admitted on cross examination that they didn't have the
11 faintest idea what the definitions were. All of their
12 testimony as to all of the material affected was given in a
13 complete vacuum. There was no basis for it.

14 There was, and I will, if I could for just a
15 moment, this is indicative of both testimony directly from
16 the appendix, and it will be very short.

17 QUESTION: Before you do that, may I just --

18 MR. SMITH: Yes, sir.

19 QUESTION: Even if the witnesses didn't understand
20 what the statute means, do you also contend the District
21 Court didn't understand the statute?

22 MR. SMITH: I would submit to the Court that for
23 the District Court to find that the exhibits that these
24 plaintiffs presented fell within the amendment, then the
25 District Court completely misread Virginia law, because none

1 of their exhibits fall within the statute.

2 QUESTION: Well, you also there are suggesting
3 that the plaintiffs who tried this case, those lawyers
4 really didn't understand what was going on, that they
5 really failed in their proof.

6 MR. SMITH: Oh, yes, sir, I think that is exactly
7 right, they failed in their proof, and I suggest to the
8 Court that it was purposeful, because I think that from the
9 start of this litigation, it is a lot easier if you are
10 going into a federal court and claiming that the state is
11 trying to restrict James Joyce's Ulysses than it is to go
12 in and say the state is trying to restrict Hustler. And I
13 cannot imagine any other reason why they never showed their
14 own witnesses the definitions before they testified.

15 They told their witnesses -- their witnesses came
16 in with a group of books. Their testimony was, and
17 questionings from the plaintiffs, do you think that any book
18 with a picture of nudity in it is going to be affected? Yes.
19 That is not true. That has nothing to do with the Virginia
20 statute. The Virginia Supreme Court has ruled, just like
21 this Court has, it has to be a lewd view of the genitals,
22 not mere nudity, and this permeated their testimony.

23 QUESTION: Have they done that with respect to
24 the juvenile statute?

25 MR. SMITH: I am sorry, Justice --

1 QUESTION: Have they so ruled with respect to the
2 juvenile statute as opposed to obscenity generally?

3 MR. SMITH: They have ruled with respect to a
4 similar statute. They had -- before this Court had the case
5 of New York versus Ferber, which was the so-called kiddie porn
6 case, Virginia had essentially that same case, and in talking
7 about what is obscene for juveniles, the Virginia Supreme
8 Court expressly held, citing Miller versus California, I
9 believe, that whether it is adults or juveniles, mere nudity
10 cannot be obscene for juveniles. That case is cited in our
11 brief, Freeman v. Commonwealth.

12 QUESTION: Mere nudity can never be obscene for
13 a juvenile?

14 MR. SMITH: Mere nudity in the sense of just a
15 picture of the human body. They went on to say that the
16 nudity has to be a lewd exhibition of the genitals, as this
17 Court gave as the example in Miller v. California. And I
18 would just like to read, if I can get back to the record just
19 for a moment, it is a question to their -- and this sums up
20 their entire case upon which this is based. This is after
21 they have presented all of the books. This is after they have
22 presented all of their evidence.

23 On cross examination the state's lawyer asked,
24 "Question: Ms. Ross, do you know what the legal definition
25 of harmful to juveniles is? Answer: No.

1 "Question: Has anyone read that to you? Answer:
2 No. Is there one?

3 "Question: No one ever told you there was one,
4 did they?

5 "Answer: I don't know. Not that I remember.
6 What is the legal definition?"

7 That was the context of their case in the District
8 Court. Taking that --

9 QUESTION: Did they ever just describe what kind
10 of books were in these stores?

11 MR. SMITH: They are general bookstores, just the
12 typical -- one is Ampersand Books in Alexandria, and the
13 other one --

14 QUESTION: Well, did they say -- did they describe
15 what kind of books they had in their stores?

16 MR. SMITH: Yes, their exhibits were normal books
17 that might --

18 QUESTION: Well, let's assume the District Court
19 looked at those books, then read the statute, and decided
20 that X percent of those books in that store would be covered.
21 Now, let's just assume the District Court went through that
22 routine. You are asking us to disagree with the District
23 Court.

24 MR. SMITH: I am asking the Court that this is a
25 matter of law, that the District Court was wrong about that,

1 that none of their exhibits --

2 QUESTION: Well, that means, I suppose, then
3 we have to really look at -- go through the exhibits, look
4 at the evidence, and then decide what the statute means and
5 say -- you want us to say then that the Court of Appeals and
6 the District Court were wrong.

7 MR. SMITH: I will wager this case on one exhibit,
8 Plaintiff's Exhibit No. 4, The Penguin Book of Love Poetry.
9 If that book falls within this statute, then we concede the
10 case. You don't have to look at all of them. Just look at
11 that one book. Or if you want to look at all of them, the
12 same thing goes for all of them, because every one of them --

13 QUESTION: I don't want to look at any of them.

14 QUESTION: You are basically arguing that the
15 statute has a narrower meaning than the lower court said,
16 and presumably it could affect 80 percent of the books in a
17 pornographic bookstore or 2 percent of the books in a
18 regular. The percentage of books affected across the board
19 isn't so important. It is what the statute means in terms
20 of our decided cases.

21 MR. SMITH: I think it is a joint question. I think
22 it is important what the statute means, but secondly, I think
23 the number is important as far as these plaintiffs are
24 concerned, because they have built their whole case on the
25 fact that there is such a large amount that their whole case

1 on the fact that there is such a large amount of material
2 involved.

3 QUESTION: But suppose there were a bunch of
4 people that concededly deal in pornography. Would it make
5 much of a case for them to come in and say, look, this
6 statute restricting juvenile access affects 90 percent of
7 our books?

8 MR. SMITH: No, because then I would suggest this
9 Court has no problem with the case, because then you would
10 know you were dealing with borderline obscenity in this Court
11 in every case in this area always found that that is -- the
12 periphery of the first amendment. As Mr. Justice Stevens
13 said in Young v. American Minitheaters, there is very little,
14 if any, interest in the uninhibited exhibition of that type
15 of material, and that is the type of material that we are
16 involved in.

17 QUESTION: The percentage is really not that conse-
18 quential of that percentage is derived by the proper
19 interpretation of the statute, as you say it is proper, then
20 there wouldn't be anything horrible about coming down on the
21 bookstore that happens to have 20 percent of it or 25 percent
22 of it.

23 It is important from this context. They came up
24 with all these horrible ways, the only ways they could
25 comply with the statute, and one of which was borrowing

1 -- totally barring juveniles from their bookstore. I would
2 suggest to the Court if you are talking about a normal
3 everyday bookstore, barring juveniles from that bookstore
4 because of supposedly this large amount of material would
5 be devastating. I would suggest to the Court that borrowing
6 juveniles from an adult bookstore that has 90 percent of the
7 inventory that is borderline obscenity would not be the kind
8 of burden that this Court was concerned about in the cases
9 dealing with this type of situation.

10 QUESTION: What is the narrowing language in the
11 statute that you think was not adequately considered by the
12 courts below?

13 MR. SMITH: Well, there are two parts. The first
14 part is the definitions themselves. The definitions in
15 Section 18.2-390, which I set out in my brief, very narrowly
16 define types of sexual activities that are involved --

17 QUESTION: Those are the definitions of what is
18 harmful to juveniles?

19 MR. SMITH: They are the definitions of the
20 material involved in the statute. Even if a work has that
21 material, it is still not within the statute. It still has
22 to be harmful to juveniles, and that is what the Eighth
23 Circuit said in the Upper Midwest case pushes this case up
24 to the borderline of obscenity, because -- and I will give
25 you a quick example.

1 In Young v. American Minitheaters, those bookstores
2 and theaters were found to be adult bookstores based on just
3 the fact of the type of sexual material they involved, sado-
4 mashochistic abuse, lewd nudity, this kind of thing. Those
5 types of materials would not fall under this statute, because
6 you have to go a step further. It has to be obscene for
7 juveniles, and it is exactly what the Eighth Circuit was
8 talking about in the Upper Midwest case that I cited in
9 the brief.

10 QUESTION: Well, isn't your argument on this
11 percentage business, isn't it that you are contending that
12 this statute has only a de minimis consequence to these, the
13 people who -- the plaintiff, the plaintiffs' bookstores?

14 MR. SMITH: Yes, sir.

15 QUESTION: That is right?

16 MR. SMITH: Yes, sir.

17 QUESTION: And therefore it really is sort of a
18 miniscule burden to cause them to go through the steps to
19 comply with the statute.

20 MR. SMITH: Given the -- interest
21 to the state in protecting its juveniles, given that it is
22 borderline obscenity, that is exactly correct.

23 QUESTION: But if it affects a much larger
24 percentage, you seem to agree that the steps they would
25 have to go through would be too burdensome.

1 MR. SMITH: As far as the everyday bookstore,
2 that's correct.

3 QUESTION: Yes.

4 MR. SMITH: But one of -- and let me make this
5 clear, getting back to what Justice Scalia was asking
6 earlier. For an everyday normal bookstore to bar
7 juveniles because of some part of their material, a miniscule
8 part, would be devastating for them. For an adult bookstore
9 with 90 percent books borderline obscenity, who cares?

10 I would like to reserve the remaining time for
11 rebuttal unless the Court has any further questions.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Smith.

13 We will hear now from you, Mr. Bator.

14 ORAL ARGUMENT OF PAUL M. BATOR, ESQUIRE

15 ON BEHALF OF THE APPELLEES

16 MR. BATOR: Mr. Chief Justice, and may it please
17 the Court, in *Butler v. Michigan* this Court announced
18 a fundamental First Amendment rule, one from which it has
19 never deviated. The states are not free to place substantial
20 restrictions on the access of adults to books and magazines
21 that are protected by the First Amendment, even if the
22 purpose of the protection is to safeguard children.

23 Our central submission today is that the Virginia
24 nude display statute on its face violates this fundamental
25 principle, because unlike the preexisting sales statute, which

1 had no impact whatever on adults, this statute requires book-
2 sellers immediately to place important new restrictions on
3 adult access to books protected by the First Amendment. It
4 places an immediate and affirmative obligation on booksellers
5 to screen their inventory, to reorganize their displays, and
6 to purge from their shelves, where books are freely and
7 readily available, all books that have enough sexually
8 explicit materials in them that they are not suitable for
9 sale to children.

10 QUESTION: Why couldn't you just have an adults
11 only part of the bookstore?

12 MR. BATOR: I beg your pardon?

13 QUESTION: Why couldn't you just have an adults only
14 part of the bookstore?

15 MR. BATOR: Well, Your Honor, we think that would
16 involve a very substantial restriction on the access of the
17 adults.

18 QUESTION: But all you'd be restricting would be
19 juveniles, I would think.

20 MR. BATOR: Your Honor, there are a couple of
21 reasons why that would be very difficult or onerous for
22 adults. First of all, books are sold in large numbers of
23 places which are not bookstores. We have newsstands, we have
24 bookstands in supermarkets, at airport and drugstore counters.
25 They can't have two different sections. It really is not

1 feasible for them to have an adult section. Secondly,
2 the District Court --

3 QUESTION: Are they members of your -- are
4 people like that members of your organization?

5 MR. BATOR: Yes.

6 QUESTION: Airport bookstands?

7 MR. BATOR: Yes, we represent really the whole
8 gamut of booksellers and distributors, including those,
9 Your Honor. Now, another problem with --

10 QUESTION: And hard core bookstores?

11 MR. BATOR: I beg your pardon?

12 QUESTION: And hard core bookstores?

13 MR. BATOR: No, our clients do not include any
14 adult or porno bookstores whatever. We do have two 20 to --

15 QUESTION: Did the appellees below, Mr. Bator,
16 make a claim that they sold books that met the definition of
17 what is harmful to juveniles?

18 MR. BATOR: Yes, the testimony below was very
19 clear.

20 QUESTION: I mean, well, but did the -- your
21 clients, did they claim that they display routinely books
22 which meet the statutory definition of harmful to juveniles?

23 MR. BATOR: The statutory definition under the
24 Virginia display statute.

25 QUESTION: Yes.

1 MR. BATOR: Yes, Justice O'Connor. We have
2 testimony in the record, very clear testimony in the
3 affidavits as well as in the oral testimony on the part
4 of these bookstore owners that they understood the statute
5 to cover somewhere between 25 to 40 percent of --

6 QUESTION: Well, but did their testimony take
7 into account the actual statutory definition, which does
8 seem to be much more restrictive than the testimony would
9 indicate they thought it was? There is something to be
10 said for what the state's attorney is arguing.

11 QUESTION: Or, to put it differently, Mr. Bator, if
12 your clients indeed have 40 percent of books that meet this
13 definition, I think you are inaccurate to say that they are
14 not porno stores. I think it is incredible that anybody
15 could come within this -- 40 percent within this definition
16 is very high, it seems to me.

17 MR. BATOR: No, Your Honor, because I think the
18 statute covers a large amount of material. The statute covers
19 a large amount of material that does not fall into this
20 classification of what do we mean by is it porno, but that
21 does have some sexually explicit material.

22 I go back to both questions, because I want to be
23 able to cover it. Your Honor, these booksellers are, of
24 course, not lawyers, but, of course, they are the ones who
25

1 have to deal with this statute.

2 QUESTION: Apparently they had not read the
3 statute when they testified. Now, this definition defines
4 it exactly as the Court has in Miller, only refined down to
5 juveniles, predominantly appeals to the prurient, shameful, or
6 morbid interest of juveniles, is patently offensive to pre-
7 vailing standards and the adult community as a whole with
8 respect to what is suitable material for juveniles, and when
9 taken as a whole lacking in serious literary, artistic,
10 political, or scientific value for juveniles.

11 Did the testimony and the witnesses have in mind
12 that precise definition?

13 MR. BATOR: Your Honor, I think the witnesses
14 testified that they read the statute, but I think they read
15 them as an ordinary nonlawyer would read them, and they gave
16 an explanation of how they would understand this statute,
17 and of course that is the perspective that is important.
18 They understood this statute to cover a substantial amount
19 of their inventory.

20 QUESTION: Well, as I looked at it, the ordinary
21 books like Ulysses and other things that I would think of
22 clearly wouldn't fit within this definition, so I am just
23 wondering whether we have two ships passing in the night
24 here.

25 MR. BATOR: Your Honor, I believe, and this now

1 goes again to Justice Scalia's question as well, that it is
2 a perfectly reasonable understanding of the statute and
3 really just what this statute suggests that if you think that
4 a book is unsuitable for sale to 13-year-old you may not
5 display it in your bookstore. Now, that does not just include
6 porno. That includes a large range of material which I would
7 be rather averse to having a 13-year-old child of mine buy a
8 in a bookstore, and that very much includes a large range of
9 popular as well as literary works.

10 Now, we do have a District Court finding on this.
11 That is to say, it seems to me that the Attorney General has
12 here said everything turns on what this statute encompasses.
13 But we have two courts below that made findings on that
14 issue. The District Court said they -- the District Court
15 didn't accept the testimony completely. It lowered the
16 percentage. The District Court made its own judgment. It
17 said somewhere between 5 and 25 percent of the inventory of
18 the non-adult bookshop is likely to be covered here.

19 QUESTION: Did the District Court give its
20 opinion as to precisely what the statute meant?

21 MR. BATOR: Yes.

22 QUESTION: Where do we find that?

23 MR. BATOR: The District Court made a finding, and
24 it is on Page A -- on Page A20, third full paragraph.

25 QUESTION: A20 --

1 MR. BATOR: A20 of the jurisdictional statement.

2 The Court concludes that the average general book-
3 store carries a significant percentage of materials varying
4 between 5 and 10 percent that are harmful to juveniles as
5 defined by --

6 QUESTION: Now, that could mean two different
7 things, couldn't it? It could mean that these bookstores are
8 really then quite different than you have characterized them
9 because they carry material that is much like that described
10 in the Miller statute.

11 MR. BATOR: No, Your Honor, I honestly believe
12 the record would not support that conclusion. These are
13 ordinary bookshops.

14 QUESTION: But all this finding tells you is that
15 a certain percentage of the books in the store are covered
16 by the statute. Now, to me that doesn't militate one way
17 or the other as to whether the statute is good or bad,
18 because it depends on what the inventory of the bookstore
19 is.

20 MR. BATOR: Yes, but the record is replete with
21 descriptions of what these bookstores are, and I hope very
22 much -- the women who owned these bookstores gave very vivid
23 and interesting testimony about what it is like to run an
24 ordinary bookshop in Alexandria or Arlington. These are the
25 opposite of porno bookshops.

1 Now, the District Court finding was based in the
2 context of these bookshops and the exhibits and the
3 affidavits and the testimony, and --

4 QUESTION: As far as the testimony goes, Mr. Bator,
5 it is not worth a whole lot if it comes from people who
6 haven't read the statute.

7 MR. BATOR: I am sorry.

8 QUESTION: I mean, as far as the testimony is
9 concerned, it is not worth a whole lot if it was testimony
10 by people that hadn't read the statute that they purported
11 to be applying to the books.

12 MR. BATOR: Well, the District Judge made his own
13 finding based not only on the testimony, but the affidavits
14 and the exhibits. The Court of Appeals was very careful not
15 to disturb that finding, although it did say that the
16 testimony is such that it is very hard to guess the exact
17 percentage.

18 QUESTION: -- of the exact percentage anyway.
19 It is then -- that is just to -- as a predicate for inquiring
20 how much of a burden it is on adults or within the bookstore.

21 MR. BATOR: It seems to me -- again, this goes
22 really to the interchange I had with Justice O'Connor. That
23 is, it is terribly important to understand that the life of
24 this statute plays itself out not at the level of
25 constitutional theory or lawyers' interpretation. It plays

1 itself out between the local bookshop and the local
2 community, and that bookshops's fear of arrest and prosecution
3 by the local attorney, commonwealth attorney and the local
4 police.

5 QUESTION: Yes, but it is not impossible to comply
6 with the statute, no matter how much percentage of the books,
7 and your submission is, and I guess it was taken below, that
8 none of these ways of complying would remove the burden on
9 adults.

10 MR. BATOR: Our point is not that it is impossible
11 to comply, but that the effect of good faith compliance is
12 likely to be a very drastic restriction on the free access
13 of adults to these books.

14 QUESTION: Well, Mr. Bator, could the bookstore
15 set up a children's only section, not an adults only, but a
16 children's only section, so that people who are affected are
17 the children, not the adults?

18 MR. BATOR: I suppose a bookstore could have a
19 children only section. The real question is whether if
20 you want to read a popular work or browse or look at a
21 popular work of literature in an ordinary neighborhood
22 bookstore, whether you have to enter a section that is
23 labeled X, labeled adults only.

24 QUESTION: Well, if you had a children's only
25 section you wouldn't have to do that as an adult.

1 QUESTION: Mr. Bator, if every store had an adults
2 only section, as you tell us would be necessary if all
3 bookstores have large quantities of these books, do you
4 really think it would be a great disincentive for adults to
5 go into that section? Have they stayed away from the movies
6 in droves when they have adults-only films? Why would their
7 reaction to general adults only sections in bookstores
8 be any different?

9 MR. BATOR: Your Honor --

10 QUESTION: You are being peppered with questions
11 from both sides. Just take your time and answer them, and
12 hope in the future they will be asked one at a time.

13 MR. BATOR: Your Honor, I feel like the hockey
14 goalie who has pucks coming from all sides.

15 (General laughter.)

16 MR. BATOR: Your Honor, on the question of the
17 deterrence, again we have -- the District Court and the Court
18 of Appeals went into that, and there was testimony. The
19 problem here is that the sale of books is very much affected
20 by display, that is to say a large proportion of books are
21 sold to people who aren't planning to go but who go in to
22 read, to browse, and they come upon a book they rather
23 like, so it is a very sensitive area.

24 The District Court found that there would be a
25 substantial deterrent to adults -- I understand that that

1 doesn't deal with Justice O'Connor's hypothetical, but if
2 it says X rated, adults only, a lot of people are going to
3 stay out because they are embarrassed, and they don't want --
4 These are not people in porno bookshops. These are people
5 in ordinary bookshops.

6 The fact is -- this is not of record, and it is just
7 based on my New York Times reading, but as I understand it,
8 in the movie industry as well, even though movies are
9 different because people plan to go to a movie, it is not an
10 impulse thing, but an X rating on a movie, as I understand it,
11 is thought to be commercial disaster, but there is another
12 point here, Your Honor, that I want to stress before I get
13 back to the other side of the bench.

14 There would be an enormous change in the general
15 ambience and atmosphere of bookshops if what we have is
16 an adult section, X only, and a children's section, children
17 only. That is to say, the whole atmosphere of a bookstore
18 that we know -- every one of us has been in a bookstore on
19 Saturday afternoon, and really that is what this case is
20 about, is what kind of bookstores do we want? Do we want a
21 bookstore where every book or every shelf is labeled with a
22 government seal of approval or a government seal of
23 disapproval? That is the issue in this lawsuit.

24 The fact is that the life of the bookstore is free
25 circulation for browsing, and that is what we think the

1 statute badly inhibits.

2 Now, there is another problem, Justice O'Connor.
3 There is a large number of books where it would be disastrous
4 to say children only. I mean, I guess I don't even know
5 quite what that would mean, because there are a lot of books
6 that are absolutely proper for kids and for grownups, and
7 they are just general books. I don't think we can reorganize
8 the bookshops, this world of books and of intellect in terms
9 of these tight rules, and really, I think our question is
10 whether it is constitutional for the government basically to
11 create an across the board rating system for books, and
12 there is a great --

13 QUESTION: Well, Mr. Bator, what if the statute just
14 said it prohibited allowing juveniles to peruse and examine
15 material that is harmful to them?

16 MR. BATOR: I think that would be a more difficult
17 case, although that also would create a tremendous problem
18 for booksellers.

19 QUESTION: But it certainly wouldn't be a burden
20 on the adults, would it?

21 MR. BATOR: If the crime were for the booksellers
22 to allow kids, I think there would be a very serious First
23 Amendment problem, very much the same sort that the Court had
24 in the Smith case, because the effect even of that statute
25 would be to put pressure on the bookseller to self-censor.

1 The vice of this statute, and I think the problem
2 that the Attorney General has absolutely never confronted, is
3 that this --

4 QUESTION: Well, at least it would avoid the
5 burden on the adults.

6 MR. BATOR: If the bookseller looks at the statute,
7 even in the version Justice O'Connor gives, and decides the
8 only safe thing to do here is if it has sex in it, put it
9 under the counter or put it in an X-ray separate section,
10 that is the burden on the adult.

11 QUESTION: You think the burden would be to
12 saying if you had a separate section in the bookstore that
13 said minors not allowed?

14 MR. BATOR: It would be very problematic, Your
15 Honor. I think that a lot of adults would find that intensely
16 uncomfortable because it really labels them.

17 QUESTION: As not minors?

18 MR. BATOR: I beg your pardon?

19 (General laughter.)

20 QUESTION: As not minors. It labels them that
21 way.

22 MR. BATOR: They are not. They are not minors.

23 I think in this world everybody knows what
24 that is all about, and it would be a very radical departure
25 from our traditions of what bookstores are supposed to be like.

1 If the statute as we argue applies to a large range of
2 perfectly ordinary literary, serious and popular works, the
3 point about Hollywood Wives, Justice O'Connor, is not for us
4 to wrangle about whether it is covered or not, but if Hollywood
5 Wives is covered, then there are hundreds of ordinary best
6 sellers, potboilers of every sort that are covered here, and
7 in a sense they ought to be covered. That is to say, there
8 are a lot of books that we do not want the bookseller to sell
9 to a 12-year-old, and the vice of this statute is, if you
10 don't want it sold to a 12-year-old, you have got to remove
11 it from the shelf.

12 QUESTION: Well, you concede that the statute,
13 the old statute that prohibited selling the items to juveniles
14 is constitutional?

15 MR. BATOR: Yes.

16 QUESTION: Yet surely that is a burden on the
17 bookstore owner.

18 MR. BATOR: It does put a burden on the bookstore --

19 QUESTION: Now, why is it a substantially different
20 burden to say you won't allow juveniles to peruse the
21 material that you can't sell to them?

22 MR. BATOR: We have two answers to that, Justice
23 O'Connor. We think that the burden on the bookseller in
24 the case of the display statute is more onerous, because you
25 have to do this advance screening of the whole inventory,

1 but the really important point is that complying with the
2 burden in the display context is much more dangerous to the
3 First Amendment because it restricts the access of adults.
4 Complying with the burden with respect to sales has no impact
5 on adults at all. But if you remove a book from the shelf,
6 the easily accessible shelf, because you are afraid of a kid
7 coming upon it, you have also removed it from the adult.

8 There is another point I would like --

9 QUESTION: May I ask you a question, Mr. Bator?

10 Does your argument really focus on the fact that the statute
11 applies to written material as opposed to pictorial material,
12 you know, the magazines such as Hustler and so forth --

13 MR. BATOR: The statute does apply to both.

14 QUESTION: I understand it does apply to both.

15 Would you have any objection, or does your proof support
16 any objection to a statute which just excluded the written
17 material?

18 MR. BATOR: Well, Your Honor, that would be a more
19 difficult case, and it is not our case, and I would hope
20 very much that the Court would not on this record and with
21 these briefs try to answer that question. Our position
22 would, however, be, if you push me to the corner of saying,
23 that the Court's cases do not support and the First Amendment
24 should not support a lesser protection for pictures than for
25 text, but that's --

1 QUESTION: You would say even if the statute were
2 limited to magazines such as Hustler, assuming they are not
3 obscene, and Playboy and the like, and those -- you have a
4 constitutional right to have those displayed publicly.

5 MR. BATOR: Not a constitutional right to buy, but
6 the access problem --

7 QUESTION: But to display.

8 MR. BATOR: -- I think is more difficult, but of
9 course the important point here is that that is not what
10 Virginia has done. It seems to me we really have to focus
11 on what Virginia has done. Virginia should not be allowed
12 to have it both ways. That is, they have drafted a statute
13 that at least from the perspective of the bookseller is
14 sensibly and, as the District Court said, consensitively
15 viewed as a broad statute that encompasses any material that
16 has enough sex in it so you don't want it sold to a kid.

17 Now, they --

18 QUESTION: I don't know how you can say that,
19 Mr. Bator, unless you are talking about a bookseller, as
20 some of your witnesses were, who hadn't read the statute.
21 If you read the statute, this covers very offensive
22 material, but only very offensive material.

23 MR. BATOR: I think, Justice O'Connor, they have
24 read the statute, but when they were cross-examined, these
25 were women who were not used to the business of tight cross

1 examination at law, and when they were cross examined on
2 detail, they were vague on the detail, but that is the real
3 world. That is how this statute is going to operate in the
4 real world.

5 QUESTION: Mr. Bator, may I follow up on Justice
6 O'Connor's question about whether the statute would be all
7 right if it merely prohibited permitting juveniles to browse
8 as opposed to requiring you to segregate materials in a
9 fashion so that it is impossible for them to browse? Do we
10 have any reason -- is it clear that the statute requires any
11 more than that? If you look at the definition of unlawful
12 act it says "It shall be unlawful to knowingly display
13 for commercial purpose in a manner whereby juveniles may
14 examine and peruse."

15 Now, "may" could well mean two things. It could
16 mean it is possible for them to do so or it could mean it is
17 permitted for them to do so, so it may well be that all that
18 is necessary under the statute is a sign in the store that
19 says juveniles not permitted to browse.

20 MR. BATOR: Well, Your Honor, I don't think a
21 sensible bookseller in the local community faced with the
22 possibility of local police and local prosecutors would
23 read the statute that way. The statute prescribes display.
24 It says any display.

25 QUESTION: The statute also has a definition of

1 "knowingly" which seems to suggest, and knowingly, it says
2 "knowing display," the definition of "knowingly" says that
3 you have to know or have reason to know the age of the
4 juvenile.

5 Now, that suggests that there has to be some
6 concrete occasion in which the juvenile is being allowed
7 to browse, and you have reason to know what his age is.
8 Isn't that a permissible reading?

9 MR. BATOR: We read the "knowingly" in light of
10 his definition again in the Virginia statute. I think the
11 bookseller can't just sit back and say I don't know anything.
12 I think what they have to do is make a good faith effort
13 to comply, and compliance here means compliance with rules
14 about display that may give access to juveniles.

15 Now, if the statute -- we are constantly dealing
16 a little bit here with two possible statutes. I would really
17 like to say that Virginia can't and shouldn't be allowed to
18 have it both ways. That is what they do is, they draft a
19 statute that is broad enough so that the bookseller is under
20 pressure to self-censor and to comply broadly. And then the
21 Attorney General comes in here and says, oh, no, no, no, this
22 statute is --

23 QUESTION: Well, did you object to a motion to
24 abstain in the District Court?

25 MR. BATOR: There was, Your Honor. The District

1 Court found it is not an appropriate case for abstaining.

2 QUESTION: Did you oppose the motion --

3 MR. BATOR: Yes.

4 QUESTION: -- of the state to abstain?

5 MR. BATOR: Yes, we have not in any way agreed
6 that -- in fact, we do not think the law would permit
7 abstention here. Now, the Attorney General did not --

8 QUESTION: Well, certainly you could have gotten
9 a conclusive construction of the statute by abstention, a
10 statute which we are now arguing about the meaning of.

11 MR. BATOR: There is no readily available narrowing
12 construction here. The Attorney General has not come up with
13 a standard here.

14 QUESTION: Well, may I ask, Mr. Bator, does
15 Virginia have a certification procedure?

16 MR. BATOR: It does, yes.

17 QUESTION: Was any effort made to ask the District
18 Judge to resort to that?

19 MR. BATOR: We do not think that there would be
20 a meaningful question that could be certified.

21 QUESTION: As to definition as to what the statute
22 meant?

23 MR. BATOR: We don't think a meaningful question
24 could be certified on that because the Attorney General him-
25 self has not come up with an intelligible standard. I mean,

1 what he said is miniscule.

2 QUESTION: But in any event --

3 MR. BATOR: I beg your pardon?

4 QUESTION: -- no motion was made to the District
5 Court to certify.

6 MR. BATOR: In the District Court there was a
7 motion made. We opposed it. I don't --

8 QUESTION: To certify? To certify?

9 MR. BATOR: Oh, no motion to certify, just to
10 abstain. Now, I think the abstention point was abandoned
11 in the Court of Appeals. The Court of Appeals did not
12 pursue it. And I don't think it was pursued in any question
13 to this Court. We did brief the question because we thought
14 that it was an important problem in the case. Whether the
15 Court should say, well, let's wait and see, somehow see what
16 the state courts say, but we think that would be inappropriate.
17 The bookseller can't wait and see. The bookseller has to
18 comply now. And the fundamental problem is that this
19 so-called miniscule construction has really no content.

20 That is, the Attorney General has not come up with
21 an intelligible standard for what this so-called narrow
22 construction is. The Court's cases --

23 QUESTION: Well, isn't it just to apply the
24 definitions as they are written in the statute for what is
25 harmful to juveniles? That is pretty narrow.

1 MR. BATOR: No, we read that as being very broad,
2 and the District Court and the Court of Appeals read it as
3 being broad, and it would be really unprecedented for this
4 Court to reverse two courts on that issue of state law. That
5 would be quite an unprecedented thing for the Court to do, is
6 to reverse two courts on the meaning of a state statute on
7 which they have agreed.

8 I want to finish one thought if I --

9 QUESTION: Excuse me, Mr. Bator. Where do the
10 courts describe the meaning of it? Where do they describe
11 the meaning of it, that we would be reversing their
12 description of the meaning of the state law?

13 MR. BATOR: Well, I --

14 QUESTION: As opposed to just saying it covers
15 40 percent of all books

16 MR. BATOR: I think their understanding of the
17 meaning of the statute is implicit in what they understood
18 the impact of the statute to be, that is, it is implicit in
19 their description of what this statute does to the ordinary
20 bookshop under the threat of prosecution and punishment by
21 the local police and local prosecutor.

22 I mean, what we -- it seems to us that there is
23 one thought I have been trying to get out that I would like
24 to get out here, that we are talking about the First
25 Amendment. We are talking about the Butler rule, which

1 places a very serious rule against the state in doing things
2 that can have an impact on adults. Now, Virginia passes
3 this broad statute which the consensus of the testimony and
4 the finding of the District Court and the Court of Appeals
5 places a substantial burden on adults. Now, the Attorney
6 General comes in here and says, no, no, this statute
7 is a paper tiger. I don't think that counts as the kind of
8 narrowing construction that this Court said can save an overly
9 broad statute. That is what this Court should not do, is
10 allow the statute to be reinterpreted on the -- because the
11 Attorney General comes in here and sort of says, well, we
12 are not going to enforce this statute against any respectable
13 bookshop.

14 Anyway, it is not the Attorney General who enforces
15 the criminal law of Virginia, it is the local Commonwealth
16 Attorneys. This statute places a serious burden of self-
17 censorship on the bookshops, and complying with that burden
18 we feel will place a very substantial inhibition on what
19 grownups have always done, freely go to a bookshop, browse
20 in the bookshop, and decide what they want to read, decide
21 what they want to buy, and that impact on adults, which
22 doesn't exist at all in a sales situation we think is the
23 fundamental vice of this statute. Self-censorship leading to
24 an access burden on adults is what makes this statute uncon-
25 stitutional under the First Amendment.

1 Like the battered hockey goalie, I will now retire
2 unless there are questions.

3 QUESTION: Before the goalie retires, may I ask
4 this question? I have been thinking, as Justice Brennan
5 apparently suggested, about the possibility of certification.
6 Are there three or four works that are identified in the
7 record with respect to which the two of you disagree as to
8 whether they are covered by the statute?

9 MR. BATOR: I am sorry, Justice Stevens. You will
10 have to --

11 QUESTION: Are there two or three specific works
12 of literature as to which you think the statute covers and
13 your opponent says it doesn't cover with respect to which we
14 could ask the Virginia Supreme Court whether it covers?

15 MR. BATOR: I suppose you could frame an abstention
16 or a certification based on one or two or three books.

17 QUESTION: Do you know of any such examples that
18 come to mind that sort of test what the breadth of the statute
19 would be?

20 MR. BATOR: I suppose that there is a disagreement
21 about Portnoy's Complaint, which is not a book I would like
22 to have sold to a 12-year-old, and which I think is clearly
23 covered, and I guess the Attorney General says today that
24 it is not covered, but suppose -- suppose the Virginia
25 Supreme Court tells us it is covered or not covered. Is that

1 the kind of intelligible narrowing construction of the
2 statute? That is to say, it is a single book, and this
3 Court's cases make it very clear that a whole series of liti-
4 gations to narrow a statute are not sufficient. There has to
5 be a quick cure.

6 QUESTION: Well, Mr. Bator, would it make a
7 difference if the Court said the statute was complied with
8 if the bookstore owner just said juveniles were not permitted
9 to browse? Would that make a difference?

10 MR. BATOR: Well, it would make a difference, but
11 we do not think it would save the statute.

12 QUESTION: So that is a certifiable question.

13 MR. BATOR: We do not think it would save the
14 statute, Your Honor. First of all, juveniles also have a
15 constitutional right of access to books. I mean, that is a
16 major problem.

17 QUESTION: But they don't have a right of access
18 to books that are harmful to minors within the meaning of
19 this definition, do they?

20 MR. BATOR: So again what you would have to do is,
21 you would have to reorganize the entire display of the bookshop
22 and you would have books that are for everybody, and some
23 just for kids, and just some for adults, and we think that
24 that would produce a major change in the First Amendment
25 spirit of how bookstores are run.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bator.

2 Mr. Smith, you have six minutes remaining.

3 ORAL ARGUMENT OF RICHARD BAIN SMITH, ESQUIRE

4 ON BEHALF OF THE APPELLANT - REBUTTAL

5 MR. SMITH: Mr. Chief Justice, I will not take it
6 all.

7 The reason we didn't ask to have this case certified
8 below was because this Court now has a tool that neither the
9 District Court had nor the Fourth Circuit had. Virginia's
10 certification procedure only became effective April of this
11 year. There was no certification procedure available.

12 QUESTION: That is effective for this Court now,
13 Mr. Smith?

14 MR. SMITH: We would certainly say it is. Yes, sir.
15 It is effective -- it was effective April 1st, 1987. It is
16 Rule 5:42 of the Rules of the Supreme Court of Virginia. It
17 is very comprehensive, and, Justice Stevens, I won't ask that
18 just we agree on four exhibits be sent back, you send every
19 exhibit that the plaintiffs put into evidence below, and I
20 will take the same position before the Supreme Court of
21 Virginia that I am taking here that not one of those falls
22 within the statute.

23 QUESTION: Specifically Portnoy's Complaint.

24 MR. SMITH: Portnoy's Complaint was not an
25 exhibit.

1 QUESTION: Are you familiar with the book?

2 MR. SMITH: Yes. That is not covered.

3 QUESTION: That is not covered.

4 MR. SMITH: That is not covered.

5 QUESTION: So you do have a square disagreement
6 on that. Let me ask you another -- may I ask you another
7 question --

8 MR. SMITH: Certainly.

9 QUESTION: -- on the meaning of the statute?

10 In the definition of harmful to juveniles -- I had
11 it in front of me a minute ago -- the last subparagraph
12 is on A42 of the jurisdictional statement -- has a subparagraph
13 C, "is, when taken as a whole, lacking in serious literary,
14 artistic, political," and so forth, "value," but the introduc-
15 tion of that paragraph says "quality of any description or
16 representation in whatever form."

17 Now, my question is, supposing you have a ten-
18 chapter book, one chapter of which would satisfy the
19 statute. Does the book satisfy the statute or not?

20 MR. SMITH: Justice Stevens --

21 QUESTION: The book as a whole.

22 MR. SMITH: -- if you would look at Section 18.2-391,
23 which is not the definitional statute but the actual statute
24 under -- it is paragraph 2. It starts off, it says, "Any book,
25 pamphlet" --

1 QUESTION: I understand.

2 MR. SMITH: The last line of that answers the
3 question. Not only must be harmful to juveniles, it has to
4 be taken -- the book has to be taken as a whole, just as
5 with this case you cannot pull isolated passages out.

6 QUESTION: I understand that Paragraph 2 does, but
7 the definition of "harmful to juveniles" does not. It is
8 only because of the additional language in Paragraph 2 that
9 you answered my ten-chapter book the way you do.

10 MR. SMITH: Well, if one chapter is obscene, and
11 then the other nine -- or obscene for juveniles, and the
12 other nine chapters are fine for juveniles, would that book
13 fall within it? No, sir.

14 QUESTION: It wouldn't fall within -- that wasn't
15 my question. It wouldn't fall within subparagraph 2 of 391,
16 but it would fall within the definition of subparagraph 6
17 of 390, would it not?

18 MR. SMITH: That is where -- the reason hat is
19 where it becomes important to look at that -- what I just --

20 QUESTION: I understand.

21 MR. SMITH: -- the part I pointed you to, because
22 that is dealing with books. If we are talking about just a
23 picture, then the picture in itself is as a whole, but that
24 is why they added in again, taking -- in other words, you have
25 got -- with respect to books, you have got two taken as a

1 wholes. Not only you have taken as a whole as far as harmful
2 to juveniles, but the book as itself has to be taken as a
3 whole.

4 QUESTION: Let me be sure. If I merely had the
5 definition of harmful to juveniles, the chapter we speak of
6 would be harmful, the book as a whole would not, but you are
7 saying 391 would not apply to that because of subparagraph 2.
8 to that ten-chapter work?

9 MR. SMITH: I don't think it would under either
10 way, and the reason I say that is, this is the Virginia
11 version of Miller versus California as it relates to
12 juveniles, and the entire work has to be taken as a whole.
13 You can't pull an isolated passage out of the book, and that
14 has been this Court's jurisprudence for 30 years, and that
15 is what the Virginia Supreme Court has always followed. You
16 can't have a book that has -- and that is what happened below.
17 They would -- some of the exhibits there would be a vivid
18 description of a rape in three pages out of 700 pages, and
19 that doesn't make it fall within the statute.

20 QUESTION: I am not going to ask you to debate it
21 with me. I am just trying to ask your understanding.

22 MR. SMITH: I understand, and --

23 QUESTION: If chapter -- subparagraph 2 were not
24 in Section 391, and we were merely dealing with section 390,
25 which I gather is the definition that existed before the

1 recent amendment, would my example of a ten-chapter book
2 containing one sexually explicit chapter that would follow
3 the definition, would that book, work as a whole in your view
4 be harmful to juveniles within that section?

5 MR. SMITH: No, and perhaps the easiest -- or the
6 reason for it is that under Virginia law this is a criminal
7 statute, and has to be strictly construed against the
8 Commonwealth. In any type of disagreement like that, the state
9 loses.

10 QUESTION: Thank you.

11 QUESTION: Mr. Smith, suppose a bookseller does
12 not segregate books. Would he be able to comply with the
13 Virginia statute by simply saying, whenever I see a
14 juvenile, a person who looks to me like a juvenile, browsing
15 in a book which is a book that I ought to know falls within
16 this statute, I stop that juvenile and ask him to leave the
17 store. That is my store policy.

18 Would that be enough to comply with the statute?

19 MR. SMITH: Yes, sir. As a matter of fact, that
20 exact example took place in this case. One of the bookstore
21 owners said that she had some material that she thought
22 might be adult material, and she said, "But I keep it on a
23 shelf next to my counter, where I keep an eye on it so
24 juveniles can't get to it."

25 Of course that complies, because the state has to

1 prove that she syinterly -- we have to prove that she
2 knowingly violated the statute.

3 QUESTION: Well, I am not talking so much about
4 knowingly as I am talking about the language "display for a
5 commercial purpose in a manner whereby juveniles may examine
6 and peruse." "May"

7 MR. SMITH: Because I think --

8 QUESTION: "May" means it is possible for them to
9 do so or they are permitted to do so.

10 MR. SMITH: This Court had a case which I
11 have cited in my brief called the Foreign Products Case, and
12 that case said that when used in a statute as this "May" is
13 used, it can mean "might" or it can mean reasonable
14 certainty or it can mean actual tendency under Virginia
15 law, since it has to be strictly construed against the
16 Commonwealth, it has to be what you have suggested, and it
17 would qualify.

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Smith.

19 The case is submitted.

20 (Whereupon, at 11:02 o'clock a.m., the case in
21 the above-entitled matter was submitted.)
22
23
24
25

REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-1034

CASE TITLE: Virginia vs. American Booksellers Association,
Inc., et al.

HEARING DATE: November 4, 1987

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence
are contained fully and accurately on the tapes and notes
reported by me at the hearing in the above case before the
Supreme Court of the United States
and that this is a true and accurate transcript of the case.

Date: November 12, 1987

Margaret Daly
Official Reporter

HERITAGE REPORTING CORPORATION
1220 L Street, N.W.
Washington, D.C. 20005

HERITAGE REPORTING CORPORATION
(202) 628-4888

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'87 NOV 12 P3:49