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THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VIDEO SOFTWARE DEALERS
ASSOCIATION, et al.,

Plaintiffs,

v.

NORM MALENG, et al,

Defendants.

NO. C03-1245L

BRIEF OF AMERICAN BOOKSELLERS
FOUNDATION FOR FREE
EXPRESSION, ASSOCIATION OF
AMERICAN PUBLISHERS, INC., COMIC
BOOK LEGAL DEFENSE FUND,
FEMINISTS FOR FREE EXPRESSION,
FREEDOM TO READ FOUNDATION,
INTERNATIONAL PERIODICAL
DISTRIBUTORS ASSOCIATION,
NATIONAL ASSOCIATION OF
RECORDING MERCHANTISERS,
PUBLISHERS MARKETING
ASSOCIATION, AND RECORDING
INDUSTRY ASSOCIATION OF
AMERICA, INC. AS *AMICI CURIAE* IN
SUPPORT OF PLAINTIFFS

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1979) 4

STATUTES

H.B. 1009, 58th Leg. Reg. Sess. (Wash. 2003).....*passim*

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submit this *amicus* brief in support of plaintiffs, urging that this Court find H.B. 1009, 58th Leg. Reg. Sess. (Wash. 2003) ("the Act") unconstitutional and, therefore, grant summary judgment to plaintiffs.¹ The Act criminalizes the sale or rental to persons under 17 years of age of computer and video games containing depictions of "aggressive conflict in which the player kills, injures, or otherwise causes physical harm to a human form in the game who is depicted, by dress or other recognizable symbols, as a public law enforcement officer." This brief is submitted pursuant to the Court's September 15, 2003 order granting permission to plaintiffs to designate one *amicus* brief.

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1 FTRF provide such materials to readers and viewers.

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3 The materials published, distributed and sold by *amici* include depictions
4 and descriptions of "aggressive conflict"² in which a person "kills, injures or
5 otherwise causes physical harm" to a "public law enforcement officer." These
6 range from popular motion pictures such as Orson Welles' "Touch of Evil" (in
7 which Welles' corrupt police officer is shot to death at the end) and "High Noon"
8 (in which Gary Cooper's sheriff is forced to shoot it out alone) to such modern
9 staples of action comedies as the buddy-cop movies of "Lethal Weapon" and
10 "Rush Hour," where police officers are constantly being shot at and assaulted, to
11 do commentaries about crime and punishment. Even such modern escapist
12 family fare as "X-Men 2" features a creature assaulting an entire phalanx of
13 secret service agents in an attempt to assassinate the president. In addition, the
14 number of books, both fiction and non-fiction, that include descriptions of
15 violence to police officers is vast. These expressive materials are and should be
16 protected by the First Amendment.

17
18 More generally, children's literature is replete with scenes of the most
19 graphic violence. A few examples will suffice:

- 20 • **Hansel and Gretel** — The witch imprisons two children, and prepares to
21 murder and cannibalize them. They escape and burn her alive in her own
22 oven.

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44 ² Precisely what this term means is unclear. See Point IV below.

- **Bluebeard** — Bluebeard keeps the bodies of wives he has killed in a secret room. When his new wife finds the bodies, he threatens to kill her, but is killed instead by her brothers, who arrive in the nick of time.
- **Cinderella** — One of Cinderella’s step-sisters is given a knife by her mother to cut off her toe to fit the golden slipper. After she is undone by dripping blood, her sister is told to cut off her heel for the same purpose. Once again the dripping blood discloses the ruse.

For older children, an example of a highly-regarded book with violent content is Golding's Lord of the Flies.

Were this Court to find the Act constitutional, such materials could be subject to regulation based on their content, substantially chilling activities of *amici* that heretofore clearly have been protected by the First Amendment.

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

If the present law is permitted to stand, it surely will inspire even broader restrictions on violent content, thereby chilling the creation and dissemination of a huge amount of mainstream speech that contains at least some “aggressive conflict.” The effect on *amici* will be profound, with dire consequences for the vibrant dialogue the First Amendment was intended to foster. The First Amendment is gravely weakened, and the communicative businesses of *amici*

1 adversely impacted, when courts defer so readily to legislative efforts to sanitize
2
3 the world to which minors are exposed.
4

5 In the past, many of the *amici* have brought actions in both federal and
6
7 state courts to assert the unconstitutionality of laws infringing on First
8
9 Amendment rights. *See, e.g., Virginia v. American Booksellers Ass'n, Inc.*, 484
10
11 U.S. 383 (1988); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), *aff'g*, 4 F.
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13 Supp. 2d 1029 (D.N.M. 1998); *American Booksellers Ass'n, Inc. v. Hudnut*, 771
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15 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); *American Library Ass'n v.*
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17 *Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997); *Village Books v. Bellingham*, No. C88-
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19 1470 (W.D. Wash. Feb. 9, 1989); *American Booksellers Ass'n, Inc. v. McAuliffe*,
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21 533 F. Supp. 50 (N.D. Ga. 1981); *Davis-Kidd Booksellers, Inc. v. McWherter*,
22
23 866 S.W.2d 520 (Tenn. 1993); *Leech v. American Booksellers Ass'n, Inc.*, 582
24
25 S.W.2d 738 (Tenn. 1979). They have also filed *amicus* briefs in the Supreme
26
27 Court to advise as to the impact on mainstream creators producers, distributors
28
29 and retailers of its decisions with respect to regulation of First Amendment
30
31 speech. *See, e.g., City of Los Angeles v. Alameda Books*, 536 U.S. 921 (2002);
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33 *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001); *United*
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35 *States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000); *Denver Area Educ.*
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37 *Telcoms. Consortium v. FCC*, 518 U.S. 727 (1996); *United States v. X-Citement*
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39 *Video*, 513 U.S. 64 (1994).
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I

**DEPICTIONS AND DESCRIPTIONS OF VIOLENT
ACTION ARE PROTECTED FORMS OF SPEECH
AND ANY CONTENT-BASED REGULATION OF
SUCH SPEECH MUST PASS STRICT SCRUTINY**

There is no constitutional basis for regulation of depictions or descriptions of "aggressive conflict."³

The traditional categories of speech subject to permissible government regulation include "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942). In addition, the Supreme Court has recently upheld legislation prohibiting the dissemination of material depicting children engaged in sexual conduct. *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L.Ed.2d 1113 (1982).

American Booksellers Ass'n, Inc. v. Hudnut, 598 F. Supp. 1316, 1331 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). *See also* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992). Depictions and descriptions of violence or "aggressive conflict" (whatever that may mean) do not fall within any of those few narrowly delineated categories of speech excluded from the protection of the First Amendment.

Every court that has considered the issue (other than a district judge in the Eastern District of Missouri whose decision was reversed by the Eighth Circuit

³ Precisely what the term means is unclear. See Point IV below.

1 and a district judge in the Southern District of Indiana whose decision was
2
3 reversed by the Seventh Circuit) has invalidated attempts to regulate material
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5 solely based on violent content, regardless of whether that material was called
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7 "violence," "excess violence" or was included within the definition of "obscenity"
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9 or "harmful to minors." See, e.g., *Winters v. New York*, 333 U.S. 507, 508, 510
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11 (1948) (First Amendment protects pictures and descriptions of "deeds of
12
13 bloodshed, lust or crime"); *Interactive Digital Software Ass'n v. St. Louis County*,
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15 329 F.3d 954, 958 (8th Cir. 2003) (violent video games "are as much entitled to
16
17 the protection of free speech as the best of literature"); *American Amusement*
18
19 *Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *Eclipse Enterprises Inc. v.*
20
21 *Gullota*, 134 F.2d 63 (2d Cir. 1997) (declining "any invitation to expand these
22
23 narrow categories of speech to include depictions of violence"); *Video Software*
24
25 *Dealers Ass'n. v. Webster*, 968 F.2d at 684 (8th Cir. 1992) ("[V]ideos depicting
26
27 only violence do not fall within the legal definitions of obscenity for either minors
28
29 or adults."); *American Booksellers Ass'n v. Hudnut*, 771 F.2d at 330; *Interstate*
30
31 *Circuit, Inc. v. City of Dallas*, 366 F.2d 590 (5th Cir. 1966), *vacated on other*
32
33 *grounds*, 391 U.S. 53 (1968).

34
35 As the Seventh Circuit stated with respect to another recent attempt to
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37 impose unconstitutional restraints on minors' ability to play video games with
38
39 violent content:

40
41 Violence has always been and remains a central
42 interest of humankind and a recurrent, even
43 obsessive theme of culture both high and low. It
44 engages the interest of children from an early age, as
45 anyone familiar with the classic fairy tales collected by
46 Grimm, Andersen, and Perrault is aware. To shield
47

1 children right up to the age of 18 from exposure to
2 violent descriptions and images would not only be
3 quixotic, but deforming; it would leave them
4 unequipped to cope with the world as we know it.

5
6 *Kendrick*, 244 F.3d at 577.

7
8 A content-based regulation of violent expression, such as the Act, must
9
10 pass strict scrutiny – *i.e.*, it must “promote a compelling interest” and use the
11
12 “least restrictive means to further the articulated interest.” *Sable*
13
14 *Communications, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). Moreover, even if the
15
16 state has a compelling interest, the regulation must be “carefully tailored” to
17
18 advance that intent. *Id.* The Act defines the interest as curbing “hostile and
19
20 social behavior in Washington’s youth” and fostering “respect for public law
21
22 enforcement officers.” H.B. 1009 § 1. Because the Act does not use the least
23
24 restrictive means to further the stated interests; nor is it carefully tailored to
25
26 achieve those purposes; it must be struck down.

27
28 As the Eighth Circuit noted in striking a similar piece of legislation, before
29
30 the State can constitutionally restrict protected speech, it must at least:

31
32 . . . come forward with empirical support for its belief
33 that “violent” video games cause psychological harm
34 to minors.

35
36 *IDSA*, 329 F.3d at 959. The scientific evidence purporting to support a causal
37
38 relationship between children playing violent video games and specific harms is,
39
40 at best, inconclusive.

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42 Thus, there is no basis for this court to depart from the consistent judicial
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44 rejection of attempts to deprive material depicting or describing violence of First
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46 Amendment protection. The Act fails to pass strict scrutiny.

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II

**FIRST AMENDMENT-PROTECTED
COMMUNICATIONS CANNOT BE RESTRICTED
BASED ON THEIR EMOTIONAL OR
PSYCHOLOGICAL IMPACT**

As noted, the Washington legislature passed the Act in part to “curb hostile and antisocial behavior in Washington’s youth.” H.B. 1009 §1. First Amendment protected speech cannot however be restricted based on its emotional or psychological impact on some readers or game players. As the Supreme Court recently observed in *Free Speech Coalition v. Ashcroft*, 535 U.S. 234 (2002):

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.

(535 U.S. at 245) In *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), aff’d 475 U.S. 1001 (1986), the Seventh Circuit similarly stated:

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.

771 F.2d at 330.

1 No Supreme Court decision permits the government to limit minors' First
2
3 Amendment rights to a category of speech whenever government believes that it
4
5 will curb hostile or antisocial behavior in children or, as the State now phrases it,
6
7 will "discourage criminal violent behavior." *Brandenberg v. Ohio*, 395 U.S. 444
8
9 (1969) and its progeny make it clear that the First Amendment prevents a State
10
11 from forbidding or proscribing advocacy of violence unless "such advocacy is
12
13 directed to inciting or producing imminent lawless action *and* is likely to incite or
14
15 produce such action." (at 447) No such likelihood is even suggested here. A
16
17 generalized desire to discourage criminal violent behavior does not come close
18
19 to meeting the demanding *Brandenberg* standard. "The prospect of crime,
20
21 however, by itself does not justify laws suppressing protected speech." *Free*
22
23 *Speech Coalition*, 535 U.S. at 245. That the Act is aimed at curbing the behavior
24
25 of youths no more warrants abandoning the *Brandenberg* standard than did the
26
27 objective of protecting youths from sexual predators in *Free Speech Coalition*.
28
29 *See also Eclipse Enterprises, Inc., supra*. Such a slippery slope would obviate
30
31 the First Amendment rights of minors.

32
33 This Court should conclude, as has every appellate court to have
34
35 addressed the issue, that regulation of material based solely on its description or
36
37 depiction of violent action is unconstitutional, whatever its claimed justification.

38 III

39 40 41 THE ACT EMBODIES UNCONSTITUTIONAL 42 VIEWPOINT DISCRIMINATION

43
44 The Act is unconstitutional as viewpoint-based discrimination. Such
45
46 viewpoint discrimination is the most "blatant" and "egregious" form of First
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1 Amendment violation. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S.
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3 819, 829 (1995). As the Supreme Court has explained, “[t]he First Amendment
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5 generally prevents government from proscribing speech . . . or even expressive
6
7 conduct . . . because of disapproval of the ideas expressed.” *R.A.V. v. St. Paul*,
8
9 505 U.S. 377, 382 (1992) (citations omitted). This is because “each person
10
11 should decide for him or herself the ideas and beliefs deserving of expression,
12
13 consideration and adherence. Our political system and cultural life rest upon this
14
15 ideal.” *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994).

16
17 The Act is intended to “foster respect for public law enforcement officers”
18
19 among minors by banning the sale of games in which they are harmed, even if,
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21 as in the Orson Welles movie “Touch of Evil”, the officer is corrupt or otherwise
22
23 not admirable in thought or deed. That certainly is a viewpoint-based distinction,
24
25 and such patent viewpoint discrimination is clearly unconstitutional. *Lamb’s*
26
27 *Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993);
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29 *American Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475
30
31 U.S. 1001 (1986).

32 33 IV

34 35 THE ACT IS UNCONSTITUTIONALLY VAGUE

36
37 The Act is void for vagueness. As the Supreme Court stated in
38
39 *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), a law is void for
40
41 vagueness under the due process clause of the Fifth Amendment if its
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43 prohibitions are not clearly defined. “Where a statute imposes criminal penalties,
44
45 the standard of certainty is higher.” *Kolender v. Lawson*, 461 U.S. 352, 358 n.8
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47

1 (1983). In *Grayned*, the Court provided the following explanation of the three
2
3 reasons why vague laws restricting expression are unconstitutional.
4

5 Vague laws offend several important values. First,
6 because we assume that man is free to steer between
7 lawful and unlawful conduct, we insist that laws give
8 the person of ordinary intelligence a reasonable
9 opportunity to know what is prohibited, so that he may
10 act accordingly Second, if arbitrary and
11 discriminatory enforcement is to be prevented, laws
12 must provide explicit standards for those who apply
13 them. A vague law impermissibly delegates basic
14 policy matters to policemen, judges, and juries for
15 resolution on an *ad hoc* and subjective basis, with the
16 attendant dangers of arbitrary and discriminatory
17 application. Third, but related, where a vague statute
18 'abut(s) upon sensitive areas of basis First
19 Amendment freedoms,' it 'operates to inhibit the
20 exercise of (those) freedoms.' Uncertain meanings
21 inevitably lead citizens to 'steer far wider of the
22 unlawful zone' than if the boundaries of the
23 forbidden areas were clearly marked.
24

25 *Grayned*, 408 U.S. at 108-109 (footnotes omitted). See also *Smith v. California*,
26 361 U.S. 147, 151 (1959) ("[S]tricter standards of permissible statutory
27 vagueness may be applied to a statute having a potentially inhibiting effect on
28 speech; a man may the less be required to act at his peril here, because the free
29 dissemination of ideas may be the loser.")
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34 The potential application of this test to the vast panoply of expressive
35 works *amici* produce and distribute gives rise to acute concern regarding the lack
36 of any reasonably certain objective meaning for the Act's core operative term --
37 "aggressive conflict." What is an "aggressive conflict"? Must it be physical or
38 can it be verbal? Even if limited to the physical, what makes a conflict
39 "aggressive"? Is it the conflict which is aggressive or the participants? Since a
40 conflict requires two persons, must both be aggressive? If only the "law
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1 enforcement officer” is aggressive, will that suffice? And, most importantly,
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3 aggressiveness is a subjective determination. What is “aggressive” to one
4
5 observer, is merely “firm” or “determined” to another. See *Cohen v. California*,
6
7 403 U.S. 15, 25 (1971) (“one man’s vulgarity is another’s lyric”).
8

9 If this Court affirms the “aggressive conflict” formula for the regulation of
10
11 violent video and computer games, there would be no legal impediment to its
12
13 application to other expressive media, such as books, magazines, recordings
14
15 and motion pictures.
16

17 The language of the Act provides no opportunity for people, such as those
18
19 represented by the *amici*, to determine whether certain material falls under its
20
21 criminal ambit. Further, because the language is so subjective, it is quite
22
23 conceivable that a person may be criminally charged if an official vested with the
24
25 right to enforce the Act or similar legislation believes that the material depicts
26
27 “aggressive conflict” even when the defendant in good faith believed it did not.
28

29 As a direct result of the quintessentially vague language, the Act will have a
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31 chilling effect on distributors and others who deal with valuable mainstream
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33 expressive works. As the Supreme Court has noted, “[u]ncertain meanings”
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35 inevitably lead citizens to “ ‘steer far wider of the unlawful zone’ . . . than if the
36
37 boundaries of the forbidden areas were clearly marked.” *Baggett v. Bullitt*, 377
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39 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).
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CONCLUSION

By reason of the foregoing, *amici* respectfully but urgently request this Court to grant summary judgment to plaintiffs and enjoin enforcement of the Act.

Dated: January 29, 2004

Respectfully submitted,
SONNENSCHN NATH & ROSENTHAL LLP

By _____
MICHAEL A. BAMBERGER
Attorneys for *Amici*

17403999 v3

APPENDIX A: THE *AMICI*

American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

Association of American Publishers, Inc. ("AAP") is the national association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Comic Book Legal Defense Fund ("CBLDF") is a non-profit corporation dedicated to defending the First Amendment Rights of the comic book industry. CBLDF, which has its principal place of business in Northampton, Massachusetts, represents over 1,000 comic book authors, artists, retailers, distributors, publishers, librarians, and readers located throughout the country and the world.

Feminists for Free Expression ("FFE") is a national, not-for-profit organization of diverse women and men who share a commitment both to gender equality and to preserving the individual's right and responsibility to read, view, or

1 produce expressive materials of her or his choice free from government
2
3 intervention. In opposition to the misapprehension that censorship is in the
4
5 interest of women and others who feel unequally treated by society, FFE believes
6
7 that the goal of equality is inextricably linked to the values enshrined in our
8
9 Constitution's free speech clause.

10
11 **Freedom to Read Foundation** ("FTRF") is an organization established in
12
13 1969 by the American Library Association to promote and defend First
14
15 Amendment rights, support the rights of libraries to include in their collections
16
17 and make available to the public any work they may legally acquire, and help
18
19 shape legal precedent for the freedom to read on behalf of all citizens.
20

21 **International Periodical Distributors Association** ("IPDA") is the trade
22
23 association for the principal national distributors engaged in the business of
24
25 distributing or arranging for the distribution of paperback books and periodicals to
26
27 wholesalers throughout the United States for ultimate distribution to retailers and
28
29 the public.
30

31 **National Association of Recording Merchandisers** ("NARM") serves
32
33 the music retailing community in the areas of advocacy, networking, information,
34
35 education and promotion. The Association's members include retailers,
36
37 wholesalers, distributors, and suppliers of products and services, as well as
38
39 individual professionals and educators in the music business field.
40

41 **Publishers Marketing Association** ("PMA") is a trade association
42
43 representing more than 3,700 publishers across the United States and Canada.
44
45 Many of PMA's members are small, independent publishers who publish a
46
47

1 variety of works, including many concerning controversial topics or involving
2
3 experimental approaches to writing, which more mainstream publishers have not
4
5 acquired.

6
7 **Recording Industry Association of America, Inc. ("RIAA")** is a trade
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9 association whose member companies produce, manufacture and distribute over
10
11 90% of the sound recordings sold in the United States. The RIAA is committed
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13 to protecting the free expression rights of its member companies.
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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2004, I caused to be served upon
counsel of record listed below, at the addresses stated below, via United States
mail, a true and correct copy of the following documents: **Brief of American
Booksellers Foundation for Free Expression, Association of American
Publishers, Inc., Comic Book Legal Defense Fund, Feminists for Free
Expression, Freedom to Read Foundation, International Periodical
Distributors Association, National Association of Recording
Merchandisers, Publishers Marketing Association, and Recording Industry
Association of America, Inc. as *Amici Curiae* In Support of Plaintiffs and
Application and Order For Special Permission to Practice Pursuant to Local
Rule GR(2)(d).**

Oma L. Lamothe
Noel R. Treat
Norm Maleng, Prosecuting Attorney
Civil Division
E550 King County Courthouse
516 Third Avenue
Seattle, WA 98104

Carol A. Murphy
Assistant Attorney General
Criminal Justice Division
P.O. Box 40116
Olympia, WA 98504-0116

Laura Watson, Esq.
Assistant Attorney General
Ecology Division
P.O. Box 40117
Olympia, WA 98504-0117

William G. Clark
Assistant Attorney General
Attorney General's Office
P.O. Box 40116
Olympia, WA 98504-0116

Narda Pierce, Esq.
Office of the Attorney General
of Washington
P.O. Box 40110
Olympia, WA 98504-0100

David J. Burman
Signe H. Brunstad
Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099

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Paul M. Smith
Jenner & Block, LLC
Suite 1200
601 Thirteenth Street, NW
Washington, DC 20005

Dated at New York, New York, this 29th day of January, 2004.

SONNENSCHN NATH & ROSENTHAL LLP

By: _____
Michael A. Bamberger
1221 Avenue of the Americas
New York, NY 10020-1089
Telephone: (212) 768-6700
Facsimile: (212) 768-6800
E-mail: mbamberger@sonnenschein.com