2006 WL 6306542 (C.A.8) (Appellate Brief)
United States Court of Appeals,
Eighth Circuit.

Mike HATCH, in his official capacity as Attorney General of the State of Minnesota, Appellant,

v.

ENTERTAINMENT SOFTWARE ASSOCIATION and Entertainment Merchants Association, Appellees.

No. 06-3217.
November 29, 2006.

On Appeal from the United States District Court for the District of Minnesota

Brief of American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Comic Book Legal Defense Fund, Freedom to Read Foundation, Magazine Publishers of America, Motion Picture Association of America, Inc., National Association of Recording Merchandisers, National Association of Theatre Owners, Inc., Publishers Marketing Association, and Recording Industry Association of America As Amici Curiae in Support of Appellees

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STATEMENT

American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Comic Book Legal Defense Fund, Freedom to Read Foundation ("FTRF"), Magazine Publishers of America, Motion Picture Association of America, Inc. ("MPAA"), National Association of Recording Merchandisers ("NARM "), National Association of Theatre Owners, Inc. ("NATO"), Publishers Marketing Association, and Recording Industry Association of America ("RIAA") submit this amicus brief in support of Appellees, urging that this Court affirm the decision of the court below that Minn. Stat. §3251.06 (2006) (the "Minnesota Act") is unconstitutional. [1] This brief is submitted upon written consents, attached hereto, of counsel to both Appellants and Appellees.

INTEREST OF AMICI

Amici's members (hereinafter "amici") publish, produce, distribute, sell and are consumers of books, magazines, motion pictures, sound recordings, and printed materials of all types, including materials that are scholarly, literary, artistic, scientific and entertaining. Libraries and librarians represented by FTRF provide such materials to readers and viewers.

Materials published, distributed and sold by members of amici include depictions of violence that appear to fall within the Entertainment Software Rating Board ("ESRB") Mature (M) rating, were the ESRB ratings to be applied to such material. These range from popular motion pictures such as "Flags of our Fathers," "Saving Private Ryan," "The Terminator" and "Rambo,"

starring well-known actors such as Tom Hanks, Arnold Schwarzenegger and Sylvester Stallone, to documentaries about wars and the Holocaust, to photographs in books, magazines and newspapers about recent terrorist attacks. These expressive materials are, and should be, protected by the First Amendment. Based on the reasoning proposed by the State, were this Court to reverse the decision below and depart from its own precedents, such materials could be subject to regulation based on their content, thus substantially chilling activities of amici that heretofore have been clearly protected by the First Amendment. Amici have a significant interest in ensuring that the body of law regarding "harmful to minors" speech on sexual matters not be expanded to intense violence, blood and gore and that it not be extended to restrict protected speech that legislators believe is emotionally harmful to minors.

If accepted by this Court, the State's argument that depictions of violent action can be regulated and censored, even if they are "speech," would carve an enormous new exception into the First Amendment bedrock upon which amici depend for the creation and dissemination of a wide variety of constitutionally protected material in all media. It departs dramatically from First Amendment jurisprudence and threatens a vast array of mainstream motion pictures, television programs, books, magazines, and works in other media that contain violent imagery no more shocking than that available every day on the news. The current violence in Iraq and elsewhere in the Middle East, for example, is gruesome, gut-wrenching, and tragic, but it is real, and few would contend that it should be excised from the media to spare the sensibilities of minors. Likewise, the realistic violence in movies like "Saving Private Ryan" or in books about the Civil War and World War II should not be denied full constitutional protection because some fear its effect on minors.

Amici believe that we do ourselves, our children, and the First Amendment a grave disservice by allowing the government, based on deeply flawed, unfounded studies, to regulate material that hitherto has enjoyed full constitutional protection. Rather than allowing the mantra of "obscene speech" to shield restrictions on any speech that lawmakers deem unsuitable for children from meaningful judicial scrutiny, this Court should reaffirm the First Amendment protection of communications that include descriptions or depictions of violence.

A further significant constitutional flaw in the Minnesota Act, as the district court properly found, is its incorporation of ratings issued by private voluntary associations into the criminal construct. Amici MPAA and RIAA also use voluntary ratings in connection with their members' expressive works. Members of other amici deal with products bearing such voluntary ratings. Not only is the incorporation of such ratings systems an unconstitutional delegation, but it will discourage future use of such ratings, depriving parents of the information and guidance they provide. In addition, the Minnesota Act incorporates definitions which, while they may be appropriate for use by private organizations in a voluntary rating program, are unconstitutionally vague when inserted into a governmental regulatory scheme.

Many of the amici have brought actions in both federal and state courts to assert the unconstitutionality of laws infringing on First Amendment rights. *See, e.g., Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383 (1988); *PSINet, Inc. v. Chapman,* 342 F.3d 227 (4th Cir. 2004); *Am. Booksellers Found. v. Dean,* 342 F.3d 86 (2d Cir. 2003); ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999); *Video Software Dealers Ass 'n v. Webster,* 968 F.2d 684 (8th Cir. 1992); *Am. Booksellers Ass'n v. Hudnut,* 771 F.2d 323 (7th Cir. 1985) *aff'd,* 475 U.S. 1001 (1986); *Am. Library Ass'n v. Pataki,* 969 F. Supp. 160 (S.D.N.Y. 1997); Village Books v. Bellingham, No. C88-1470 (W.D. Wash. Feb. 9, 1989); *Am. Booksellers Ass'n v. McAuliffe,* 533 F. Supp. 50 (N.D. Ga. 1981); *Davis-Kidd Booksellers, Inc. v. McWherter,* 866 S.W.2d 520 (Tenn. 1993); *Leech v. Am. Booksellers Ass'n,* 582 S.W.2d 738 (Tenn. 1979). They also strongly believe it important to assert the values of the First Amendment in this case as amici.

ARGUMENT

I. VIDEO GAMES, EVEN WHEN THEIR CONTENT INCLUDES SCENES OF VIOLENCE, ARE PROTECTED BY THE FIRST AMENDMENT

In defiance of all applicable precedents both in this Circuit and elsewhere, the State attempts to create a new exception to the First Amendment for "violent video games."[2] The district court properly rejected the State's effort to deny First Amendment protection to certain expressions of violent action conveyed to persons under eighteen, and this Court should do so as well.

A. Expression of Violent Action Is a Protected Form of Speech and Any Content-Based Regulation of Such Speech Must Pass Strict Scrutiny

There is no constitutional basis for regulation of material depicting "intense violence" or "blood and gore," even if those terms could be defined precisely. The depiction or description of violence is not one of the few narrowly delineated categories of speech excluded from the protection of the First Amendment:

> As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 127, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (KENNEDY, J., concurring). While these categories may be prohibited without violating the First Amendment, none of them includes the speech prohibited by the CPPA.

Ashcroft v. Free Speech Coal., 535 U.S. 234, 245-46 (2002).

Every court, including this Court, that has considered the issue[3] has invalidated attempts to regulate material solely based on violent content, regardless of whether that material is called "violence," "excess violence" or included within the definition of "obscenity." *See, e.g., Winters v. New York,* 333 U.S. 507, 508, 511 (1948) (First Amendment protects pictures and descriptions of "deeds of bloodshed, lust or crime"); *Interactive Digital Software Ass'n v. St. Louis County,* Mo., 329 F.3d 954 (8th Cir. 2003); *Am. Amusement Mach. Ass'n v. Kendrick,* 244 F.3d 572 (7th Cir. 2001); Eclipse Enters. Gullota, 134 F.3d 63, 66 (2nd Cir. 1997) (declining "any invitation to expand these narrow categories of speech to include depictions of violence"); *Video Software Dealers Ass'n v. Webster,* 968 F.2d at 688 ("[V]ideos depicting only violence do not fall within the legal definitions of obscenity for either minors or adults."); *Am. Booksellers Ass'n v. Hudnut,* 771 F.2d 323 (7th Cir. 1985); *Interstate Circuit, Inc. v. City of Dallas,* 366 F.2d 590 (5th Cir. 1966), *vacated on other grounds,* 391 U.S. 53 (1968).

The State argues (see Br. 19-20) that *Ginsberg v. New York,* 390 U.S. 629 (1968) holds that "there is no First Amendment protection for [any] material that 'is patently offensive to prevailing standards in the adult community as a whole with regard to what is suitable material for minors.'" This takes language from Ginsberg out of context. The quote from Ginsberg is from part of the Court's opinion quoting a portion of the New York statute under consideration in that case. In that statute, the quoted phrase is limited to "nudity, sexual conduct, sexual excitement, or sado-masochistic abuse,"[4] making it abundantly clear that the Ginsberg holding is limited to explicit sex, as stated by the court below. And, given the presumption that speech is protected from content-based regulations, *RAV v. City of St. Paul,* 505 U.S. 377, 382 (1992), one cannot, as the State seeks to do, start from the modest exception created by Ginsberg to a broader concept of harmfulness.

Content-based regulation of violent expression such as the Minnesota Act must pass strict scrutiny - i.e., it must "promote a compelling interest" and use the "least restrictive means to further the articulated interest." Sable Commc'ns, Inc. v. FCC, 492 U.S. 115, 126 (1989). Moreover, even if the State has a compelling interest, the regulation must be "carefully tailored" to achieve the stated purpose. Id. The district court properly found that the Minnesota Act fails to pass strict scrutiny.

B. First Amendment-Protected Communications Cannot Be Restricted Based on Their Emotional or Psychological Impact

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In Ginsberg, the Supreme Court adopted the concept of "variable obscenity" or "obscenity for minors," which subsequently was engrafted onto the three-part obscenity test set forth in *Miller v. California,* 413 U.S. 15 (1972). The *Ginsberg/Miller* analysis rests on the fact that "[o]bscenity is not within the area of protected speech." Ginsberg, 390 U.S. at 635, citing Roth v. United States, 354 U.S. 476, 485 (1957). Both Ginsberg and Miller involved the regulation of obscene materials - that have a "specific judicial meaning which derives from the Roth case, i.e., obscene material 'which deals with sex."' Miller, 413 U.S. at 20 n.2, citing Roth, 354 U.S. at 487.[5] It is obscene sexual material as defined first by Roth and then Miller, not violent material, that has been held to be unprotected by the First Amendment for almost 50 years. See Roth, 354 U.S. 476; Miller, 413 U.S. 15.

Contrary to the State's position, First Amendment-protected speech cannot be restricted based on its emotional or psychological impact on some readers or game players. As Justice Kennedy stated in Ashcroft v. Free Speech Coal., 535 U.S. at 245: Congress may pass valid laws to protect children from abuse, and it has. E.g., 18 U.S.C. §§ 2241, 2251. The prospect of crime, however, by itself does not justify laws suppressing protected speech. ("Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech") (internal quotation marks and citation omitted). It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities.

As the Seventh Circuit stated in *American Booksellers Ass'n v. Hudnut,* 771 F.2d at 330:

> Racial bigotry, anti-semitism, violence on television, reporters' biases - these and many more influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular culture. Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.

Neither of these precedents are mentioned by the State in its brief.

Neither Ginsberg nor any other Supreme Court decision allows government to limit minors' First Amendment rights to a category of speech whenever government believes that it will protect the emotional and physical harm of children, or, in its view, assist parents in guarding their children's well-being. Any such rule would be a slippery slope that would obviate the First Amendment rights of minors. "Harmful to minors" is not any content that a legislature might believe could potentially result in harm to some minors. It is instead a legal term of art that was, in the statute at issue in Ginsburg, the formulation used by the New York legislature to define obscenity for minors with respect to sexual explicit material under consideration in Ginsberg. It does not mean actual emotional or physical harm to a minor.

This Court should reject the reasoning of the State and conclude, as has this and every other appellate court to have addressed the issue, that regulation of material based solely on its description or depiction of violent action is unconstitutional.

II THE MINNESOTA ACT IMPROPERLY DELEGATES LEGISLATIVE POWER

The Minnesota Act prohibits the purchase by a minor of any video game rated "M " or "AO" by the Entertainment Software Rating Board ("ESRB"). These designations, developed privately and voluntarily without any legislative direction, are incorporated directly into the Minnesota Act as standards of harmfulness to children in a manner that constitutes an unconstitutional delegation of legislative power. There is no mechanism for any individual to challenge a rating as too restrictive or unjustified; there is no mechanism for the State to challenge a rating as too lenient or inappropriate.

The incorporation of private ratings into criminal statutes has been repeatedly found to be constitutionally unacceptable. *See, e.g., Motion Picture Ass'n of Am. v. Specter,* 315 F. Supp. 824 (E.D. Pa. 1970); *Engdahl v. City of Kenosha,* 317 F. Supp. 1133

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(E.D. Wis. 1970); *Drive In Theatres, Inc. v. Huskey,* 305 F. Supp. 1232 (W.D.N.C. 1969) aff'd 305 F.2d 228 (4th Cir. 1970). Specter and Drive In Theaters both involved, as does this case, adoptions of private ratings directly into a criminal statute. However, the U.S. Supreme Court has held that an enforcement scheme that gives even an implied legal effect to standards set outside the state's own criminal regulation of illegal conduct is just as improper as express adoption of those standards. *See* *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70 (1963).

In Bantam, the Supreme Court considered the activities of a state "Commission to Encourage Morality in Youth," which compiled and circulated lists of "objectionable" publications. *See* 372 U.S. at 59 n.1. The Commission's lists created no express presumption, rebuttable or otherwise, that distributors of the listed publications were subject to criminal sanction under state obscenity laws. Yet the Court still found the coercive and inhibiting effect of the Commission's non-reviewable designations unacceptable, even though actual sanctions could come only after a trial. See 372 U.S. at 67.

Engdahl struck down a town law even when the delegated standards were not binding, as they are here. 317 F. Supp. 1133. In Engdahl, movies classified by an industry rating board as unsuitable for minors were prohibited to minors under town law unless a film distributor persuaded a statutory Board of Appeals that the film did not violate standards set out in the law. The court in Engdahl held that use of the standards did not "meet the constitutional requirements." *Id.* at 1136.

The State relies on *Borger v. Bisciglia,* 888 F. Supp. 97 (E.D.Wisc. 1995). However, the Borger court itself recognized that "a private organization's rating system cannot be used to determine whether a movie receives constitutional protection." *Id.* at 100. It is thus clear that, under the applicable precedents, this legislative delegation is unconstitutional.

There also are possible unintended consequences. The purpose of ratings is to inform parents and thus assist them in making more knowledgeable purchasing decisions. As the ESRB web site explains, it is to "provide accurate and objective information... so you can make an informed purchase decision." http://www.esrb.org/ratings /ratings-guide.jsb (last visited Nov. 7, 2006). By incorporating the ESRB ratings into a statute, the Minnesota Act creates an incentive for the rating boards either to relax their standards or even eliminate them altogether - exactly the opposite of what Minnesota intended in promulgating the Act.

The purpose of the Minnesota Act is to inhibit access by a class of customers (minors) to a class of products identified under a harmfulness standard legislated by the State. If upheld, one effect of the Minnesota Act would be to undermine the intended function of the rating systems by inhibiting access by some customers to some games without a finding by any duly constituted authority that those games actually violate the legislated standard. The State should not be surprised if the industry concludes that the ratings, thus co-opted and turned against their creators, and likely bringing with them disputes and litigation, should either be weakened or eliminated altogether. There is nothing to prevent the industry from doing either.

Were this to occur, a likely result would be a video game market in which parents and children receive no industry guidance toward age-appropriate games, or receive guidance that varies ever more widely from the present standard. This Court should avert the possibility of such an outcome by voiding the Minnesota Act.

III. EVEN IF THE DELEGATION TO THE ESRB WAS NOT UNCONSTITUTIONAL, THE TEST INCORPORATED BY THE MINNESOTA ACT WOULD BE UNCONSTITUTIONALLY VAGUE

"Where a statute imposes criminal penalties, the standard of certainty is higher." *Kolender v. Lawson,* 461 U.S. 352, 358 n.8 (1983). As the Supreme Court stated in *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972), a law is void for vagueness under the due process clause of the Fifth Amendment if its prohibitions are not clearly defined. The Court provided the following extensive explanation of the three reasons why a vague law is unconstitutional:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly .... Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries

for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statue 'abut(s) upon sensitive areas of basis First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked.

Id. at 108-09 (footnotes omitted); see also Smith v. California, 361 U.S. 147, 151 (1959) ("[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.") Even when, as here, the statute "nominally imposes only civil penalties,"

> perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If... the law interferes with the right of free speech or association, a more stringent vagueness test should apply.

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

The definitions set forth by the ESRB, and thus incorporated by the State, do not meet this test. With respect to violent content, M-rated videos "may contain intense violence [or] blood and gore." [6] Intense violence is defined as "graphic and realistic depictions of physical conflict" which "[m]ay involve extreme or realistic blood, gore, weapons and depictions of human injury and death." Blood and gore is defined as "depictions of blood or the mutilation of body parts."

With respect to violent content, AO-rated videos "may include prolonged scenes of intense violence" which is defined as set forth above.

While such definitions may be perfectly acceptable for use by a private organization for its own use in providing advisory ratings, when incorporated in the Minnesota Act they are unconstitutionally vague as shown below.

1. The definition of "Intense Violence" has a number of components, each of which may well be independent of the others:
a) graphic and realistic-looking depictions of physical conflict: There is no contextual element with respect to physical conflict. Would a game concerning an Olympic boxing match be ratable "AO" or would it also have to be bloody?

b) *extreme or realistic blood:* What is "extreme blood?" Is that a quantitative or qualitative test? How does blood become unrealistic?

c) *gore:* This apparently means thick or clotted blood. [7] Does this mean any amount of thick or clotted blood may make a video ratable as M?

d) *weapons:* Presumably this modifies physical conflict. Is every "prolonged realistic conflict" involving weapons ratable as "AO"? Does this exclude all games having a military scenario?
e) *depictions of human injury and death:* Again this is a very broad and undefined term.

2. "Blood and Gore" is defined, in part, as "depictions of blood." Neither context nor quantity are defined. Potentially, hospital scenes, accident scenes, and battle scenes are all potentially ratable as "M."

If the Court affirms the "intense violence/blood and gore" formula for the regulation of violent video games, there would be no legal impediment to its application to other expressive media, including books and magazines. The potential application of the test to the vast panoply of the materials amici produce magnifies concern with the lack of any reasonably certain objective meaning for the ESRB's rating scheme's operative terms.

The language of the Minnesota Act provides no opportunity for people, such as those represented by the amici, to determine whether particular material is covered. As a direct result of the quintessentially vague language, such legislation will have a chilling effect on distributors and others who deal with valuable, mainstream works. As the Supreme Court has noted, "[u]ncertain meanings" inevitably lead citizens to" steer far wider of the unlawful zone'.... than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt,* 377 U.S. 360, 372 (1964) (*quoting Speiser v. Randall,* 357 U.S. 513, 526 (1958)).

Given the subjectivity of its ratings, the ESRB may well have developed internal guidelines to provide consistency and to narrow the apparent breadth of the language. That is perfectly fine for a voluntary group applying ratings without state sanctions. However, the State of Minnesota cannot avoid the constitutional mandate against vagueness by incorporating, by reference, such private standards into a speech-restricting statute.

CONCLUSION

By reason of the foregoing, amici respectfully urge this Court to affirm the order below holding the Minnesota Act unconstitutional.

Appendix not available.

Footnotes

1 A description of the *amici* is attached as Appendix A.

2 Despite this Court's precedent and the settled law in other circuits, the State also argues that videogames are not speech. *Amici* endorse Appellants' argument as to the incorrectness of that conclusion. It is particularly strange to argue that video games are not speech and, at the same time, to argue that viewing their content harms minors.

3 Other than a judge in the Eastern District of Missouri whose decision was reversed by this Court and a judge in the Southern District of Indiana whose decision was reversed by the Seventh Circuit. *Interactive Digital Software Ass'n v. St. Louis County, Mo.,* 329 F.3d 954 (8th Cir. 2003) reversing 200 F. Supp. 2d 1126 (E.D. Mo. 2002); *Am. Amusement Mach. Ass'n v. Kendrick,* 244 F.3d 572 (7th Cir. 2001) reversing 115 F. Supp. 2d 943 (S.D. Ind. 2000).

4 *Ginsberg,* 390 U.S. 629, App. A at 646.

5 The Miller Court further stated that "[u]nder the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' *sexual conduct* specifically defined by the regulating state law, as written or construed." 413 U.S. at 27 (emphasis added).

6 ESRB Game Ratings and Descriptor (http:// www.esrb.org/ratings/ratings__guide-print.jsb, accessed 11/4/2006).

7 *Webster's Third New International Dictionary* 980 (1986) 2nd definition.

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